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SUBJECT INDEX

'A'

Arbitration and Conciliation Act, 1996 - Section 34- A contract was awarded by NHPC for the construction of permanent suitable bridge across the river Siul- 67 meters length of suspended portion being launched with 33.5 meters length of the nose fell down in the river- 16 persons died on the spot and 5 persons were grievously injured- the bridge was insured – a claim for loss of Rs.1,51,30,000 was made- Arbitral Tribunal awarded various amounts towards loss of bridge and rejected the claim for compensation on account of death of workmen- held, that Court cannot reappraise the material on record and substitute its own view in place of Arbitrator's views – the findings recorded by Tribunal are based upon correct evidence and cannot be termed as perverse - where two views are possible, the view taken by arbitrator has to be preferred- petition dismissed.

Title: M/s United India Insurance Company Vs. M/s Kishan Singh & Co. Pvt. Ltd & others Page-1408

'C'

Code of Civil Procedure, 1908- Section 9- A dispute between an employer and a single workman cannot be termed as an industrial dispute but may become one, if it is taken up by Union or number of workmen- the case of the plaintiff was not taken up by the Union, therefore, civil Court had jurisdiction to hear and entertain and suit.

Title: M/s Cosmo Ferrites Limited and others Vs. Rajinder Singh Page-525

Code of Civil Procedure, 1908 - Section 11- Plaintiff filed a suit for injunction which was dismissed on the ground that defendants were in possession of the suit land without any right, title or interest- plaintiff subsequently filed a suit for possession of the suit land and also for claiming damages for unauthorized use and occupation, which was decreed- held, that in earlier suit, findings were recorded regarding the defendants being in unauthorized occupation over the suit land- the plea of the defendants having become owner by way of adverse possession stood repelled – these findings were never challenged by the defendants- defendants pleaded that they had become owners on the basis of sale deed- they had also pleaded adverse possession, which is not permissible- Court had rightly decreed the suit partly for possession.

Title: Kehar Singh and another Vs. Ramesh Chand (dead), through LRs. Page-539

Code of Civil Procedure, 1908 - Section 24- A Petition for transfer was filed by the tenant stating that no Lawyer was ready to take up his case as the respondent had a great influence in the society- held, that a petition for transfer is not to be dealt with in a light hearted manner – transfer of a case from one Court to another should not be granted readily as a matter of course - power has to be exercised with extreme care, caution and circumspection- petitioners had failed to mention the name of Lawyer who had refused to accept the brief under the influence of respondent- petitioners are adopting delaying tactics to prolong the trial by filing such application- petition is a gross abuse of the process of the Court, hence, same is dismissed with cost of Rs. 50,000/-.

Title: Rakesh Kumar & Anr. Vs. Pratap Chand & Others Page-373

Code of Civil Procedure, 1908- Section 34- Interest is in the nature of the compensation for the loss of money by one who is entitled to the same.

Title: Vinay Bodh Vs. Dolekar & others Page-429

Code of Civil Procedure, 1908- Section 79- An award was passed for the sum of Rs.1,78,000/- as compensation- awarded amount was partly ordered to be released to the plaintiffs, however, a sum of Rs. 1,25,000/- was ordered to be invested in Kisan Vikas Patras - this amount was not deposited by the employee of the Court- this fact came to the notice when an application for release of the amount was filed- FIR was registered and the employee was convicted – Civil Writ Petition was filed for the recovery of the amount which was disposed of with liberty to the plaintiffs to seek appropriate remedy in accordance with law- plaintiff filed a civil suit for recovery of Rs. 3,57,500/-- held, that employee was a government servant and the State and the employer are liable for the acts of the employees - therefore, defendant No. 1 and 2 were rightly held liable to pay amount - however, they are at liberty to recover the amount from the employee in accordance with law.

Title: The Presiding Officer, Motor Accident Claims Tribunal Vs. Jitwar Singh deceased through his LRs Sadhna Devi and others Page-400

Code of Civil Procedure, 1908- Section 80 (2)- Plaintiff filed an application to institute the suit against Gram Panchayat without serving a notice- it was recorded in the resolution that plaintiff was creating obstruction on the public road- Naib Tehsildar (Settlement) mentioned that road was in existence since long time- Gram Panchayat had spent Rs. 7,15,000/- upon the road- Panchayat was repairing the road for the benefit of public - no urgent and immediate relief was required by the plaintiff, therefore, application was rightly dismissed.

Title: Tilak Raj son of Sh. Amar Nath Vs. Gram Panchayat Barsar Page-927

Code of Civil Procedure, 1908- Section 100- Court will not upset the concurrent finding of fact, unless the findings are perverse, without consideration of material evidence, based on no evidence or misreading of evidence or is grossly erroneous or if allowed to stand, would result in miscarriage of justice.

Title: Rubi Sood and another vs. Major (Retd.) Vijay Kumar Sud & others Page-771

Code of Civil Procedure, 1908- Sections 144- Judgment debtor claimed that he had deposited an amount of Rs. 4,68,25,228/-, whereas he is liable to pay only Rs. 3,70,49770.80- he sought the refund of the excess amount - Decree holder contended that judgment debtor had not objected to attachment of the property and the principle of res-judicata will apply to the present case- held, that amount of Rs. 63,11,334/- was not awarded to the decree holder - the Court can only recover the amount, which is awarded under the decree- decree holder cannot be allowed to enrich himself unjustly and to retain the amount, which was not awarded to him - petition allowed and the excess amount ordered to be refunded to the J.D.

Title: Deepak Arora and another Vs. Vijay Khanna Page-75

Code of Civil Procedure, 1908- Section 115- Learned Counsel for the revisionists stated that he did not want to continue with the Revision Petition- hence, petition dismissed as withdrawn.

Title: Dharam Pal & another Vs. Amar Nath & others Page-1063

Code of Civil Procedure, 1908 - Order 1 Rule 10- Order VI Rule 17- Plaintiff filed a Civil Suit for declaration that he is owner in possession of the suit land and in adverse possession of the area adjacent to the suit land- suit was partly decreed- it was claimed that sale deeds were made in favour of respondents No. 2 and 3 through an attorney of a dead person,

which are null and void- land belongs to respondents No. 4 to 9 who have to be impleaded and necessary amendment has to be made in the plaint- held, that plea of adverse possession is not available to the plaintiff as the suit cannot be filed on the basis of adverse possession - adverse possession can be used as a shield and not a sword - therefore, application dismissed with cost of Rs. 20,000/-.

Title: J.P. Chatrath Vs. Khem Chand Chauhan and others Page-1020

Code of Civil Procedure, 1908 - Order V Rule 20- An application for substituted service was filed on the ground that defendants No. 4, 7 and 8 had left Shimla long time ago and their whereabouts were not known- contesting defendant pleaded that defendants No. 4 and 8 had died and instead of bringing on record their legal representatives, present application has been filed- held, that there was no satisfactory proof of death and the factum of the death was disputed – report of process server was contradictory and did not establish the death of the defendants - therefore, an issue framed to determine, whether defendant No. 4 and 8 had died and parties ordered to lead evidence.

Title: Sheel Darshan Sood and another Vs. Manju Sood and others. Page-334

Code of Civil Procedure, 1908- Order 6 Rule 17- Petitioners sought amendment of the Writ Petition, which was opposed on the ground that application was filed with a view to delay the decision of civil writ petition- petitioners had violated the financial discipline of the bank and had not adhered to the payments schedule- notice was issued to the petitioner under Section 13(2) SARFESI Act and the Writ Petition is not maintainable- held, that Court should allow all the amendments, which are necessary for determining the real controversy between the parties and do not cause any prejudice to the other side, which cannot be compensated in terms of money – in the present case, no prejudice would be caused if the application is allowed as the proposed amendment is explanatory in nature relating to subsequent events- application allowed subject to the payment of cost of Rs. 3,000/-.

Title: M/s Sainsons Pulp & Papers Ltd. and another Vs. State Bank of India and others (CMP No. 5525 of 2015) Page-912

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff filed an application for seeking amendment in the plaint- application was filed after the issues were framed and it was belated - the amendment would change the nature of the suit- it was not pleaded in the application that in spite of due diligence, amendment could not have been made earlier, therefore, application is liable to be dismissed.

Title: Partap Singh Vs. Kanwar Singh Page-110

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff sought the amendment of the plaint for claiming the outstanding charges from the defendants- defendants contended that evidence had been led and the proposed amendment will change the nature of the suit - held, that no new fact was being introduced- the power to allow amendment is wide and can be exercised at any stage- plaintiff had claimed any other relief to which he is entitled, therefore, application allowed and plaintiff permitted to amend the plaint.

Title: The Reserve Bank of India and another vs. M/s A.B. Tools (P) Ltd., and another (D.B.) Page-1086

Code of Civil Procedure, 1908 - Order 8 Rule 1- Defendants were granted time for filing written statement on 08.07.2014 and on 01.08.2014- defendant No. 1 died thereafter and

application for bringing on record legal representatives was allowed on 25.11.2014 – application was filed for placing on record written statement- held, that main case could not proceed further on account of death of defendant No. 2-delay was not unreasonable, which could not be compensated in terms of money- trial Court had rightly exercised the discretion to allow the defendant to file written statement.

Title: Sumitra Rani Vs. Vinod Kumar and others Page-847

Code of Civil Procedure, 1908 - Order 9 Rule 4- claimant had filed a Claim Petition, which was dismissed in default and application under Order 9 Rule 4 was also withdrawn by the claimant- held, that procedural wrangles and tangles, hyper technicalities and mystic maybes should not be a ground to dismiss the Claim Petition – a fresh petition can be filed under Order 9 Rule 4, if it is not barred by limitation.

Title: Oriental Insurance Co. Ltd. Vs. Kishan Chand & others Page-37

Code of Civil Procedure, 1908 - Order 9 Rule 9- Petitioner was ordered to be ejected by Assistant Collector 1st Grade, Mandi- he filed an appeal, which was dismissed in default for non-appearance- an application for restoration of appeal was filed, which was dismissed on the ground that it was filed after two years and three months - this order was challenged unsuccessfully in appeal and revision- held, that length of delay is not a decisive factor for condonation for delay, but sufficiency of satisfactory explanation is a material factor- petitioner had hired an advocate and he cannot be penalized for non-appearance of the advocate- authorities had not gone into the sufficiency of the explanation offered by the petitioner- further, application for restoration was decided after 10 years- hence, petition allowed and case remanded with a direction to decide the same afresh after giving reasons.

Title: Nek Ram Vs. Financial Commissioner (Appeals) and others Page-254

Code of Civil Procedure, 1908- Order 9 Rule 13- A decree was passed by the Court ex-parte- an application was filed for setting aside ex-parte decree – held that ex-parte decree cannot be set aside on the ground that there was some irregularity in the service of the summons- Process Server went to the commercial premises and found it locked - thereafter he went to the residential house of the Managing Director, where he met the Managing Director- process was shown to the managing director but he refused to accept the same- therefore, copy of notice was affixed on the gate of his residence- it is apparent from the report that Managing Director was duly served and there was no reason for setting aside ex-parte decree- application dismissed.

Title: M/s P.A. Times Industries Vs. M/s Apex Marketing Page-890

Code of Civil Procedure, 1908 - Order 16- Insurance Company relied upon the verification report issued by the Licensing Authority- owner produced another driving license, which was put for the first time to RW-2 –Insurance Company filed an application to lead additional evidence by placing on record certain documents to show that license was fake- application was allowed and last opportunity was granted to produce the witnesses on self responsibility- adjournment prayed was declined on the ground that Petition was old and was filed in the year 2011- held, that Commissioner should not have imposed cost when Insurance Company was not at fault and the license was produced for the first time by the claimants- further, Commissioner had refused to provide any assistance for summoning the witnesses and had directed the company to produce the witnesses from Manipur on self responsibility – order passed by the Commissioner to close the evidence of the Insurance

Company was not sustainable - Petition allowed and the Commissioner directed to allow the Insurance Company to lead additional evidence.

Title: National Insurance Company Ltd. Vs. Jhanpli Devi alias Mukka Devi and others Page-547

Code of Civil Procedure, 1908- Order 16 read with Sec.151- Petitioner filed an application for examining the material witnesses on the ground that it was reported in the summons that the witness had died about 16 years ago and it was necessary to examine his son-defendant No. 6 was also to be examined regarding the signatures of the marginal witnesses- held that mere delay in filing the application is not sufficient to dismiss the same- Rules of Procedure are handmaid of justice and the purpose of prescribing procedure is to advance the course of justice – marginal witness had died and his son is alive- brother of the plaintiff and other defendants are material witnesses - case relates to a dispute between the family members and, therefore, was required to be dealt with by exhibiting more compassion and sympathy - application allowed subject to the payment of cost of Rs. 40,000/-.

Title: Neelam Kumari Vs. Yogender Singh and others Page-1145

Code of Civil Procedure, 1908- Order 19- Plaintiff relied upon an affidavit - however, he had not made specific averment in the plaint regarding the execution of affidavit- he had not examined the Executive Magistrate who had attested the affidavit- compromise was already arrived at and there was no question of executing the affidavit – held, that in these circumstances, affidavit was not admissible in evidence.

Title: Chobe Ram Vs. Chander Kala & ors. Page-359

Code of Civil Procedure, 1908- Order 21- Petitioners filed a Writ Petition before the High Court which was transferred to Administrative Tribunal- petition was allowed and the respondent No. 1 was directed to constitute Review Departmental Promotion Committee and place the cases of the petitioners before the Committee for consideration of their promotion w.e.f. 27.2.1980, the date from which their juniors were promoted and in case petitioners are ordered to be promoted they would be entitled to all consequential benefits- respondent promoted the petitioner notionally and denied the benefits of arrears of salary to the petitioner- petitioner claimed the higher pay only on the ground that one 'K' was drawing more pay than him but record showed that 'K' was stagnated on the post of Senior Assistant and was given two proficiency increments- this difference was only on the ground of fortuitous circumstances – the petitioner cannot be equated to 'K' as he had not suffered the pain and pangs of stagnating on one post for more than 21 years- hence, pay was rightly fixed- petition dismissed.

Title: Sada Ram vs. Chief Secretary Govt. of H.P. (D.B.) Page-725

Code of Civil Procedure, 1908- Order 21 Rule 32- A counter-claim was filed for specific performance of the contract which was decreed- application for execution of the decree was filed- objections were filed pleading that Execution Petition is not maintainable and the decree is not executable in view of the instructions issued by the govt. - held that, decree had attained finality and it cannot be nullified by taking recourse to administrative instructions.

Title: Rikhikesh son of Shri Narain Dass Vs. Om Parkash Page-918

Code of Civil Procedure, 1908- Order 22- Insurer pleaded that owner has died and appeal had abated - held that provisions of Order 22 regarding the abatement have not been made applicable to MACT, therefore, Claim Petition would not abate on the death of the owner/insured.

Title: Oriental Insurance Co. Ltd. Vs. Kishan Chand & others Page-37

Code of Civil Procedure, 1908- Order 22- Plaintiff No. 1 died during the pendency of the suit- no application was filed for bringing on record his legal representatives **–** however, the suit has been filed by many plaintiffs- plaintiff No. 8 was recorded to be owner of 1/3rd share- therefore, cause of action relating to plaintiff No. 8 was severable and the suit will abate qua him and not in its entirety.

Title: Tripta Devi widow of Shri Jagdish & others Vs. Krishan Chand (died) through LRs. Kadshi Devi and others Page-266

Code of Civil Procedure, 1908- Order 22 Rule 3- One of the petitioners in an appeal had expired during the pendency of the reference petition- this fact was not brought to the notice of the Court and the award was passed in ignorance of the death- held, that death of the petitioner and non-substitution of his legal representatives in Reference Petition does not affect the same – legal representatives are entitled to receive compensation, therefore, they are ordered to be brought on record.

Title: NTPC Limited Vs. Jitender and others Page- 1064

Code of Civil Procedure, 1908- Order 23 Rule 1- Learned Counsel for the petitioner submitted that he did not want to continue with the present petition and same be dismissed as withdrawn- In view of statement of the Learned Counsel, petition is dismissed as withdrawn.

Title: Babita Rani vs. Divisional Commissioner Kangra & others Page-167

Code of Civil Procedure, 1908- Order 23 Rule 1- Learned Counsel for the petitioner submitted that he did not want to continue with the present petition and same be dismissed as withdrawn- In view of statement of the Learned Counsel, petition is dismissed as withdrawn.

Title: Tulsi Ram Vs. HPSEB & another. Page-119

Code of Civil Procedure, 1908- Order 26 Rule 9- Plaintiff had obtained demarcation from the revenue authorities- report was not accepted by trial Court- plaintiff moved an application for appointment of local commissioner, which was allowed- defendant raised objections to the report which were decided along with main appeal- report was supported by Aks Tatima Shajra as well as the copy of Field Book- it was in accordance with the instructions issued by Financial Commissioner - when a fresh local commissioner was appointed, the earlier report would be of no consequences.

Title: Jagdishwari Devi Vs. Subhash Chand Page-366

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiffs claimed an injunction pleading that defendants had started interfering with the path and the kuhal due to which plaintiffs were unable to sow paddy in the suit land- defendant pleaded that they had not consented for the construction of the path- when the objection was raised Panchayat stopped the construction work- major portion of the path has been constructed over the

land of the plaintiff- respondents have given no objection for the construction of the jeepable road- plaintiffs could not be deprived of their right of access to the houses- therefore, plaintiff was rightly held entitled for the relief of injunction by the trial court.

Title: Puran Chand & anr. Vs. Sanjay & ors. Page-1066

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a suit seeking injunction for restraining the defendants from transferring the plaintiff from Cosmo Ferrites Limited and causing any obstruction in entering the factory premises for attending his job- the application was allowed- an appeal preferred against the order was dismissed- according to Clause 20 of the Standing Order, the workman can be transferred according to exigency of the work from one department to another provided that his wages, grade, continuity of service and other conditions of service are not adversely affected by such transfer - such transfer can be made only when the workman consents after getting a reasonable notice - plaintiff had brought to the notice of the management that he was not capable of performing heavy work and that he may be given work according to his capability- he had never requested for his transfer- transfer was made simply because the workman had participated in a strike and an FIR was also registered against him- held that trial Court below had rightly granted injunction.

Title: M/s Cosmo Ferrites Limited and others Vs. Rajinder Singh Page-525

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff sought a relief of injunction pleading that 'D' was owner to the extent of ½ share- successor of the 'D' got the suit land recorded in his exclusive possession in connivance with the revenue staff- he was threatening to raise construction without getting the suit land partitioned- defendant pleaded that he was exclusive owner of the suit land- he had started construction in the month of February, 2012 and had spent more than Rs.7 lakh- lower Courts had recorded a finding that plaintiff is owner to the extent of ¼ share, whereas defendant is owner to the extent of ½ share- a transfer by the co-owner makes the transferee a co-owner- such transferee is entitled to all the rights and obligation which the other co-owners have- a co-owner has right to enter upon the common property and to take possession of the whole subject to the equal rights of other co-owners- he is not entitled to injunction for restraining other co-owners from exceeding his rights in common property absolutely unless the act of co-owner amounts to ouster- mere making of construction or improvement in the common property does not amount to ouster- if the act of the co-owner amounts to diminution in the value of the property then a co-owner can seek an injunction to prevent the diminution- a co-owner out of possession can seek an injunction to prevent an act, which is detrimental to his interest- plaintiff has to establish that the act complained of would cause some injury which would affect his position and enjoyment- defendant had claimed a right to raise construction over the suit land - he had claimed that he is in peaceful and uninterrupted possession of the suit land which amounts to ouster- therefore, in these circumstances, injunction was rightly granted.

Title: Ashok Kapoor Vs. Murtu Devi Page-1312

Code of Civil Procedure, 1908- Order XLVII- Review petitioners claimed that the original petitioner was not sponsored by the employment exchange nor was he entitled to the grant of temporary status- he was not entitled to regularization and was a casual worker- the grounds taken in the Review Petition show that petitioners have filed an appeal and not a Review Petition – there was no error on the face of the record- petition dismissed.

Title: Union of India & others Vs. Paras Ram (D.B.) Page-1397

Code of Criminal Procedure, 1973- Section 2 (wa)- Victim is a person who has suffered any loss or injury on account of an act or omission with which accused persons have been charged- petitioner claimed that he had set the criminal law in motion and, therefore, he falls within the definition of victim- complainant had made a complaint on the basis of which an inquiry was conducted but FIR was not lodged– complainant has enmity with accused and, the possibility of filing complaint to wreak-vengeance cannot be ruled out- when the prosecution lodged an FIR on the basis of complaint, it is only the State which can prefer an appeal and not the complainant or informant who is not a victim.

Title: S.M. Katwal Vs. Virbhadra Singh and others Page-486

Code of Criminal Procedure, 1973- Section 378- Accused was found sitting in the Volvo Bus on seat No. 30- he got perplexed on seeing the police- conductor disclosed that luggage of the accused was inside the dickey and was marked with chalk - one bag bearing Mark seat No. 30 was taken out and during the search 190 grams of charas was recovered – accused was acquitted by the Trial Court- an application was filed seeking leave to appeal against the order passed by trial Court- independent witnesses had turned hostile- merely because, prosecution witnesses corroborated each other and link evidence was established is not sufficient when the bag was not produced before the Court- Trial Court had appreciated the facts properly- hence, leave to appeal refused.

Title: State of Himachal Pradesh Vs. Mizuta Natsuhiro (D.B.) Page-59

Code of Criminal Procedure, 1973- Section 401- Compromise was entered between the parties- in view of compromise revisionist ordered to pay amount of Rs. 50,000/- as full and final settlement and the sentence of imprisonment imposed by trial Court as affirmed by appellate Court set aside.

Title: Balwant Singh Vs. Sheela Devi & another Page-1330

Code of Criminal Procedure, 1973- Section 401- Counsel submitted that in view of compromise executed between the parties, revisionist does not want to continue with the present petition - hence, in view of statement; Revision Petition dismissed as withdrawn.

Title: Vikram Verma vs. Manju Verma Page-423

Code of Criminal Procedure, 1973- Section 438- An FIR was lodged against the petitioner for the commission of offences punishable under Sections 341, 504, 506 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- petitioner had joined investigation- no recovery is to be effected from the petitioner- petitioner being female is entitled to special provision of bail - therefore, bail granted to the petitioner.

Title: Dr. Devkanya wife of Sh. Rahul Lodhta vs. State of H.P. Page-1331

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 430, 504 and 506 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable

apprehension of the witnesses being tampered with and the larger interest of the public and State- Courts are under an obligation to maintain balance between human rights and a criminal cases- considering that investigation is complete and no recovery is to be effected from the accused, bail granted to the accused.
Title: Kameshwar son of late Sh. Parma Ram Vs. State of H.P. Page-105

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Section 11(D) of Prevention of Cruelty to Animals Act and Section 8 of Prohibition of H.P. Cow Slaughter Act- co-accused are yet to be arrested- cruelty to animal is a heinous offence- Courts are under legal obligation to protect the lives of animals because animals cannot protect themselves- investigation is at initial stage and it would not be expedient to release the petitioner on anticipatory bail- application dismissed.
Title: Ateek Ahmed son of Shaeed Ahmed Vs. State of H.P. Page-93

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 465 and 471 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- police had not claimed that custodial interrogation is necessary in the present case- interests of the State or general public will not be affected by keeping the accused inside the jail- therefore, bail granted.
Title: Gopal Chauhan vs. State of Himachal Pradesh Page-120

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 465 and 471 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- police had not claimed that custodial interrogation is necessary in the present case- interests of the State or general public will not be affected by keeping the accused inside the jail- therefore, bail granted.
Title: Surinder Singh son of Darshan Singh Vs. State of Himachal Pradesh
Page-164

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 468, 471 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- if anticipatory bail is allowed, interests of the State and general public will not be adversely affected- petitioner had cooperated with the police, therefore, bail application allowed and the petitioner ordered to be released on bail.
Title: Mool Chand son of Shri Tulle Ram Vs. State of H.P. Page-905

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commissions of offences punishable under Sections 341, 323, 395, 367, 147, 148, 149, 120-B IPC- petitioner pleaded that he is a student and his career would be spoiled in case he is not permitted to appear in the last semester of final examination- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- release of the petitioner will not affect the investigation adversely- bail granted.

Title: Nishant Sharma son of Sh. Desh Raj Sharma Vs. State of H.P. Page-107

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 376(D) and 506 of IPC- it was pleaded that challan has been filed before the Court- statement of eye-witnesses have been recorded and the disposal of the case will take some time- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behaviour of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- mere fact that petitioner is in judicial custody and there will be delay in the conclusion of the trial is not sufficient to grant bail- petitioner is facing trial of heinous and grave offence of gang rape – release of the petitioner on bail would affect the trial adversely- bail declined but direction issued to trial Court to dispose of the case expeditiously.

Title: Rakesh Kumar son of Shri Sohan Lal Vs. State of H.P. Page-328

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 366, 376, 354, 506 and 511 read with Section 34 of IPC- it is pleaded that trial will take a long time- prosecution witnesses did not support the prosecution version- original culprits were not apprehended and the petitioners were falsely implicated- held, that contradictions in the statements of the witnesses will be seen by the trial Court at the time of disposal of the case - merely because, there will be delay in the conclusion of trial is no ground for granting bail- petitioner is facing trial for heinous offence of sexual assault, such offences are increasing – every woman has a right to reside in the society with honour and dignity- releasing the petitioner on bail will affect the trial adversely- hence, bail declined but direction issued to the trial Court to conclude the trial expeditiously.

Title: Ravi Kumar @ Chimnu son of Sh. Waryam Singh Vs. State of H.P. Page-330

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioners for the commission of offences punishable under Sections 147, 148, 149, 302, 323, 354, 364, 436, 452 and 506 IPC- held that in case a person is suspected of a crime of an offence punishable with death or imprisonment for life, there must be ground to negate the existence of reasonable grounds for believing that such a person is guilty of an offence punishable with sentence of death or imprisonment for life - Court must record reasons for prima facie concluding as to how bail was granted- the heinous nature of the crime warrants more caution and there is a greater chance of rejection of bail- mere fact that accused surrendered themselves will not entitle them to bail- investigation is at initial stage- many accused are yet to be arrested- release at this stage would be a serious threat to the peace

and tranquility as well as threat to the safety of the complainant and her family members- release at this stage will also affect the investigation- application dismissed.

Title: Nikhil Vs. State of Himachal Pradesh Page-442

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 307 and 323 read with Section 34 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- in the present case, challan has already been filed in the Court, investigation is complete and no recovery is to be effected from the petitioner- trial of the case will be concluded in due course of time, therefore, petition allowed.

Title: Pankaj Sharma son of Dina Nath Vs. State of Himachal Pradesh Page-550

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 307 and 323 read with Section 34 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- in the present case, challan has already been filed in the Court, investigation is complete and no recovery is to be effected from the petitioner- trial of the case will be concluded in due course of time, therefore, petition allowed.

Title: Rakesh Kumar son of Gola Ram Vs. State of Himachal Pradesh Page-553

Code of Criminal Procedure, 1973- Section 439- Petitioner was arrested for the commission of offences punishable under Sections 457 and 380 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete and challan has been filed in the Court- criminal cases would be disposed of in course of the time – interests of the general public or State would not be affected by releasing the petitioner on bail, therefore, petitioner ordered to be release on bail.

Title: Sandeep Singh son of Jagdish Singh Vs. State of Himachal Pradesh Page- 149

Code of Criminal Procedure, 1973- Section 439 - Petitioner was arrested for the commission of offences punishable under Sections 457 and 380 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete and challan has been filed in the Court- criminal cases would be disposed of in course of the time – interests of the general public or State would not be affected by releasing the petitioner on bail, therefore, petitioner ordered to be release on bail.

Title: Jatinder Singh Vs. State of Himachal Pradesh Page-122

Code of Criminal Procedure, 1973- Section 439- Petitioner was arrested for the commission of offences punishable under Sections 457 and 380 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete and challan has been filed in the Court- criminal cases would be disposed of in course of the time – interests of the general public or State would not be affected by releasing the petitioner on bail, therefore, petitioner ordered to be release on bail.
Title: Malkiyat Singh son of Chiman Singh Vs. State of Himachal Pradesh Page-125

Code of Criminal Procedure, 1973- Section 468- An offence punishable under Section 323 of IPC is punishable with imprisonment for a period of one year- FIR was registered on 01.06.2008 and final report was presented on 4.1.2010 beyond the period of limitation- held, that charge-sheet presented against the petitioner was time barred.
Title: Amar Singh Vs. State of Himachal Pradesh Page-1358

Code of Criminal Procedure, 1973- Section 482- Cancellation report has been filed before the trial Court, therefore, the petition dismissed as infructuous- however, petitioners will be at liberty to file fresh petition on the same cause of action.
Title: Karan Laroiya & another Vs. State of H.P. & others Page-1363

Code of Criminal Procedure, 1973- Section 482- Husband was directed to pay monthly maintenance @ Rs.4,000/- to wife and minor child and to provide one room in the shared household – husband contended that accommodation belongs to his mother and will not fall in the definition of shared household- he is ready to hire a separate accommodation for the wife and the child- held, that wife does not have a right to reside in a particular property – she only has a right in the property of her husband - husband had failed to prove that house belongs exclusively to his mother- it has come on record that he along with his mother had taken a loan for building and he was repaying the loan – therefore, his contention that house is not shared household cannot be accepted- petition dismissed.
Title: Sandeep Gupta Vs. Indu Gupta Page-556

Code of Criminal Procedure, 1973- Section 482- Matter was compromised before Lok Adalat- petitioner claimed that he had never authorized Advocate to appear before Lok Adalat or to make any statement on his behalf- held, that the proceedings before Lok Adalat cannot be challenged before the High court by filing a petition- statement of facts as to what transpired in the hearing is conclusive regarding the facts so recorded in the judgment and no one can contradict such statement by filing affidavit or by leading evidence- further, petitioner had not placed any material to show that he had taken action against either of the counsel- therefore, in these circumstances, petition dismissed.
Title: Rajan Chopra Vs. Uttam Chand Page-453

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.
Title: Kamal Deep Bhardwaj Vs. State of H.P. Page- 230

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.

Title: Amarjeet Singh Vs. State of H.P Page-218

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.

Title: Inderpal Singh Vs. State of H.P Page-229

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.

Title: Shashi Kant Vs. State of H.P. Page- 250

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.

Title: Himesh Sharma Vs. State of H.P Page-229

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition for quashing the FIR registered against him- respondent contended that final report has been presented before the Court; therefore, petition is not maintainable- petitioner contended that the dispute is essentially of a civil nature and is given a cloak of a criminal case, therefore, Court has jurisdiction to quash the criminal proceedings- held, that complaint can be quashed where a dispute is predominately of a civil nature and not when the allegation against the petitioner constitutes a criminal offence - these principles cannot be made applicable when a prima facie case is made out against the petitioner, which has culminated into a charge-sheet- only the Court where the charge-sheet has been filed should be left to deal with the same- petition dismissed.

Title: Lashkari Ram Vs. State of H.P. & anr. Page-250

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition seeking quashing of FIR as well as order passed by JMIC, Kasauli and Sessions Judge, Solan- it was alleged that respondent No. 2 had sold 11,170 apple boxes to respondent No. 3- respondent No. 3 had paid amount of Rs. 20 lacs and remaining amount was not paid- 11,170 apple boxes were stored in the cold store owned by petitioner No. 1- held, that respondent No. 3, purchaser of the goods, had acquired title from respondent No. 2- mere non-payment of part of sale consideration cannot constitute an entrustment- thus, no offence punishable under Section 406 of IPC was made out against the respondent No. 3 or respondent No. 1- further,

petitioner was not liable to pay the sale consideration and it cannot be held liable for the non- payment of the sale consideration- accordingly, FIR ordered to be quashed- however, the order regarding the sale of the apples cannot be challenged on behalf of petitioner No. 1 who is merely a bailee.

Title: Uma Akash Agro Pvt. Ltd. and others Vs. State of H.P. and others Page-90

Code of Criminal Procedure, 1973- Section 482- Petitioners sought quashing of FIR on the ground that private complaint was filed before Sub Divisional Judicial Magistrate Aanadpur Sahib in which all the accused were acquitted- wife had left matrimonial home in the month of May, 2003 and FIR was lodged after more than 10 years- no specific date and time regarding the demand of dowry were given- record showed that ACJM had given liberty to the complainant to file fresh complaint under provision of law before competent Court having jurisdiction and this judgment has attained finality- hence, fresh complaint filed by the complainant pursuant to the direction of the Court cannot be said to be barred by law.

Title: Sanjeev Kumar son of Shri Jagdish Singh Vs. State of H.P. through Principal Secretary (Home) to the Government of Himachal Pradesh Shimla Page-1292

Code of Criminal Procedure, 1973- Section 482- Reply filed by State showed that cancellation report of FIR stood already filed before the trial Court; hence petitioner withdrew the petition with liberty to file a fresh petition on same cause of action.

Title: Pankaj Sood & another Vs. State of H.P. & others. Page-1348

Companies Act, 1956 - Section 433 (e)- Petitioner claimed that respondent/company was indebted to the petitioner for a Sum of Rs. 12,06,580/- against Bill dated 26.9.2006- service tax on previous bill of Rs. 30,000/- and penalty of Rs.1,50,000/- for backing out of the contract is payable- held, that where the company disputes the claim and the dispute is bona-fide, it cannot be said that company was avoiding its liability- said inference can only be drawn when debt is undisputed or bona-fide or some sham defence is sought to be raised towards the liability -winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bonafide disputed by the Company- balance-sheet shows that Company is financially sound and solvent – respondent has disputed the debt and it cannot be said that there was no bonafide reason for non-payment of the amount- petition dismissed.

Title: Soni Gulati & Co. vs. JHS Svendgaard Laboratories Limited Page-182

Constitution of India, 1950- Article 226- A letter was received by the High court highlighting the difficulties being faced by blind and deaf students- reply filed by the State shows that there are shortcomings in the implementation of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 - University directed to provide necessary amenities- direction also issued to provide basic facilities required for blind and deaf students in the school and to appoint the requisite number of teachers, to enhance their scholarship, to provide them screen readers, screen magnifiers, speech recognition software, Text-to-speech software, optical character recognition software, large monitors, hand held magnifiers and standalone reading machines.

Title: Court on its own motion Vs. The State of Himachal Pradesh and others (D.B.) (CW PIL No. 30 of 2011) Page-940

Constitution of India, 1950- Article 226- A letter was received stating there are 17 inmates in the Old Age Home at Basantpur- out of them, four inmates are severely handicapped- it was prayed that these inmates be given disability/rehabilitation pension, a separate rehabilitation centre should be opened by the State for the helpless disabled persons with facility to provide some vocational training and that inmates suffering from mental illness be shifted to the Hospital of Mental Health and Rehabilitation- held, that it is the constitutional duty of the State Government to look after the interests of shelter less, disabled, destitute, mentally retarded person by providing them necessary assistance- old age pension has been denied to two persons on the ground that they are not citizens of India - the policy enacted by the State Government to deny the pension on the ground of domicile is arbitrary and unreasonable- direction issued to the State to open separate home for adult disabled and mentally retarded and to check whether basic amenities are being provided- further direction issued to provide vocational training, disability allowance and to release old age pension.

Title: Ajai Srivastava Vs. State of Himachal Pradesh and others (D.B.) Page-969

Constitution of India, 1950- Article 226- A letter was written to the High Court stating that there are 30 adult inmates housed in the State Home for Destitute Women at Mashobra- there is no Sweeper available between 5 p.m. to 10 a.m- there is no nurse to look after the mentally sick persons- there is no boundary wall around the Home- old age pension is not being provided to the inmates and their relatives had not been contacted- held, that it is responsibility of the State to provide necessary succor to the inmates- basic rights of the inmates are required to be protected by the State- inmates cannot be segregated on the basis of their domicile or citizenship- direction issued to provide fencing around the building, to pay disabled/old age pension, to appoint Sweeper, nurse and washerman - efforts be made to contact their nearest relatives.

Title: Court on its own motion Vs. State of Himachal Pradesh and others (D.B.) (CW PIL No. 02 of 2015) Page-934

Constitution of India, 1950- Article 226- All India Post Graduate Medical Entrance Examination (AIPGMEE) was conducted from 1.12.2014 to 6.12.2014- admission process was started on the basis of entrance examination - initially it was provided that allotment of the seats will be made in the specified ratio- however, subsequently roster was issued on the basis of method of appointment- petitioner contended that allotment has to be made in accordance with original condition- held, that while filling up the seats for post graduate qualification, the only criterion should be merit – State has created sub groups on the basis of method of appointment – all the medical officers discharge the same duties - once they are permitted to sit in one examination, they are to be treated as the same- the classification within the classification is not permissible and it was also not permissible to change the condition after the publication of the prospectus.

Title: Dr. Vivek Kumar Garg and ors. Vs. State of H.P. & ors. (D.B.) Page-1111

Constitution of India, 1950- Article 226- Appellant was not a party before the Writ Court and had not filed any application seeking leave to appeal- held, that leave can be granted to 3rd party provided it carves out a case to the effect that the judgment is prejudicial to its rights and interests- since no such case was made out therefore, writ Petition dismissed as not maintainable.

Title: Devta Balu Nag Ji Vs. Devta Shring Rishi Ji & others (D.B.) Page-674

Constitution of India, 1950- Article 226- Appellants were appointed as Panchayat Sahayaks- their appointments were quashed and set aside- an advertisement was issued for filling up 9 posts of Panchayat Sahayaks- a communication was sent to Sub Regional Employment Officer, Ex-servicemen Cell, Hamirpur – respondent appeared for interview- a communication was sent by respondent No. 4 to respondent No. 3 requesting him to issue appointment letter- appointments were not given by respondent No. 3- private respondent approached the High Court pleading that suitability of the ex-serviceman was to be adjudged only by Ex-servicemen Cell and thereafter department is to offer appointment letters to the candidates- as per letter dated 17.8.1987 ex-servicemen once interviewed by State Level Selection Committee are not required to be subjected to any future interview for which they have been nominated - once the private respondents are found eligible, they could not have been subjected to further test- they were rightly held entitled for the appointment by the Writ Court.

Title: Ashok Singh and others Vs. Ved Parkash and others (D.B.) Page-929

Constitution of India, 1950- Article 226- Complaints were received in the Court that authorities are not taking action against the person who are violating the directions issued by the Court- trees are being cut on the pretext that permission had been obtained from the authorities to cut the trees- respondent directed to appear before the Court to explain the situation and the respondent commanded to take action strictly as per law.

Title: Court on its own motion Ref:- Ghazala Abdullah Vs. State of H.P. & others (D.B.)

Page-1291

Constitution of India, 1950- Article 226- Departmental proceedings were initiated against the petitioner- disciplinary authority asked the petitioner to explain as to why the proposed penalty be not imposed upon her within seven days from the date of receipt of the order- however, an order of compulsory retirement was passed on the same day- held, that purpose of show cause notice is to enable the delinquent to show as to how the report submitted by the Inquiry Officer is factually incorrect - when the order imposing the penalty and to show cause are passed on the same day, show cause notice is an empty formality to show that principle of natural justice had been complied with - order of compulsory retirement could have been passed after adhering to the principle of natural justice and fair play- authority passing an order must act with an open mind while issuing show cause notice-order of compulsory retirement set aside, however, respondent left at liberty to pass a fresh order after complying with the principle of natural justice.

Title: Anu Rana Vs. Central Bank of India & ors. Page-1103

Constitution of India, 1950- Article 226- Government had framed Himachal Pradesh Vidya Upasak Yojna, 1998 to provide teaching man power in Government Primary Schools located in remote/backward/difficult/tribal areas as regular teachers were not willing to serve in those areas- Vidya Upasaks were to be initially recruited for a period of one year and their services could be extended after evaluating their performances- services of those teachers who had passed a written test and had successfully completed one year's condensed teacher training course specifically prepared for them were to be regularized after a period of five years subject to the condition that they passed 10+2 examination and had qualified written test and interview conducted by H.P. Subordinate Service Selection Board- appointment letters were issued on the basis of combined merit list- services of the candidates were counted from the date of the regular appointment and not from the date of initial appointment- further, they were also not held entitled for pension- petitioners were

appointed in the year 2000 and their appointment continued till 2007- their services were to be counted from the date of the initial appointment- pension rules were amended in the year 2003 and their appointment was prior to the amendment- hence, they were wrongly deprived of the pension- petition allowed and their services were ordered to be counted from 2000 for the purpose of pension and annual increments etc.
Title: Joga Singh and others Vs. State of Himachal Pradesh and others (D.B.)
Page-1023

Constitution of India, 1950- Article 226- Government of India had introduced Voluntary Retirement Scheme for the employees of the public enterprises- scheme was adopted by State Government as well as by HPSIDC- however, scheme was subsequently modified and instead of 1½ months' emoluments for each completed year, one month's emoluments were proposed to be given- the representation was made to the State Government which was rejected without a speaking order- held, that fixation of the date was arbitrary and had no nexus sought to be achieved by retirement scheme- all the employees who were in the service of State Government and Corporation were given the benefit - modified order is quashed and set aside- Corporation directed to grant ex-gratia payment equivalent to 1½ months emoluments as per original scheme.
Title: HPSIDC Employees Union Vs. State of H.P. & anr. Page-466

Constitution of India, 1950- Article 226- It was stated in the status report dated 25.4.2015 that first milestone would be achieved by June, 2015, subject to the weather conditions- Status report filed before the Court showed that required progress had not been made till filing of the status report- respondents were taking the plea that delay in the execution of the work was due to bad weather- held, that construction technology had improved to such an extent that construction work is being carried out smoothly even in the areas where temperature remains in minus - a committee of two persons appointed to monitor the progress of the work in question- committee members directed to visit the spot fortnightly and to submit the report about the progress of work and also to give suggestions to take work to logical conclusion.
Title: Court on its own motion Vs. State of H.P. and others (D.B.) (CWPIL 8480 of 2014)
Page-879

Constitution of India, 1950- Article 226- It was stated on behalf of petitioner that Writ Petition was disposed of in terms of reply- counsel for the respondent stated that he has no objection for adopting this course- hence, petition disposed of in terms of para-14 (I to IX) of the reply and respondent directed to do needful within 8 weeks.
Title: Anu Mahindru Vs. State of Himachal Pradesh & others (D.B.) Page-454

Constitution of India, 1950- Article 226- Land was allotted to the father of the petitioner No.1- no objection was raised by the respondent to the allotment of the land- however, a Revision Petition was filed which was allowed without a speaking order- a Writ Petition was filed which was allowed and the petitioners were permitted to approach Divisional Commissioner, Mandi who dismissed the application filed by the petitioners- a Revision was filed after 17 years – such revision was not maintainable- authorities had not adverted to the question of delay- hence, petition allowed and the order set aside.
Title: Bachitar Singh & ors. Vs. Divisional Commissioner Mandi & ors. Page-1220

Constitution of India, 1950- Article 226- Names of the petitioners were sponsored by District Employment Officer, Hamirpur, for interview to the post of TGT (Med.) under the quota reserved for wards of ex-servicemen- petitioners were not interviewed on the ground that married daughters were not eligible to get the benefit- held, that son of ex-serviceman was eligible for consideration as the ward of ex-servicemen, even though he is married, however, the daughters were not being considered to be the wards of ex-servicemen- this amounted to discrimination on the basis of sex and is violative of the constitution- it has no nexus with the object sought to be achieved – petition allowed and respondents directed to interview the petitioners for the advertised post.
Title: Jyoti Kumari & ors. Vs. The Secretary Education & anr. Page-436

Constitution of India, 1950- Article 226- Petitioner and 1600 workmen were retrenched on 9.2.2004- services of more than 1000 workmen were reinstated but the services of the petitioner were not reinstated- retrenchment order was set aside but the petitioner was not given employment- petitioner raised an industrial dispute but his case was rejected on the ground of delay and was not referred to Industrial Tribunal- held, that relief cannot be denied to workmen on the ground of delay- petitioner is a labourer and should not have been denied the relief simply on the ground of delay.
Title: Vyasa Devi wife of Sh. Shyam Lal Vs. State of H.P. & others Page-734

Constitution of India, 1950- Article 226- Petitioner applied for 42 days earned leave, which was sanctioned- he applied for extension of leave and when he came to join his duty he was told that his services had been terminated- he made various representations which were rejected- Municipal Corporation Act provides for giving a reasonable opportunity to the employee to the show cause- petitioner was never served with any show cause notice- petitioner was never told that his leave was not sanctioned - no inquiry was conducted – absence is not misconduct unless it is pleaded or proved that absence was willful- employer had failed to prove that absence was willful, therefore, services of the petitioner were wrongly terminated and the Writ was rightly allowed.
Title: Municipal Corporation, Shimla Vs. Mohinder Singh Malhi and others Page-481

Constitution of India, 1950- Article 226- Petitioner claimed that retail outlets are being opened indiscriminately without any regard to distance, volume and growth potential- High Court issued an order that no letter of intent shall be issued without obtaining order from the Court- Government of India issued fresh guidelines stating that existing roster was closed in July, 2012- petitioner contended that order issued by High Court was not complied with in letter and spirit- held, that respondents have complied with major portion of the directions except that the locations already advertised were ordered to be governed as per the old conditions- respondents directed to consider the old cases which are pending at the time of filing of the petition as per new guidelines.
Title: Himachal Pradesh Petroleum Dealers Association vs. Neeraj Mittal and others
Page-740

Constitution of India, 1950- Article 226- Petitioner filed a Civil Writ Petition before the High Court which was allowed and a supernumerary post was created- case of the petitioner was considered by the Departmental Promotion Committee and his name was recommended for promotion on notional basis- petitioner claimed that he has not been paid the actual salary though he was ready to work on the higher post- held, that petitioner has been kept away from discharging the duties of the higher post- he was always ready and willing to

work on the higher post- thus, petition allowed and the respondent directed to pay salary from the date of promotion till the date of superannuation.

Title: Balbir Singh Vs. State of Himachal Pradesh and another (D.B.) Page-1225

Constitution of India, 1950- Article 226- Petitioner filed a Writ Petition seeking relief that respondent No. 5 be held to be disqualified from holding the office of MLA and he be restrained from acting as MLA- held, that power under Article 226 is in the widest possible terms but this power cannot be used to set aside the election- election can be set aside only by raising an election dispute and only an Election Tribunal can set aside the election under properly filed election petition under Representation of the People Act- writ petition dismissed as not maintainable.

Title: Ashwani Gupta Vs. State of H.P. and others (D.B.) Page-1210

Constitution of India, 1950- Article 226- Petitioner pleaded that more than 50% of the paper was out of syllabus –Registrar, H.P. University submitted a report that some questions were out of syllabus- held, that students should not suffer for the fault of the university- University directed to award marks regarding the questions set out of syllabus to the students.

Title: Kamal Dev Verma son of Sh. R.C. Verma & others Vs. H.P. University & others

Page-275

Constitution of India, 1950- Article 226- Petitioner sought a direction to the respondent to issue NOC to the petitioner on the basis of remarks obtained in the All India Post Graduation Medical Entrance Examination 2015- Clause No. 1.9 of the notification is illegal and not applicable to the case of the petitioner- petitioner joined PG courses at Chandigarh- she came to know about her critical pregnancy diagnosed as "HYPEREMESIS GRAVIDARUM"- she was not entitled to any maternity leave - she had no option but to submit her resignation- she requested the respondent to relax the P.G. policy so that she could appear in P.G. examination in future as a sponsored candidate- she applied for no objection certificate but the certificate was not issued in her favour- clause No. 1.9 clearly provided that In-Service Medical Officers who leave the PG/ Diploma course midway shall stand debarred to re-appear in the PG/ Diploma Entrance Examination for next 5 years- held, that provisions relating to admission to PG courses were clear and unambiguous- Court cannot pass any direction to accommodate the petitioner- petitioner had not made any attempt to obtain leave or to withdraw the resignation furnished by her- she made a request to consider her posting in the blood bank at IGMC, Shimla which shows that her condition was not critical - rule cannot be declared unreasonable because it operates harshly in a given case- petition dismissed.

Title: Dr. Lalita Bansal Vs. State of H.P. & ors Page-953

Constitution of India, 1950- Article 226- Petitioner sought a writ of certiorari for quashing an order of the cabinet to shift Divisional Office of HPPWD from Balakrupi to Tanda- held, that a decision to shift the office of DFO was a policy decision and the Court will not interfere with the same except where the policy is contrary to Law or Constitution or is arbitrary or irrational - merely because certain section of the public does not approve the decision is no ground to interfere with the same- petition dismissed.

Title: Jagjeevan Singh and another Vs. State of H.P. and another Page-21

Constitution of India, 1950- Article 226- Petitioner sought quashing of a letter stating that notification issued under Section 4 of Land Acquisition Act, 1984 stood lapsed and direction be issued to Land Acquisition Collector to initiate the proceedings under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- the record showed that there was unreasonable delay on the part of the respondents in finalizing the proceedings under Land Acquisition Act- therefore, respondents cannot take advantage of their wrong to claim that they will proceed under the new Act- provision of Section 6 will not come in to operation till the requirement laid down in part-VII of the Act are fulfilled – respondents had delayed the proceedings instead of promptly paying compensation- petitioner cannot be made to suffer for the default in discharge of statutory duties by the respondents- Writ Petition allowed and the letter issued by respondents quashed.
Title: Seli Hydro Electric Power Company Ltd. Vs. State of H.P. and others (D.B.)
Page-1069

Constitution of India, 1950- Article 226- Petitioner sought the transfer of investigation in FIR to CBI or to Delhi- record shows that closure report had been submitted to the Court of competent jurisdiction- interference by High Court will amount to taking over the jurisdiction and powers of the Magistrate- petitioner had filed similar petition before Delhi, High Court which was withdrawn in view of submission of cancellation report- when investigation is complete, it is not permissible to direct the police to conduct further investigation- there can be further investigation but no fresh investigation- second FIR cannot be registered when an FIR had already been registered- petition dismissed.
Title: Raj Pal Singh vs. Central Bureau of Investigation & others (D.B.) Page- 859

Constitution of India, 1950- Article 226- Petitioner was an employee of BCB - she was declared surplus and was redeployed to the NSSO (FOD)- she claimed grant of higher pay scale with ACP- Government of India had taken a decision in the year 1986-1987 to afford fresh option to Ex-BCB employees but she was not given a chance to exercise the option- respondent stated that she was placed in Punjab Government pay-scale - similarly situated person had approached Central Administrative Tribunal and the judgment passed by the Tribunal was upheld by the High Court as well as by the Apex Court- held, that similarly situated person should be treated similarly irrespective of the fact that only one person had approached the Court- denying the benefits to the person who had not approached the Court is unjustified.
Title: Union of India and others Vs. Tripta Sharma (D.B.) Page- 426

Constitution of India, 1950- Article 226- Petitioner was appointed as a cleaner on daily wages on 1.10.1986- he was subsequently regularized on 6.11.1997- respondents were shown senior – although they were appointed later- held, that seniority list should have been drawn on the basis of length of service- respondents directed to re-draw the seniority list and to promote the petitioner if otherwise found eligible.
Title: Suraj Bahadur Vs. H.P. State Forest Development Corporation Ltd. and ors.
Page-394

Constitution of India, 1950- Article 226- Petitioner was appointed as clerk-cum-typist in Indian Red Cross Society- she claimed regularization of her services- claim was denied by the Labour Court on the ground that Red Cross Society is not a State and the petitioner is not an employee of the State Government- held, that Red Cross Society falls within the definition of State under Article 12 of the Constitution of India- it cannot deny regularization

to its employee for 26 years, whereas employees in the State Government are regularized after 7 years – petition allowed and the respondent directed to consider the case of the petitioner for regular appointment.
Title: Seema Mehta Vs. Chairman-cum-Deputy Commissioner and another
Page-236

Constitution of India, 1950- Article 226- Petitioner was appointed as Part Time Water Carrier- her services were terminated- petitioner claimed that no notice was served upon her prior to the termination of her services – respondent stated that date of birth of the petitioner was recorded as 1940 in the family register- therefore, she had attained the age of superannuation even prior to her appointment- when this fact came to the notice of the respondent, petitioner was retired from the services- held, that order retiring the services of the petitioner involved civil consequences, therefore, a notice was required to be served upon the petitioner prior to the passing of the order- since no notice was served upon the petitioner, therefore, petition allowed and the order passed by the respondent set aside.
Title: Shankari Devi Vs. State of H.P. & ors. Page-243

Constitution of India, 1950- Article 226- Petitioner was appointed on ad hoc basis on a consolidated salary of Rs. 1500/- per month in H.P.U. Model School on 31.5.1997 – a committee recommended creation of regular posts of Headmaster and teachers in the regular pay scale- these recommendations were accepted subject to the approval of Executive Council- petitioners were put in a regular pay scale but the increment was not released to them- held, that petitioners were appointed after completing all the codal formalities – therefore, they should have been granted annual increments from the initial date of appointment - Vice Chancellor had created posts subject to the approval by Executive Council and appointment on such post is valid until set aside- since, appointments were regularized by Executive Council- therefore, the appointees are entitled to annual increment as well as GPF at par with regular employees.
Title: Raj Bala Gaur Vs. H.P. University and others Page-411

Constitution of India, 1950- Article 226- Petitioner was appointed as Lower Division Clerk on contract basis- Department invited application for three posts of Lower Division Clerk for which the petitioner also applied- his case was rejected on the ground that he was over age- when his contract was not renewed, he filed an application before Central Administrative Tribunal which was also dismissed - selected candidates were not arrayed as party- this application was not filed before the High court, therefore, it could not be said as to what plea was taken by the petitioner before the Court-in these circumstances, petition dismissed.
Title: Mohinder Kumar Vs. Union of India and others Page-967

Constitution of India, 1950- Article 226- Petitioner was debarred from taking part in any activities or proceedings of the Gram Panchayat by the Deputy Commissioner- an appeal was preferred before Divisional Commissioner which was dismissed- held that order passed by Divisional Commissioner is non-speaking one, hence, order passed by him set aside with a direction to pass a reasoned and speaking order.
Title: Dharam Singh Negi Vs. State of H.P. & others (D.B.) Page-181

Constitution of India, 1950- Article 226- Petitioner was engaged on daily wages basis on muster roll as Beldar - services of 1087 workmen including petitioner were retrenched by

respondent No. 3- 43 workmen raised industrial dispute and their services were reinstated – petitioner raised an industrial dispute after this order but his case was rejected and was not referred to Industrial Tribunal on the ground of delay- held, that relief cannot be denied to workmen on the ground of delay- petitioner is a labourer and should not have been denied the relief simply on the ground of delay.

Title: Deepi Devi wife of Sh. Rupia Ram Vs. State of H.P. & others Page-703

Constitution of India, 1950- Article 226- Petitioner was engaged on daily wages on 22.3.1983- he was regularized as electrician on 1.4.1995- he was re-designated as Technician Grade-I and his pay was fixed at Rs. 4,550/-- he was informed subsequently that Rs. 4,68,300/- was wrongly released to him- his pay was re-fixed as per audit para- held, that it was not permissible for the respondent to recover the amount or to re-fix his pay after a long time - respondent had not taken into consideration the representation filed by the petitioner assailing the combined seniority list- petition allowed and the order re-fixing the salary set aside.

Title: Jagdish Chand Vs. State of H.P. & another Page-408

Constitution of India, 1950- Article 226- Petitioner was transferred from Corporate Office Shimla to STPL, Patna- the persons who were working for more period than the petitioner were not transferred- wife of the petitioner had undergone renal (kidney) transplant in the year 2000- daughter of the petitioner is studying in 10+2 at Shimla- petitioner has worked only for three years at Shimla and has been transferred while the people working for more than 9-10 years have not been transferred- therefore, petition allowed and the transfer order of the petitioner quashed, liberty granted to the respondent to transfer the person on the basis of length of services at a particular place.

Title: Abhay Shankar Shukla Vs. SJVN Ltd. & ors. (D.B.) Page-1208

Constitution of India, 1950- Article 226- Petitioners are beldars who were placed beyond the parent cadre by way of secondment- it was contended that consent of the petitioners was not obtained prior to their transfer- respondent contended that Statute did not provide for obtaining consent for placement on deputation/secondment/foreign service- Statute did not provide that the consent of the employee need to be taken - willingness of posting beyond the cadre need not be expressly sought and can be implied – where the employees had joined without any reservation they are not entitled for any relief but where employees had approached the Court immediately after the passing of the order, they are entitled to the relief.

Title: Desh Raj Vs. Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya (D.B.) Page-944

Constitution of India, 1950- Article 226- Petitioners are pursuing their studies in the St. Bedes College, Shimla- petitioners had obtained 8 marks whereas they were required to obtain 10 marks for obtaining admission in higher classes- a representation was made which was allowed by respondent No. 3 and the internal marks were changed- respondent No. 1 did not accept the recommendation of respondent No. 3- it was contended that there is a specific bar regarding the revision of internal assessment- held, that there is no provision in the statute for the revision/review of internal assessment- therefore, respondent No. 1 had rightly refused to accede to the request of respondent No. 3- petition dismissed.

Title: Tanuja Bhatia Vs. H.P.University and others Page-924

Constitution of India, 1950- Article 226- Respondent No. 6 started work of the widening the road by cutting and excavating the hill rock - it resulted in massive amount of boulders rolling down the hills causing damage to the plants and land of the petitioners- damage assessment report was prepared but compensation was not paid- held, that respondents should have redressed the grievances of the petitioners on their own level and should have paid the compensation- State has vicarious liability to pay compensation for acts of its employees- a person cannot be deprived of the use of his property except in accordance with law- respondent No. 6 directed to pay compensation of Rs.15,00,000/- along with interest @ 9% p.a. from the date of filing of the petition.

Title: Vishan Dass & anr. Vs. State of H.P. & ors. (D.B.) Page-456

Constitution of India, 1950- Article 226- Respondent was working on daily wages basis as Beldar- his services were retrenched- he filed a petition before the Labour Court which was allowed- held, that while retrenching the employee, the principle of last come first go has to be applied- while giving re-employment preference has to be given to the retrenched employee- petitioner was not re-employed but his juniors were re-employed- thus, seniority was rightly granted to the respondent- reference can be made at any time and there is no limitation for making the reference.

Title: State of H.P. through Secretary (IPH) to Govt. of H.P. and another Vs. Raj Kumar son of Shri Jaisi Ram Page-1349

Constitution of India, 1950- Article 226- **Securitisation and Reconstruction of Financial Assets and Enforcements of Security Interest Act, 2002** (SARFAESI Act) – Section 13(4)- Petitioner filed a Writ Petition against an action taken against it in terms of Section 13(4) of SARFAESI Act- petitioner has a remedy of appeal under Section 17 of the Act- held that when an alternative remedy is available, writ petition is not maintainable.
Title: SPS Steels Rolling Mills Ltd.Vs. State of Himachal Pradesh & others (D.B.) Page-1387

Constitution of India, 1950- Article 226- Show cause notice was issued to the petitioner asking them to show cause as to why action be not taken for not paying proper VAT on mobile chargers- petitioners have efficacious and alternative remedy under Section 48 of the Act- petitioners have to appear before the authority and to file reply- it would be open for the petitioners to take all the grounds which have been taken before the High Court – a show cause notice cannot be quashed by the Writ Court- hence, Writ Petition dismissed as not maintainable.

Title: Micromax Informatics Ltd. Vs. State of HP and others (D.B.) Page-1334

Constitution of India, 1950- Article 226- **Sick Industrial Companies (Special Provisions) Act 1985**- Section 22- Petitioners sought a direction to the bank to take steps to prevent the petitioner from becoming sick- petitioners had stated that an order was passed by BIFR which was upheld in AAIFR- held that where an inquiry under Section 16 of the Act is pending or where any scheme is under preparation or consideration then all the inquiries and legal proceedings would be suspended- Sick Industrial Companies (Special Provisions) Act is a special Act and will prevail over the general law, hence, proceedings in the Writ Petition will remain under suspension till pendency of proceedings under Sick Industrial Companies (Special Provisions) Act.

Title: M/s Sainsons Pulp & Papers Ltd. and another Vs. State Bank of India and others (CWP No. 2805 of 2011) Page-908

Constitution of India, 1950- Article 226- State Government had granted extension of one year of service to some of the employees- extension was withdrawn subsequently by the State- held, that policy was promulgated by the State Government in exercise of executive powers and the Policy was withdrawn by exercising the same power and authority – it was specifically mentioned in the policy that it was conditional and could be withdrawn at any stage - once employee accepted the extension in terms of policy, he cannot complain, however, it is directed that any adverse remarks will not affect the petitioners and such remarks are expunged.

Title: Lal Chand Prasad Vs. State of H.P. and others (D.B.) Page-440

Constitution of India, 1950- Article 226- State had not created any post of psychiatric in district hospital- direction issued to the State to create post of psychiatric in all district hospital- to increase rehabilitation grant, to provide protective electric heaters, neat and clean good quality towels and to provide necessary grant for taking cured to their houses.

Title: Court on its own motion Vs. The Principal Secretary (Social Justice & Empowerment) and ors. (D.B.) Page-937

Constitution of India, 1950- Article 226- State pleaded that it was not in a position to consider the cases of employees for the allotment of Government accommodation as per their entitlement and prayed that government be directed to examine the cases of government servant and to make allotment as per the rule - statement is acceptable to the Counsel for the respondent - accordingly State directed to make allotment as per rules which would be subject to the outcome of the Writ Petition.

Title: State of H.P. through Secretary (GAD) Vs. Purushottam Sharma (D.B.)

Page- 877

Constitution of India, 1950- Article 226- Status report filed regarding the condition of various institutions for Mentally Challenged and Differently-abled Children/Adults established throughout the State- report pointed out many deficiencies- direction issued to remove the deficiencies- further, direction issued to establish one institution for mentally retarded children in cluster of three Districts- direction issued to Municipal Council, Nagar Panchayats and the State to accord "No Objection Certificate" to cut/remove the trees for constructing public utility building by imposing necessary condition.

Title: Court on its own motion Vs. State of H.P. and others (D.B.) Page-973

Constitution of India, 1950- Article 226- The newspaper reported that the shopkeepers in the lower bazaar had encroached upon the road and as against the time of five minutes, it was taking more than one hour fifteen minutes to cover the distance from one corner of the Lower Bazaar to the another - this news item was treated as a Public Interest Litigation- M.C. Shimla admitted the contents of the news item and stated that shopkeepers re-encroach soon after the removal of the encroachment- Chief Fire Officer also pointed out that it took more than 40 minutes to ply the vehicle from one corner to another, whereas, it should not take more than 6 minutes in any case- fire tenders faced difficulties in reaching at the spot where the fire had broken out due to encroachment made by shopkeepers - held, that shopkeepers did not have any right to encroach upon the public street and the Corporation is duty bound to remove all the encroachments- the Government was bringing out the policy of regularization which increases the encroachment- further, Shimla falls in a high Seismic Zone and it would be improper for the Government to regularize the deviation

and to put the life of citizens in danger- therefore, direction issued to remove encroachment, to implement the provisions of law and to remove the illegal projections.
Title: Courts on its own motion Vs. State of H.P. & others (D.B.) Page-569

Constitution of India, 1950- Article 227- It was reported that closure report had been filed before the Magistrate- held, that petitioner should approach the Court of competent jurisdiction for the redressal of his grievances.
Title: Parveena Devi Vs. State of H.P. and others (D.B.) Page- 1035

Contempt of Courts Act, 1971- Section 12 – It was stated that respondent could not have complied with the directions issued by the Court as the directions issued in the judgment are contrary to the judgment delivered in LPA No.105 of 2012- held, that once judgment has been upheld respondents are bound to obey the same or to seek clarification, if necessary- hence, respondents directed to comply with the directions within a period of 6 weeks.
Title: Himachal Pradesh Rajkiya Prathmik Anubandh Adhayapak Sangh Vs. P.C. Dhiman and another (D.B.) Page-1055

'G'

Gramin Dak Sevak (Conduct and Employment) Rules, 2001- Rule 10- Petitioner was involved in indiscipline and forgery- Inquiry was conducted against him- Inquiry Officer found that all the charges were proved – Disciplinary Authority imposed the penalty of the removal – record established that petitioner had forged the signatures of the Head of Village on many occasions- he was involved in indiscipline and had undermined the authorities and had disgraced them - a person who indulges in illegal activities and commits fraudulent or frivolous acts by deceitful means, is to be dealt with iron hands – Writ Court cannot re-appreciate the evidence- considering the gravity of the accusations, the punishment cannot be said to be disproportionate or shocking - Writ petition dismissed.
Title: Roop Chand Vs. Union of India & others (D.B.) Page- 137

'H'

H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971- Section 54 - Consolidation proceedings concluded in the year 1997- a revision petition was filed in the year 2009 after 12 years- Divisional Commissioner ordered rectification in the revenue entries without considering the delay- litigation was also pending before Civil Court in which findings were recorded by Civil Court - such findings are binding on the revenue Court – Divisional Commissioner had upset those findings ignoring the fact that matter was pending before the Civil Court- in these circumstances, order was rightly quashed by the Writ Court.
Title: Jai Singh Vs. State of H.P. and others (D.B.) Page-1057

H.P. Land Revenue Act, 1954- Section 45- Petitioners filed an application before Learned A.C. 2nd Grade stating that they were in possession and their possession be recorded in the revenue record- correction of revenue record was ordered by Learned A.C. 2nd Grade- this order was challenged unsuccessfully before Sub Divisional Collector and Divisional Commissioner - orders were set aside by Financial Commissioner- petitioners claimed that amount of Rs.10,000/- was received by predecessor-in-interest of the respondent and the possession was delivered at the spot- held, that oral sales were not permissible in the year 1980 when amount was paid- sale was effected for more than Rs. 100/- and could have only

been made by way of registered document - statement was vague and will not amount to the sale - land had vested in BBMB at the time of making of statement- borrowing of Rs. 10,000/- and putting the predecessor-in-interest of the petitioners in possession will not amount to acquiring right or interest.

Title: Harish Chander & others Vs. Financial Commissioner and others Page-10

H.P. Panchayati Raj Act, 1994- Section 113- Election of the petitioner was assailed on the ground that he had not obtained no objection certificate from the office of BDO- his election was set aside- petitioner claimed that the election petition was barred by limitation- this plea was rejected on the ground that same was taken only at the time of argument- provision of limitation is mandatory and there is no provision to condone the delay- Court cannot proceed with the matter if the same is barred by limitation- hardship and injustice are no grounds for extending the period of limitation, therefore, orders passed by the Court below set aside.

Title: Ramesh Kumar Vs. Rajesh Kumar and others (D.B.) Page-636

H.P. Land Revenue Act, 1954- Section 134- A person can apply for delivery of possession within three years from the date of preparation of instrument of partition – if the possession is not delivered within three years, aggrieved person can seek possession on the basis of title before the Civil Court.

Title: Satya Devi widow of late Shri Udho Ram Vs. Hari Chand son of Udho Ram Page-1380

H.P. Land Revenue Act, 1954- Section 135- Plaintiff applied for partition of the land before Assistant Collector 1st Grade- respondent stated that suit land had already been partitioned- this objection was rejected and the land was partitioned- appeal was preferred against the order which was allowed and the case was remanded- meanwhile, settlement operation started in the revenue estate, Una- application was allowed by Tehsildar Settlement Una – appeal was preferred before Settlement Officer, Kangra who allowed the same and directed the parties to approach the Civil Court having jurisdiction in the matter-a civil suit was preferred pleading that land was joint- held, that where the parties had partitioned the land privately without intervention of the revenue officer, any party can apply to a revenue official to record the same- a report was made in rapat roznamcha regarding the partition – this entry was also reflected in the jamabandi- parties were shown in separate possession- this probablises the plea of private partition - it is permissible for the parties to partition a particular piece of land leaving other land joint- merely because the award was accepted by the parties cannot belie the plea of private partition- appeal dismissed.

Title: Amrik Singh and others Vs. Abnash Chand and others Page-881

Himachal Pradesh Nautor Land Rules, 1968- Rules 13 and 14- Petitioner was a government employee at the time of allotment of nautor land- land was granted to him for the construction of cow-shed - he had mentioned his annual income as Rs. 4,800/- from all sources- he had spent a sum of Rs. 80,000/- on the construction of the shops- he was not even resident of estate for which he had applied for the grant of nautor land- he had violated the Rule 7 as he had used the land for the purpose other than for which the land was sanctioned by constructing a shop- his income was Rs. 48,000/- but he had given his income as Rs. 4,800/- p.a. which was more than Rs. 2,000/- prescribed under the Rules- the object of nautor land rules was to help the persons who were landless or were in dire need of land for cultivation- petitioner cannot be called to be a landless or needy person-

nautor land was allotted in 5,769 cases in the State- Financial Commissioner directed to call for the records in all the cases and to pass the order of resumption/cancellation if the allotment had been made contrary to the provision of Rules – a further direction issued to refund the amount with interest if the land has been acquired.
Title: Narinder Lal Negi Vs. State of Himachal Pradesh and others (D.B.) Page-1364

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- Landlord sought eviction on the ground that building had become unfit and unsafe for human habitation and the building is required bonafide by landlord for re-construction – landlord had entered into an agreement for reconstruction of the building- there is no requirement of approval or sanction of building plan for seeking eviction- in these circumstances, tenant directed to handover the vacant possession to the landlord- tenant shall have a right to be re-inducted in the premises after re-construction of the building.
Title: Vinod Kumar Vs. Varinder Kumar Sood Page-404

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- Petitioner was held to be in arrears of rent to the extent of Rs. 20 lakh - amount was not deposited by the petitioner within 30 days of the order- held, that Court does not have power to extend time to deposit arrears of rent beyond the period of 30 days.
Title: Vipin Sharma & anr. Vs.Punjab State Electricity Board & anr. Page-205

Himachal Pradesh Urban Rent Control Act, 1987- Section 24(5)- Petitioner claimed that respondent was in arrears of rent, tenant had changed the user of premises and he was causing nuisance by testing and firing the guns in the area- tenant himself stated that he was not carrying the business after the cancellation of his license, therefore, allegation of the landlord that tenant was causing nuisance by firing and testing gun was not acceptable- tenant pleaded that he had a franchisee of respondent No. 2 but he had failed to place on record any document appointing him as a franchisee – witnesses claiming to be employees failed to produce any document like appointment letter, salary slip etc. – record of employees was not furnished to the shop inspector- tenant was no longer residing at Solan and was not carrying the business of arms and ammunition from the premises – he was not paying any salary to the employees of respondent No. 2 nor he was paying any taxes to the authority- held, that in these circumstances, it can be held that tenant had walked out of the premises and had given possession of the property to sub-tenant who is running business of courier service from the premises.
Title: Manbir Singh Vs. Suresh Bansal and others Page-760

Himachal Pradesh Value Added Tax Act, 2005- Section 16(xiii)- Petitioner was paying tax @ 5% on the sale of cell phone chargers and other accessories instead of 13.75%- a show cause notice was issued to it to revise the assessment order- petitioner filed a Writ Petition challenging the show cause notice- held that petitioner has an alternate remedy of filing an appeal under the H.P. VAT Act 2005 -mere illegal or irregular exercise of powers will not make the order without jurisdiction - when an effective remedy is available Court should not entertain the Writ Petition- Writ Petition dismissed for the lack of maintainability.
Title: M/s Samsung India Electronics Pvt. Ltd. Vs. State of H.P. & ors. (D.B.)
Page-1226

Hindu Adoption and Maintenance Act 1956- Section 12– An adopted son gets transplanted into adoptive family with the same right as a natural born son, however, he continues to have his share in the coparcenary property of his natural father as he had acquired share in the property at the time of birth and would not be divested by subsequent adoption.

Title: Tripta Devi widow of Shri Jagdish & others Vs. Krishan Chand (died) through LRs. Kadshi Devi and others Page-266

Hindu Marriage Act, 1955- Section 13(1) (ia) (ib)- Wife started residing in the house of her parents- a compromise was effected- husband went to bring her back but she did not return- husband was serving in the army - he suffered a stroke of paralysis but wife did not visit home to care for him- wife claimed that she and her child were forced to reside in her parental home- wife had gone to Hamirpur to get her son educated and had agreed to return to her matrimonial home after the conclusion of examination- she instead went to her parental home - she had not complied with the decision of the Panchayat – she claimed maintenance from the Army Authority- she had not visited her husband even when he had suffered paralytic stroke- all this showed that intention of the wife was to harass her husband- held, that in these circumstances, husband was rightly held entitled for divorce.

Title: Sunita Kumari Vs. Bhumi Chand Page-683

Hindu Succession Act, 1956- Section 15(2)(b)- Plaintiff pleaded that predecessor-in-interest of the plaintiff was married to 'G'- she succeeded to the property on the death of 'G'- she settled with one 'H' and plaintiff was born out of the wedlock between 'P' and 'H'- defendants claimed that they are tenants in possession on the payment of 1/4th of the produce and plaintiff has no right in the property- plaintiff admitted that he was not born out of the wedlock of 'P' and 'G' but was born to 'H'- held, that when son or daughter begotten by the deceased female not through her husband, whose property was with her during her but from someone else, such son or daughter has no right to inherit such property- such property shall devolve upon heirs of the husband or father-in-law- hence, plaintiff was not competent to file the suit.

Title: Fate Ram and others Vs. Parvati Page-388

Hindu Succession Act, 1956- Sections 2(2) and 4- Plaintiff filed a Civil Suit pleading that his father was Gaddi and was governed by custom according to which daughters do not inherit the property of their father and the attestation of mutation in favour of the plaintiff and defendants was wrong- held, that any text, rule or interpretation of Hindu Law or any custom or usage immediately before the commencement of the Act shall cease to have effect with respect to which provision is made in the Act- custom providing that the daughters will not inherit the property will be in derogation of the provision of Hindu Succession Act and cannot be recognized- further, such custom will be in violation of Article 15 of the Constitution of India.

Title: Bahadur Vs. Bratiya and others Page-1259

'I'

Indian Contract Act, 1872- Section 70- Plaintiff No. 1 had sold 8 flats in the Valley Side Estate to the defendants together with lease- it was specifically agreed that the seller will not be bound to carry out any repair after one year and alternate arrangement will be made by Flat Owners' Association- plaintiff spent Rs. 26,000,00/- towards the maintenance of common area- held, that no Flat Owners' Association was formed in area and services were

rendered by the plaintiff- once the defendants had taken the advantage of the services, they were bound to pay for the same- Article 113 of Limitation Act will be applicable in such a situation - cause of action arose on 20.9.2004 and the suit was filed on 18.1.2006 within limitation- hence, suit decreed.
Title: The Reserve Bank of India and another Vs. M/s A.B.Tools (P) Ltd., and another (D.B.)
Page-1086

Indian Evidence Act, 1872- Section 3- Evidence of the witnesses cannot be discarded on the ground of relationship.
Title: Ranjodh Singh Vs. State of Himachal Pradesh Page-51

Indian Evidence Act, 1872- Section 35- Birth certificate is issued under Registration of Birth and Death Act- similarly, family register is prepared by the Public Officer in discharge of his official duty- therefore, both these documents are admissible under Section 35 of Indian Evidence Act.
Title: Kuldeep Thakur son of Shri Ludar Chand Vs. State of Himachal Pradesh
Page-470

Indian Evidence Act, 1872- Section 50- Plaintiff was married to the deceased- plaintiff stated that marriage was witnessed by the respectables of the village- PW-3 deposed that marriage of the plaintiff and the deceased was solemnized in accordance with customary rites - statement was corroborated by PW-4 and PW-5- testimonies regarding the marriage can be taken into consideration under Section 50 of Indian Evidence Act – held that it was duly proved that marriage of the plaintiff was solemnized with the deceased as per custom.
Title: Subhash Kumar Vs. Mandra Devi (deceased) through L.R.s Ujjagar Singh and others
Page-198

Indian Evidence Act, 1872- Section 90- Plaintiff claimed the ownership on the basis of sale deed dated 11.1.1962 and 19.3.1965- defendant denied the execution of the sale deed dated 19.3.1965 and pleaded that document was manipulated by predecessor-in-interest of the plaintiffs who obtained thumb impression on the pretext of getting the land demarcated- it was contended that Court was bound to draw the presumption under Section 90 of the Evidence Act- held, that the power conferred upon the Court is discretionary and the Court is not obliged to draw such presumption- further, mere proof of formal execution of a document does not lead to a presumption that recitals contained therein are also correct- plaintiff has neither pleaded nor proved as to how the consideration was paid, who was the Deed Writer, before whom the document was executed- hand-writing was not proved nor anyone was called from Sub Registrar office, therefore, in these circumstances, trial Court had rightly refused to rely upon the sale deed.
Title: Budhi Singh & another Vs. Ashok Kumar & others Page-531

Indian Evidence Act, 1872- Section 114- Defendant No. 1 did not appear in the witness box and did not offer himself for cross-examination- therefore, the presumption can be drawn that case set up by him was not correct.
Title: Rubi Sood and another Vs. Major (Retd.) Vijay Kumar Sud & others
Page-771

Indian Evidence Act, 1872- Sections 3 and 65 (B)- Prosecution relied upon the conversation between the accused and 'K' to prove the acceptance of bribe- held, that before acting upon the electronic record, Court has to consider whether it is genuine or not- technology of preparing CD was not in existence in the year 1989-90 when the bribe was allegedly received by the accused – no evidence was produced to show as to what was the device used for recording the CD- whether such device was technically in order- the name of the person who recorded the conversation was also not mentioned- FSL had raised certain queries which was not answered- there were contradictions in the testimonies of the witnesses- there was no evidence against the accused except CD - therefore, acquittal of the accused in these circumstances was justified.
Title: S.M. Katwal Vs. Virbhadra Singh and others Page-486

Indian Penal Code, 1860- Section 84- Accused claimed that he had no malice against the deceased- accused was a chronic patient of epilepsy and last attack had occurred one day prior to the date of incident- accused was not in a proper state of mind at the time of incident- held, that absence of motive is no ground to discard the prosecution story and witnesses- mere lack of motive is also not sufficient to establish the unsoundness of mind- medical evidence does not establish the insanity of the accused- version of accused that he suffered from mental disorder was not believable – Doctor admitted that accused had normal behaviour and he was cooperative at the time of examination- hence, his plea of insanity was not established.
Title: Surender Singh Vs. State of Himachal Pradesh (D.B.) Page-689

Indian Penal Code, 1860- Section 84- Accused contended that he was insane- reliance was placed upon the testimony of DW-1 who deposed that accused was suffering from bipolar affective disorder and he had impaired judgment as he was suffering from psychosis- held, that accused has to prove that he was suffering from legal insanity- the burden is upon him to establish this fact- accused ran away from the spot, which shows that he knew what he was doing was wrong- PW-1 had not noticed any abnormality in the behavior of the accused- held that the plea of insanity taken by the accused not proved.
Title: Jeevan Rana Vs. State of Himachal Pradesh (D.B.) Page-343

Indian Penal Code, 1860- Section 201 read with Section 34- Accused cremated the deceased without intimating any person- held, that in order to establish Section 201 of IPC, prosecution has to prove that accused had knowledge about the commission of offence and that they had caused disappearance of evidence of commission of criminal offence- two persons were sent to intimate the parents of the deceased about the death- deceased was cremated in presence of co-villagers- in these circumstances, offence punishable under Section 201 read with Section 34 of IPC is not proved against the accused.
Title: State of Himachal Pradesh Vs. Kaur Singh son of Utam Singh & others (D.B.)
Page-167

Indian Penal Code, 1860- Section 302- Accused conspired with co-accused to murder the deceased- deceased was taken to nearby jungle where he was murdered- the accused and deceased were last seen travelling on the motorcycle by independent witness- police official found a motorcycle parked at an isolated place- police went to jungle to find the owner –they heard the ring of mobile phone and noticed the dead body of the deceased- Medical Officer found multiple incised wounds on the vital parts of the body which could have been caused by means of a knife- PW-1 stated that accused went alone on his motorcycle towards the main road, whereas deceased went on foot- prosecution failed to establish that after the

accused left the house of the deceased, motorcycle remained in his possession or was being driven by him – police officials admitted that a Nepali had told them about hearing a telephonic ring but Nepali was not interrogated immediately- police had not seized the motorcycle- disclosure statement was not proved - clothes recovered by police were not connected to the accused- Medical Officer found injuries on the person of the accused- held, that in these circumstances, prosecution version was not proved and acquittal of the accused was justified.
Title: Takki Mohd. Vs. State of Himachal Pradesh (D.B.) Page-647

Indian Penal Code, 1860- Section 302- Accused resided with his wife, mother and sister-in-law in a temporary shed- PW-16, father-in-law of the accused, was asked by PW-7 to call mother of the accused to milk the cattle- temporary shed occupied by the accused was bolted from inside and his daughter refused to open the same -on the second day same reply was received – matter was reported to police and the door was got opened- dead bodies of the parents of the accused were found- accused made a disclosure statement and got darat and scissor recovered- there was contradiction regarding the person who had asked the father-in-law of the accused to leave- further, he had not informed his employer that the door was found locked from the inside – it is difficult to believe that accused, his children, his wife and sister-in-law would have remained inside the room for 48 hours after the commission of crime and would not have run away from the scene of crime- in normal course, the occupants of the house would have come out of the room and would have raised hue and cry- wife of the accused who was present in the room was also not examined- clothes of the accused were recovered but no blood stains were found - blood stains were bound to be present on the clothes if the accused had committed the crime- there was contradiction as to who had informed the police- the motive for killing the parents was not established- held, that these circumstances made prosecution case doubtful- accused acquitted.
Title: State of Himachal Pradesh Vs. Om Parkash @ Pappu (D.B.) Page-1390

Indian Penal Code, 1860- Section 302- An altercation took place in marriage in which accused and the deceased grappled with each other - subsequently at Ner Chowk, accused came near the vehicle in which deceased was sitting and asked him to come down as the accused wanted to have duel with the deceased- accused and the deceased started grappling with each other- accused took out a Khukhari and started stabbing the deceased repeatedly due to which deceased fell down and died at the spot- held, that act of the accused was not premeditated- quarrel had taken place, which resulted in subsequent fight- fight had taken place all of a sudden- accused had a knowledge that his act would result in the death of the deceased- his act falls within the preview of Section 304(II) and not Section 302 of IPC.
Title: Satish Kumar alias Bichhu Vs. State of H.P. (D.B.) Page-840

Indian Penal Code, 1860- Section 302- Deceased was posted as Assistant. Lineman, in HPSEB- he left home after his duty but did not return- his dead body was found with the injuries on the head in the jungle by PW-1- PW-4 admitted that deceased had consumed alcohol and was unable to walk properly- 316.25 mg % ethyl alcohol was found in the blood sample of the deceased- since, deceased was heavily drunk, therefore, possibility of his fall from a height cannot be ruled out, especially when body was recovered at a distance of more than 100 meters below the path- accused acquitted.
Title: Hema Ram Vs. State of Himachal Pradesh (D.B.) Page-218

Indian Penal Code, 1860- Section 302 read with Section 34- Deceased left his house to bring some articles but had not returned - his dead body was found by his wife-it was revealed during the investigations that accused had consumed alcohol with the deceased and they had killed the deceased due to animosity- accused 'D' confessed to commission of crime before 'Y'- wife of the deceased and PW-2 admitted that there was no enmity between the deceased and the accused- there was no evidence that deceased was last seen with the accused- extra judicial confession made by the accused that they had sent the deceased 'Upar' (Abode of God) cannot be construed to be an admission of guilt- statement of witness to recovery was not inspiring confidence- deceased was under heavy influence of liquor- Doctor had not ruled out the possibility of sustaining injury by way of fall- held, that in these circumstances, acquittal of the accused was justified.

Title: State of Himachal Pradesh Vs. Durgu Ram and another (D.B.) Page-152

Indian Penal Code, 1860- Section 306 read with Section 34- Deceased solemnized love marriage with accused no. 1- both husband and wife used to quarrel with each other- she wanted to take control of the finances- she and her brother subjected the deceased to cruelty and abetted him to commit suicide- deceased died by jumping into the river- held, that in order to prove the abetment, the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary- parents of the deceased nowhere deposed that accused wanted to control the finances- colleagues of the deceased stated that salary was remitted directly to the bank- Bank Manager deposed that deceased was operating the account himself and all the benefits of the deceased were released to his mother- no complaint was made by the deceased regarding the cruelty- mere daily quarrels cannot amount to abetment – in these circumstances, acquittal of the accused was justified.

Title: State of Himachal Pradesh Vs. Renuka Devi & others (D.B.) Page-158

Indian Penal Code, 1860- Section 306 read with Section 34- Deceased was married to accused 'K'- accused harassed the deceased for bringing insufficient dowry- she narrated the incident of harassment to her father, step mother, Pardhan and ward member- milk was not provided to her children on which she complained to her father- complainant had provided cow to the deceased two months prior to her death - deceased died and was cremated without intimating any person- held, that there should be nexus between abetment and suicide- no positive, cogent and reliable evidence was led to prove that accused had abetted the deceased to commit suicide- accused acquitted of the commission of offence punishable under Section 306 of IPC.

Title: State of Himachal Pradesh Vs. Kaur Singh son of Utam Singh & others (D.B.)
Page-167

Indian Penal Code, 1860- Section 363- Prosecutrix, aged 14½ years old, did not return from the school- she was persuaded by accused 'K' to go to Rivalsar- she was taken to the house of co-accused 'H'- father of the prosecutrix specifically stated that prosecutrix had gone to school and had not returned - there was no evidence that consent of the father was taken - since prosecutrix was minor, therefore, her consent was immaterial- held, that in these circumstances, accused was rightly held liable for the commission of offence punishable under Section 363 of I.P.C.

Title: Kuldeep Thakur son of Shri Ludar Chand Vs. State of Himachal Pradesh
Page-470

Indian Penal Code, 1860- Section 376- Prosecutrix, aged 14½ years old, was taken by accused 'K' to go to Rivalsar – she was taken to the house of co-accused 'H' where she was raped – prosecutrix supported the prosecution version – her testimony is trustworthy, reliable and confidence inspiring - same is corroborated by medical evidence- held, that testimony of prosecutrix is sufficient to convict a person if the same is free from blemish.
Title: Kuldeep Thakur son of Shri Ludar Chand Vs. State of Himachal Pradesh
Page-470

Indian Penal Code, 1860- Section 376(2)(g)- Prosecutrix had stayed with her boyfriend in a hotel- accused 'N' who was manager in the hotel entered into the room where prosecutrix was staying and gagged her mouth- he called co-accused 'V' who took the prosecutrix to adjoining room No. 27 where she was raped – prosecutrix had immediately given an affidavit before the Executive Magistrate stating that she was pressurized by the police officials to file complaint- she was examined medically and no rape was committed upon her- her boyfriend had specifically stated that no rape was committed by accused person- he had also filed an affidavit to this effect- no injuries were detected on her person- case was filed earlier against the prosecutrix under Section 41(2) and 109 Cr.P.C.- all these circumstances create doubt regarding the prosecution version- held, that in these circumstances, accused were wrongly convicted by the Court.
Title: Vijay Kumar @ Tantu son of Sh.Nater Singh vs. State of H.P. (D.B.)
Page-1296

Indian Penal Code, 1860- Section 395- PW-2 had kept boxes of nose pins and other ornaments in her home- 4-5 persons entered in the room armed with pistols and darat- they searched the almirah and took away the ornaments- mobile phone and chains were also taken away- prosecution witnesses stated that door was opened after some time- it was not believable that door could be opened from inside when it was bolted from outside- in case, door was opened by pushing it, latch would have broken but police had not seized the broken latch- further, prosecution version that accused entered the house when PW-3 used the toilet, cannot be believed- presence of witnesses to the disclosure statement was doubtful- local police was not informed about the recovery nor independent witness was associated at the time of seizure of the mobile phone- independent witnesses ought to have been joined at the time of recovery -further recovery was made from an open place which was not believable - DNA profile matched with one accused but the Medical Officer did not depose that sample was preserved by her- Medical Officer, CH, Sundernagar was not examined to prove preservation of blood sample- it was not believable that door of gold smith could be opened by pushing it inside- held, that these circumstances create doubt regarding prosecution version- accused acquitted.
Title: Azam Vs. State of H.P. (D.B.) Page-65

Indian Penal Code, 1860- Section 498-A read with Section 34 - Accused 'K' used to harass the deceased for bringing insufficient dowry- she narrated the incident of harassment to her parents as well as Pardhan and ward member- milk was not provided to her children on which she complained to her father- two months prior to her death, complainant provided cow to the deceased- deceased died and was cremated without intimating any person-PW-1 specifically stated that accused used to call the deceased 'Kanjar' (Person leading illicit life)- held, that calling a married woman 'Kanjar' ipso facto amounts to cruelty upon married woman- other prosecution witnesses also deposed that deceased used to complain about the

harassment- held that the prosecution had proved its case for the commission of offence punishable under Section 498-A read with Section 34 IPC.
Title: State of Himachal Pradesh Vs. Kaur Singh son of Utam Singh & others(D.B.) Page-167

Indian Penal Code, 1860- Sections 109, 147, 148, 149 and 323- A charge was framed against the petitioner for the commission of offences punishable under Sections 109, 147, 148, 149 and 323 of IPC- only petitioner was arrayed as accused and other persons were arrayed as suspects- held, that offence can be committed by an unlawful assembly of 5 or more than five persons - when only one accused has been arrayed before the Court, he cannot be charged for the commission of offence punishable under Section 149.
Title: Amar Singh Vs. State of Himachal Pradesh Page-1358

Indian Penal Code, 1860- Sections 302 and 120-B – Construction work of IPH Sub Division at Village Gharyana Brahmana, District Hamirpur was allotted to the deceased- deceased had engaged accused as a sub-contractor to execute the electrical fitting and paint work- accused was not carrying out the work to the satisfaction of the deceased and due to the deficiency, payment of the accused was withheld by the deceased- deceased visited the construction site to supervise the work where he expressed his dissatisfaction with the work done by the accused- he also refused to make the payment till the deficiency was removed- accused left the spot - he returned with the co-accused armed with a baseball bat and hit the deceased due to which the deceased became unconscious and died- witnesses duly proved the presence of the accused at the spot- accused made a disclosure statement on the basis of which baseball bat was recovered- keys of the vehicle, clothes and danda were also recovered- medical evidence proved that deceased had died due to the head injury and injury to brain leading to neurogenic shock and death- injury could have been caused by means of baseball bat- held, that in these circumstances, guilt of the accused was duly proved.
Title: Mandeep Vs. State of H.P. (D.B.) Page-604

Indian Penal Code, 1860- Sections 302 and 201- Accused told that deceased had not returned from Sujanpur- people got suspicious and conducted search of the house of the accused- blood stained bed-sheet, Chadar, Dupatta and a blanket were recovered from an almirah in the house- matter was reported to the police – inquiry was made from the accused – he confessed to the killing of the deceased- accused made a disclosure statement that he had killed his wife and had concealed her body in a septic tank - deceased was recovered from septic tank but she was breathing- she succumbed to her injuries subsequently- a danda was recovered on the basis of disclosure statement made by the accused- blood stained clothes were also recovered from the house of the accused- blood was detected on the shirt and Salwar of the deceased- held, that chain of circumstances were complete and the accused was rightly convicted by the Court.
Title: Ranjodh Singh Vs. State of Himachal Pradesh Page-51

Indian Penal Code, 1860- Sections 302 and 201 read with Section 34- Deceased had engaged the services of 'B' and other Gorkhas- wife of the deceased told that deceased had not reached his home, although, he had told his mason or labrourers that he was going to his house- a missing report was lodged subsequently- accused got recovered the dead body, a stick, wooden plank with which the dead body was tied and a rope – he also gave Nishandehi of the place where he had killed the deceased- Medical Officer stated that it was

not possible to opine about the exact cause of death but the possibility of the head injury could not be ruled out- no material was placed on record to show that there was any dispute regarding the payment- there was discrepancy regarding the person who had recorded the statement of the accused under Section 27 of the Indian Evidence Act- danda, wooden plank or rope were not sent for analysis to FSL - no entry was made at the time of taking out the case property for production before the Court- held, that in these circumstances, prosecution version was not proved.
Title: Bishan Singh alias Bishnoo Vs. State of Himachal Pradesh (D.B.)
Page-337

Indian Penal Code, 1860- Sections 302 and 201 read with Section 34- Marriage of the deceased was settled with the daughter of co-accused 'N'- deceased had given Rs. 50,000/- to 'N' as marriage consideration amount- the daughter of 'N' stayed with deceased at Kullu-Manali for about 10-12 days – 'N' brought back his daughter from Manali and got her married somewhere else- deceased use to demand money from 'N'- accused use to quarrel with deceased- deceased went to the house of 'N' for demanding money but did not return- his dead body was found in the water of a dam – accused were arrested- clothes and stick were recovered at their instance- Medical Officer opined that deceased could have died by infliction of injury with a stick- case of the prosecution is based upon circumstantial evidence- dead body was found in a dam and the possibility of the involvement of 3rd person could not be ruled out- co-accused had sustained injuries which were not explained by the prosecution, which means that prosecution has concealed the genesis of the incident- witnesses to the disclosure statement did not support the prosecution version- blood group of the blood detected on the clothes was not determined and, therefore, it is not sufficient to connect the accused with the commission of crime- suspicion howsoever strong cannot take place of proof – held, that in these circumstances, acquittal of the accused was justified.
Title: State of Himachal Pradesh Vs. Nomu Ram and others (D.B.) Page-277

Indian Penal code, 1860- Sections 302 and 323 read with Section 34- Complainant was thrashing the paddy in his courtyard- houses of the deceased and accused are adjoining to each other- there was a passage between the houses- accused had stacked Bajri on the passage due to which the walls of the house of the complainant were damaged as a result of dampness- complainant asked the accused to remove Bajri but the accused started quarreling with the complainant- accused also assaulted the deceased and 'B'- matter was reported to the police, when the complainant party returned home from the police station, they found that deceased had died- record showed that complainant was asking the accused to remove Bajri immediately at 10:00 P.M, which led to a sudden fight- therefore, case would fall under Exception (4) of Section 300 of IPC- prosecution had also not explained the injury received by the accused- role of accused 'K' and 'N' was not established- appeal partly allowed.
Title: Kashmir Singh and others Vs. State of Himachal Pradesh Page-961

Indian Penal Code, 1860- Sections 302 and 376- Accused attempted to rape the deceased- deceased resisted on which accused gave a blow on the head of the deceased with a stone- he met 'D' and told him that he had murdered a woman and needed money to run away- 'D' told the contractor regarding the murder who advised 'D' to take the accused to Pradhan- accused made extra judicial confession before Pradhan- Pradhan informed the police on which FIR was registered- Pradhan improved his version in the Court making his statement doubtful- there were contradictions in the statements of the prosecution witnesses- making of extra judicial confession to a person who is not known to the accused is highly

improbable – further name of the victim was not mentioned in the extra-judicial confession- extra-judicial confession is a weak piece of evidence- extra-judicial confession was not corroborated and was lacking in detailed particulars –held, that in these circumstances, acquittal of the accused was justified.
Title: Govinda alias Rahul vs. State of Himachal Pradesh Page-2

Indian Penal Code, 1860- Sections 302 and 498-A- Deceased was married to the accused- accused was not satisfied with the dowry given to her- deceased told her parents and her sister that she was being harassed for not bringing sufficient dowry- she gave birth to a daughter but nobody came to see her and her daughter- deceased came back after compromise to her matrimonial home- she was again harassed by accused- she died due to beatings given to her with fist and kick blows - she was carrying pregnancy of 34-36 weeks- post mortem revealed that she had died due to fracture and dislocation of cervical vertebrae- dead body was found at a distance of 200 meters from the house of the accused- accused had not lodged any missing report and had not made any inquiry about his wife- Doctor admitted that fracture and dislocation of cervical vertebrae could be caused by twisting neck with great force with hands- accused had also sustained injuries- accused had made an extra-judicial confession stating that he had given beatings to the deceased- held, that act of the accused fell within the definition of cruelty- relation between accused and deceased did not improve even after convening the panchayat – accused was rightly convicted of the commission of offences punishable under Sections 302 and 498-A of IPC.
Title: Sarla Devi Vs. State of Himachal Pradesh (D.B.) Page-395

Indian Penal Code, 1860- Sections 302, 323, 324, 201, 452 and 506 (II)- Accused gave beatings to his sister who took refuge in the house of his neighbour – accused went to the house of the neighbour and again gave beating to her when another neighbour 'S' tried to intervene - she was also beaten by the accused- accused gave beatings to 'R' and 'K'- accused poured kerosene upon them and set them on fire- testimonies of the witnesses were corroborated by medical officer who stated that deceased had died due to shock caused as a result of 100% burn injuries- held that the accused was rightly convicted.
Title: Surender Singh Vs. State of Himachal Pradesh (D.B.) Page-689

Indian Penal Code, 1860- Sections 302, 323, 324, 427 and 201- Accused and the deceased went to attend the marriage where accused and deceased had a scuffle – injuries were caused to the deceased with sharp edged weapon- accused pelted stone on the car and damaged window panes- injured was brought to the Civil Hospital where he was declared brought dead- PW-1 specifically stated that when they had placed injured in the car and were taking him to the Hospital, accused did not allow him to take the deceased to the Hospital and they pelted stones on the car- this was corroborated by other witnesses- mere fact that accused had been acquitted of the commission of other offences is no ground to acquit them- related witnesses cannot be called to be interested witnesses- minor contradictions in the testimonies are not sufficient to discredit, the testimonies of the prosecution witnesses when they are examined after considerable lapse of time.
Title: Dharam Pal and another Vs. State of H.P. (D.B.) Page-1240

Indian Penal Code, 1860- Sections 302, 364 and 201- PW-1 and PW-4 were staying at Mehatpur- they had two daughters and one son- accused claimed to be putative father of the son- he took away the girls on 3.8.2009- PW-1 brought the matter to the notice of the police- investigation revealed that accused had thrown his daughters in a water canal- dead

bodies were recovered- parents had duly identified the girls- accused made a disclosure statement and identified the place from where the girls were thrown in the canal- chappals were recovered which were identified by the parents- it was duly proved that accused had taken away the girls without the consent of the parents- Medical Officer specifically stated that girls had died due to drowning- recovery of chappals pursuant to the disclosure statement was duly proved- all the circumstances led to the guilt of the accused- held, that accused was rightly convicted.

Title: Birbal Vs. State of H.P. (D.B.) Page-1411

Indian Penal Code, 1860- Sections 304-II and 506-I read with Section 34- Complainant party wanted the accused to remove the obstruction caused on the passage commonly used by the villagers - accused failed to remove such obstruction - when she tried to remove the obstruction, accused pelted the stones- one stone hit 'V' who sustained injuries- he was taken to PGI where he succumbed to the injuries- Medical Officer opined that there was fracture of skull and death was caused on account of shock caused due to extra dural haemorrhage - presence of the deceased was duly proved by the complainant party- testimonies of the witnesses corroborated each other- it was duly proved that accused had hurled abuses and had proclaimed to settle the matter – they caused injuries to the complainant party- all the accused were together and shared their common intention- held that conviction of the accused was justified.

Title: Nand Lal and others Vs. State of H.P. Page-127

Indian Penal Code, 1860- Sections 341, 506 and 376- Prosecutrix was going to her home- accused met her on the road and raped her- incident was narrated by her to her parents who reported the matter to Pardhan- Pardhan called accused and his parents- his father and brother came and expressed their regrets- even if it is assumed that accused and prosecutrix knew each other and were in love with each other that would not give a licence to the accused to sexually assault the victim- testimony of prosecutrix is sufficient to convict the accused if it inspires confidence- matter was reported to the police promptly- mere fact that victim did not resist due to fear cannot lead to the conclusion of consent.

Title: Sudesh Kumar Vs. State of Himachal Pradesh (D.B.) Page-675

Indian Penal Code, 1860- Sections 363, 366, 376 and 120-B- Accused kidnapped the prosecutrix with an intention to force her to marry the co-accused 'B'- accused 'H' told the father of the minor prosecutrix to send her to tailoring centre- accused 'H' took the prosecutrix towards the bridge where she was pushed inside the car- accused 'H' caught the prosecutrix and threatened to kill her- minor prosecutrix was brought to the Court and her age was wrongly disclosed- the documents relating to her marriage with accused 'B' were prepared – she was kept in the house where she was raped – testimony of the prosecutrix is trustworthy, reliable and inspires confidence- it is corroborated by the medical evidence- the age of the prosecutrix was proved to be less than 16 in the certificate issued by Registrar of Birth and Death and Middle standard examination certificate- father of the prosecutrix had specifically mentioned that age of the prosecutrix was 15 years- accused 'H' had called the prosecutrix from her home and had dragged her in the vehicle- father of the prosecutrix had not consented to taking away of the prosecutrix- therefore, accused were rightly convicted- appeal dismissed.

Title: Babu Ram son of Mushu Ram vs. State of Himachal Pradesh Page-559

Indian Penal Code, 1860- Sections 364, 302, 201 read with Section 34- Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989- PW-1 informed the police that accused had kidnapped her husband after beating him- search was made to locate her husband but he could not be found- the slippers of her husband were found on the next day near the house of the accused- accused had enmity with the deceased as deceased had purchased the land which accused intended to purchase – accused had beaten the complainant and her son- accused 'A' was arrested and he made a disclosure statement on which body parts of the deceased and darat were recovered- PW-1, PW-2 and PW-3 had not made any efforts to search the deceased, even though they were accompanied by many persons- PW-33 admitted the overwriting on the disclosure statement- motive for the commission of crime was not established and no material was brought by the prosecution on record to show that deceased was killed simply because he happened to be member of scheduled caste category- Medical Officer stated that cause of death could not ascertained due to advance decomposition of the body- witnesses were closely related to each other and their statements did not inspire confidence- held, that in these circumstances, prosecution version was not proved- accused acquitted.
Title: Ruchi Kant and others Vs. State of Himachal Pradesh (D.B.) Page-1039

Indian Penal Code, 1860- Sections 376 and 506- Prosecutrix was found to be pregnant- she disclosed that her pregnancy was due to forcible sexual intercourse by accused within a period of 1 years- a panchayat was convened in which compromise was effected - however, mother of the prosecutrix filed a complaint against the accused before Panchayat which was forwarded to the police where FIR was registered- prosecutrix made improvement in her statement while appearing in the Court- there are variations in her statement recorded on 11.7.2012 and 12.7.2012 under Section 161 of Cr.P.C and the statement made in the Court- it was admitted that prosecutrix and her family members went to the Clinic in the vehicle of the accused after the incident was disclosed by the prosecutrix – family members would have never boarded the vehicle if the incident was narrated by the prosecutrix- witness of the compromise turned hostile- prosecutrix stated that she was raped in the house- it was not believable that accused would have raped the prosecutrix in the house in the presence of all the members of the family- version of the prosecutrix did not inspire confidence- accused acquitted.
Title: Mast Ram Vs. State of Himachal Pradesh (D.B.) Page-1027

Indian Succession Act, 1925- Section 63- Plaintiff claimed that no Will was executed by her husband during his life time and the Will propounded by the defendant is invalid, inoperative and ineffective qua the rights of the plaintiff- wife and mother of the deceased were alive at the time of execution of the Will, however, no reference was made to them in the Will- there is no evidence to suggest that deceased did not have a cordial relation with his mother and wife, therefore, it is highly improbable that a person executing a Will in favour of third person, will not make a reference to his wife and mother at the time of execution of the Will- deprivation of the natural heirs is not a suspicious circumstance but in view of non-mentioning of the legal representative of the deceased, the Will is required to be seen with care and caution- propounder is required to prove that there was some reason for leaving aside his aged mother and wife- propounder had failed to prove that he attended to the deceased at the time of his illness and was with him in the hospital- mere registration of the Will does not dispense with the statutory requirement of proving the Will in accordance with law- where there are some suspicious circumstances, burden is upon the propounder to prove the due execution of the Will.
Title: Subhash Kumar Vs. Mandra Devi (deceased) through L.R.s Ujjagar Singh and others Page-198

Indian Succession Act, 1925- Section 63- Plaintiff claimed that she is owner in possession of suit land on the basis of Will executed by the deceased- deceased had consumed poison- plaintiff admitted in her cross-examination that Doctor had refused to treat the petitioner, according to him, deceased had consumed strong poison- deceased had died at about 3-4 a.m.- witnesses of the Will admitted that the Will was written when the sun was rising- Sun rose at about 6:00 A.M- one witness stated that Will was scribed at the instance of one 'K'- this casts doubt about the execution of the Will- deceased was under the influence of strong poison and could not be in a sound disposing mind- no marginal witness was associated from the vicinity- propounder and her husband had actively participated in the execution of the Will which casts doubt regarding the genesis of the Will.

Title: Parmeshwari Devi Vs. Kamlesh Devi and another Page-369

Indian Succession Act, 1925- Section 63- Plaintiff claimed to be a successor on the basis of registered will- he claimed that administrator had wrongly resumed the property in favour of State without affording any opportunity of hearing to the plaintiff- defendant claimed that bidder had not raised construction within two years- thus, he had violated the condition of the auction- general notice was published in the weekly gazette requiring all the bidders to complete the construction after getting the plans approved from the respondent- order was passed in exercise of power under H.P. New Mandi Townships (Development and Regulation) Act, 1973- a plot was purchased in the year 1940 and the provisions of the act were not in operation, therefore, plot could not be resumed under provision of the Act.

Title: Pradeep Kumar Vs. State of H.P. & others Page-1124

Indian Succession Act, 1925- Section 63- Will was stated to have been executed by 'D', aged more than 78 years old- it was proved on record that the contents of the Will were read over and explained to 'D' who put her thumb impression on the same- marginal witness had signed the Will thereafter- merely because the marginal witness had used different ink will not make the Will suspicious- mere non-registration of the Will is not sufficient to doubt the same.

Title: Dhameshwar Vs. Gish Pati and others Page-737

Industrial Disputes Act, 1947- Section 25- Employer contended that workman had not completed 240 days in the preceding 12 months, however, no such plea was taken before the Writ Court- it was further contended that project had come to an end and there is no work, however, Labour Court had specifically found that management was having the work- no material was placed on record to controvert this finding - workman was terminated without any cause and the order was in breach of the principles of natural justice.

Title: The Director, Telecom Project-II Vs. Neelam Chadha and another (D.B.)

Page-731

'L'

Land Acquisition Act, 1894- Section 18- One of the petitioners had died during the Reference Petition before the trial Court- this fact was not brought to the notice of trial Court- held, that when the award was passed in ignorance of death of the sole petitioner, award has to be set aside - in case of more than one petitioner, death of one of the petitioners does not make the award a nullity and the legal representatives can be brought on record in appeal.

Title: General Manager, Northern Railway vs. Ramesh Chand and others Page-102

Limitation Act, 1963- Article 65- Petitioner claimed ownership as well as adverse possession- held, that both these pleas were contradictory to each other - mere long possession is not equal to adverse possession - Court has to be circumspect while adjudicating the plea of adverse possession in case of an encroacher, illegal occupant or land grabber of public property - petitioner had not mentioned the date from which his possession became adverse- hence, his plea of adverse possession was not acceptable.
Title: Manoj Singh Vs. Union of India & ors. (D.B.) Page-706

Limitation Act, 1963- Article 65- Plaintiff claimed to be a non-occupancy tenant –he also claimed to have become owner by way of adverse possession- held, that pleas taken by the plaintiff were contradictory - plaintiff had not specified the date of commencement of his possession with necessary animus – hence his plea of becoming owner by operation of law was not acceptable.
Title: Sunehru Devi (Now deceased) through LRs and others Vs. Pohlo Ram and another
Page-668

Limitation Act, 1963 - Section 5- Petitioner claiming himself to be a victim filed an appeal against the judgment of acquittal- appeal is barred by limitation- an application for condonation of delay was filed pleading that petitioner came to know about the judgment from the newspaper- State had not preferred any appeal against the acquittal and, therefore, petitioner had to file the appeal- explanation furnished by the petitioner is vague, cryptic and highly unbelievable – petitioner was present in the Court when judgment was announced- acquittal gained wide publicity on the next day and therefore, petitioner would come to know about the judgment, hence, application is liable to be dismissed.
Title: S.M. Katwal Vs. Virbhadra Singh and others Page-486

'M'

Motor Vehicle Act, 1988- Section 147- The cover note recorded the date of issue as 21.1.2005 but the effective date of commencement of insurance was recorded as 22.1.2005- accident had taken place on 21.1.2005 at about 3:45 P.M- Insurance Company had never questioned the cover note till the date of accident – held that the date of commencement mentioned in the cover note is the date from which insurer is liable- policy document is to be construed strictly- since insurer was liable only from 22.1.2005, therefore, he is not liable for the accident which had taken place on 21.1.2005.
Title: Partap Singh Bhagnal Vs. Ramkali & others Page-995

Motor Vehicle Act, 1988- Section 147- Tractor was insured with trolley and additional premium was paid- tractor of the trolley was being used for agriculture purposes- therefore, insurer was wrongly discharged by MACT.
Title: Rattan Singh and others Vs. Dodi Devi and others Page-1179

Motor Vehicle Act, 1988- Section 149- 24 persons died and 40 persons were injured in a motor vehicle accident- 25 claim petitions were filed- seating capacity of vehicle was 42+2- Insurer has to satisfy the award to the extent of risk cover- if the claim petitions are more than the risk covered, then it is for the insured to satisfy the same.
Title: Oriental Insurance Company Vs. Indiro & others Page-1149

Motor Vehicle Act, 1988- Section 149- A cover note showed that vehicle was insured at the time of accident- insurer had failed to prove that owner had committed any breach or the driver of the offending vehicle did not have a valid and effective license at the time of accident- held, that Insurance Company was rightly held liable to pay compensation.
Title: Oriental Insurance Company Ltd. Vs. Sharda Devi & others Page-829

Motor Vehicle Act, 1988- Section 149- Accident had taken place on 12.7.2004- license expired in the month of February, 2002 and it was renewed w.e.f. 24.11.2004-driver did not have a valid driving license w.e.f. 1.2.2002 till 24.11.2004 – owner had committed willful breach of the terms and conditions of the policy by employing a driver having no valid driving license- therefore, insured was rightly held liable to pay compensation.
Title: Sucha Singh Vs. Ritesh Kumar & another Page-1182

Motor Vehicle Act, 1988- Section 149- Claimants had specifically pleaded that driver of the vehicle had given lift to the deceased- owner stated in the reply that deceased was travelling in the vehicle in the capacity of a labourer – driver stated that deceased was travelling in the vehicle as owner of goods- held that in these circumstances, plea of insurance company that the deceased was a gratuitous passenger has to be accepted as correct - owner had committed willful breach of the terms and conditions of the policy and he was rightly saddled with liability.
Title: Gumti Devi Vs. Pushpa Devi and others Page-1141

Motor Vehicle Act, 1988- Section 149- Driver had a learner licence- held, that a person holding a learner licence is competent to drive motor vehicle for which the licence has been issued.
Title: New India Assurance Company Ltd.Vs. Kamla Devi & others Page-820

Motor Vehicle Act, 1988- Section 149- Driver possessed a valid driving licence to drive the vehicle at the time of accident – insurer was not able to show as to how driver did not have a valid and effective licence at the time of accident- insurer had also failed to prove any breach of the terms and conditions of the policy- therefore, insurer was rightly held liable to pay compensation.
Title: National Insurance Company Ltd. Vs. Satish Kumar & others Page-1143

Motor Vehicle Act, 1988- Section 149- Driver was driving the Mahindra Jeep whose gross weight is 2270 kilograms, therefore, it falls within the definition of light motor vehicle and endorsement of PSV is not required in the driving license– Insurance Company had not led any evidence that accident had taken place due to the reason that driver of the offending vehicle was competent to drive one kind of vehicle and he was found driving different kind of vehicle – held that in these circumstance, Tribunal had fallen in error in saddling the owner and the driver with the liability.
Title: Manohar Lal Vs. Sukh Bahadur & others Page-29

Motor Vehicle Act, 1988- Section 149- Driving Licence of the driver had expired on 13.6.2004 – it was renewed w.e.f. 24.8.2004- accident had taken place on 12.8.2004- held, that licence is valid from the date of renewal – driver did not possess any valid driving licence on the date of accident and the owner had committed breach of the terms and

conditions of the licence by employing a driver having no valid driving licence- therefore, insurance company was rightly held liable to pay compensation with a right to recovery.

Title: Partap Chand and another Vs. Harinder Kumar and another Page-992

Motor Vehicle Act, 1988- Section 149- Insurance Company contended that driver did not have a valid driving licence and the owner had committed willful breach by employing a driver having a fake licence- held, that Insurance Company has to prove that owner knew that licence was fake- mere evidence that licence was fake is not sufficient to absolve the Insurance Company of its liability- Insurance Company had failed to lead the evidence to prove that owner knew that licence was fake and it was rightly held liable.

Title: National Insurance Company Ltd. Vs. Kaushlaya & others Page-614

Motor Vehicle Act, 1988- Section 149- Insurance Company covered the risk of 8 persons including 5 passengers; therefore, deceased cannot be called to be a gratuitous passenger and insurance company is liable to pay indemnify the insured.

Title: Oriental Insurance Co. Ltd. Vs. Kishan Chand & others Page-37

Motor Vehicle Act, 1988- Section 149- Insurance Company pleaded that driver did not have a valid driving licence as he possessed a learner licence- owner had committed willful breach of terms and conditions of the policy- held, that a person having a learner licence is competent to drive the motor vehicle for which he was given the licence - therefore, Insurance Company was rightly held liable.

Title: Oriental Insurance Company Ltd. Vs. Krishan Dev and others Page-621

Motor Vehicle Act, 1988- Section 149- Insurance Company pleaded that driver did not possess valid driving licence at the time of accident- unladen weight of the vehicle was 1670 kg. and laden weight of the vehicle was 2820 kg. – vehicle falls within the definition of light motor vehicle- driver possessed a driving licence to drive light motor vehicle- held, that Insurance Company was rightly held liable to pay compensation.

Title: The New India Assurance Co. Ltd. Vs. Roshan Lal & others Page-1011

Motor Vehicle Act, 1988- Section 149- Insurance Company pleaded that it was wrongly saddled with liability and the owner had committed willful breach- insurer had not led any evidence to prove that owner/insurer and driver of the offending vehicle had committed any willful breach- a batch of claim petitions was filed in Utarakhand where insurer was saddled with liability- this award was questioned before the Apex Court by filing SLP which was dismissed- therefore, the plea of the Insurance Company that it was wrongly saddled with liability cannot be accepted.

Title: National Insurance Company Limited Vs. Anu Devi & others Page-612

Motor Vehicle Act, 1988- Section 149- Insurer pleaded that driver did not have a valid and effective driving licence at the time of accident- held, that it was for the insurer to plead and prove that owner had committed willful breach of the terms and conditions of the policy- insurer had not led any evidence to prove the breach of the terms and conditions of the policy and it was rightly held liable.

Title: United India Insurance Company Ltd. Vs. Madhvender Kuthleharia and others Page-62

Motor Vehicle Act, 1988- Section 149- MACT held that owner was liable to pay compensation- driver had a learner driving licence w.e.f. 22.10.2002 to 21.4.2003- the accident had taken place on 14.10.2002, therefore, driver did not have a valid driving licence at the time of accident- held, that in these circumstances, insured had committed the breach of the terms and conditions of the policy and owner was rightly ordered to pay compensation.
Title: Ajay Kumar Vs. Shubham Kumar and others Page-1

Motor Vehicle Act, 1988- Section 149- Mahindra Utility met with an accident in which five persons died- claimants pleaded that deceased were travelling in the vehicle along with goods/articles - the owner and driver did not deny this fact specifically but had denied it evasively- Insurer had not produced the copies of the registration certificate and the route permit- the risk of '1 + 3' is covered in terms of the insurance contract- therefore, insurer is to be saddled with liability to pay compensation in respect of three person- held, that in these circumstances Insurance Company was wrongly absolved of the liability and the owner was wrongly held liable to pay compensation.
Title: Hem Ram & another Vs. Krishan Chand & another Page-796

Motor Vehicle Act, 1988- Section 149- Owner specifically stated that he had engaged the driver after examining his driving licence and after knowing that he was driver of tractor in the same village- held, that owner had performed his duty which he was supposed to do- insurance policy covered 1+1 person which means that risk of driver and passenger was covered- only the claimant had filed the claim, therefore, insurance company is liable to satisfy the award and it was rightly saddled with liability.
Title: United India Insurance Company Vs. Lalli alias Laloo and another Page-1199

Motor Vehicle Act, 1988- Section 149- Petitioner pleaded that deceased had gone to attend the marriage but on return, the vehicle met with an accident- held, that in view of averments made in the petition, injured and deceased were travelling as gratuitous passengers- insurer was rightly directed to satisfy the awards with a right to recovery.
Title: Oriental Insurance Company Ltd. Vs. Geeta Devi & others Page-325

Motor Vehicle Act, 1988- Section 157- Registered owner pleaded that he had sold the vehicle to 'S' prior to the accident- reliance was placed upon the affidavit and an application made by 'S' – held, that evidence on record did not prove that registered owner had sold the vehicle to 'S'- further, owner had not questioned the award, in which liability was fastened upon him- appeal dismissed.
Title: Pawan Kumar Vs. Prabahu Lal & others Page-634

Motor Vehicle Act, 1988- Section 166- A bridge was constructed by Union of India across Jankar Nallah- bridge was meant for crossing by one vehicle at a time- caution boards were put on both side of the bridge to this effect- respondent/driver took the vehicle to the bridge when another vehicle was present on it- bridge could not bear the weight of two vehicles and collapsed- Union of India filed a petition seeking compensation of Rs. 8,11,536/-- Insurer had admitted in the reply that accident had taken place due to the negligence of the driver who took the vehicle to the bridge when another vehicle was crossing- therefore, MACT had rightly held that Insurance Company was liable to pay compensation.
Title: United India Insurance Company Limited Vs. Union of India and others
Page-1016

Motor Vehicle Act, 1988- Section 166- A bus hit a group of persons standing near the vehicle bearing registration No. HP-64-0238, parked on the extreme left side of the road with parking lights on, as a result of which, 7 persons sustained injuries and succumbed to the same- Tribunal held that accident was outcome of the contributory negligence of the drivers of the bus and jeep- accordingly, 50% liability was fastened upon the insurer of the jeep as well as HRTC - it was contended that awards were excessive- On scrutiny, some of the awards were found to be excessive which were ordered to be modified and the excess amount was ordered to be refunded to HRTC.
Title: Himachal Road Transport Corporation Vs. Naresh Kumar & others
Page-980

Motor Vehicle Act, 1988- Section 166- Claim petition was dismissed on the ground that claimant had earlier filed a claim petition which was dismissed in default- held, that provisions of Code of Civil Procedure are not applicable to MACT- procedural technicalities cannot be used to decline the claim of a person- petition was dismissed in absence of both the parties – held that second petition was maintainable in these circumstances.
Title: Jagdish Vs. Rahul Bus Service & others Page-298

Motor Vehicle Act, 1988- Section 166- Claimant had boarded the bus- she sustained injuries in the accident and was taken to PGI, Chandigarh- her right arm was amputated below elbow- she was only 13 years old and a student of class 6th – she sustained 80% disability- Tribunal awarded compensation of Rs. 2,09,400/- with interest @ 7.5% per annum from the date of the Claim Petition - held, that Tribunal had not assessed the just compensation- it had not taken into consideration the physical frame of the injured/claimant, her marriage prospects, amenities, future income, pain and sufferings and other prospects- claimant was aged 13 years and would have become earning hand after five years, even a housewife is earning Rs. 6,000/- per month by making contribution towards her family- keeping in view the percentage of disability, loss of income can be taken as Rs. 4,000/- per month and applying multiplier of '15', claimant would be entitled for Rs. 7,20,000/- under the head 'loss of earning' – amount of Rs. 50,000/- awarded towards the 'future medical treatment'- amount of Rs. 40,000/- awarded under the head 'pain and sufferings'- Rs. 1,00,000/- awarded under the head 'future pain and sufferings'- Rs. 1,00,000/- awarded under the head 'loss of amenities of life' and Rs. 2,00,000/- awarded under the head 'marriage prospects'- thus, total amount of Rs. 12,31,400/- awarded to the petitioner.
Title: Pooja Devi Vs. General Manager, Punjab Roadways & others Page-42

Motor Vehicle Act, 1988- Section 166- Claimant had suffered 100% permanent disability - he has not only lost his earning capacity but his whole life has become burden for himself and his family- Court has to pass an award which is fair, just and proper – court has to keep in view hardships, discomfort, amenities of life, pain and sufferings undergone while assessing compensation.
Title: Sanjay Kumar Vs. Yashpal Singh Page-833

Motor Vehicle Act, 1988- Section 166- Claimants had specifically pleaded that deceased was a house wife and was earning Rs. 5,000 to 7,000/- p.m. by agriculturist and horticulturist vocations- they further pleaded that they have to engage a servant for looking after the affairs of the house and orchard by paying Rs. 3,000/- p.m. - it can be held by guess work that income of the deceased was not less than Rs. 4,5000/- p.m.- 1/3rd of the

amount is to be deducted towards personal expenses - loss of dependency would be Rs. 3,000/- p.m. and applying multiplier of '8', claimants will be entitled to Rs. 3,000x12x8=2,88,000/- as compensation for loss of dependency.

Title: Ramesh Kumar and another Vs. Himachal Pradesh Road Transport Corporation and another Page-1177

Motor Vehicle Act, 1988- Section 166- Claimants pleaded that deceased was travelling in the vehicle along with apple plants but it was not pleaded that she had hired the vehicle – fare paid was also not specified- insurer had specifically pleaded that deceased was travelling in the vehicle as a gratuitous passenger – no plants were found at the place of the accident- therefore, plea of the Insurance Company that deceased was a gratuitous passenger has to be accepted as correct – held that the Insurance Company was rightly held liable to make the payment with right to recovery.

Title: Savitra Devi & another Vs. Jaiwanti Devi & others Page-1007

Motor Vehicle Act, 1988- Section 166- Compensation of Rs. 40,000/- and Rs.1,09,000/- were awarded with interest to the claimants – appeals were preferred against the award - held, that even under no fault liability compensation of Rs.25,000/- has to be awarded, hence amount of Rs. 40,000/- awarded as compensation is reasonable- claimant had suffered injury which had shattered her physical frame and, therefore, compensation of Rs.1,09,000/- awarded to her cannot be said to be excessive, rather, same was not just, however, it was not questioned by victim and it was upheld reluctantly.

Title: Oriental Insurance Company Vs. Dinesh Kumar & others Page-990

Motor Vehicle Act, 1988- Section 166- Deceased 'A' was riding the scooter while other deceased was a pillion rider - scooter was hit by a bus- deceased sustained injuries and subsequently succumbed to the injuries- Claim Petition was filed by the parents of the deceased- Tribunal held that it was a case of contributory negligence and directed the Union of India to satisfy 50% of the award - driver of the bus was court martialed and was convicted - therefore, he cannot take the plea of contributory negligence- held, that Tribunal had wrongly recorded the findings of contributory negligence.

Title: Sudesh Bala Vs. Union of India and others Page-844

Motor Vehicle Act, 1988- Section 166- Deceased was aged 19 years at the time of accident – annual income of the deceased was taken as Rs. 15,000/- by the Tribunal- deceased was young person aged 19 years- he was pursuing three years diploma Course in Electrical Engineering and had almost put in two years - by guess work his income can be taken as Rs. 6,000/- p.m.- 50% of the amount is to be deducted towards personal expenses and parents had lost Rs. 3,000/- p.m. as source of dependency - they are entitled to Rs. 3000x12x14= 5,04,000/-, as compensation for loss of dependency and Rs. 30,000/- as funeral charges and compensation for love and affection.

Title: Kehar Singh and another Vs. Ashwani Kumar and others Page-986

Motor Vehicle Act, 1988- Section 166- Deceased was aged 38 years at the time of accident- he was a government servant drawing salary of Rs. 9,610/- p.m before the accident - 1/4th of the amount was to be deducted towards personal expenses- loss of dependency would be Rs. 6,400/- applying multiplier of '14', claimants will be entitled for compensation of Rs. 6,400 x 12 x 14=10,75,200/-- in addition to this they will be entitled for compensation of Rs.

28,000/- under other heads - petitioners are entitled to total compensation of Rs. 11,03,200/-.
Title: Master Sachin & others Vs. Urmila Chauhan & others Page-988

Motor Vehicle Act, 1988 - Section 166- Deceased was aged 42 years- multiplier of '14' will be applicable- he was earning Rs. 1,06,483/ as salary- Tribunal had deducted 1/3rd towards deduction and further deducted 1/4th towards his personal expenses- held, that further deductions are not permissible from the salary - only 1/4th amount was to be deducted towards personal expenses- after deducting 1/4th i.e. Rs.26,500/- -loss of dependency would be Rs. 79,500/- and claimant would be entitled for Rs.11,13,000/- as compensation for loss of income.
Title: Anubha Sood and others Vs. Krishan Chand and others Page-1127

Motor Vehicle Act, 1988- Section 166- Deceased was drawing salary of Rs. 7,103/- p.m.- 1/4th of the amount was to be deducted towards personal expenses- thus, loss of dependency is Rs. 5,300/- p.m.- multiplier has to be applied considering the age of the deceased - applying multiplier of '13', claimants are entitled to Rs. 5300x12 =Rs.63,600 x 13 = 8,26,800/-.
Title: Tara Devi & others Vs. HRTC and others Page-1184

Motor Vehicle Act, 1988- Section 166- Deceased was drawing salary of Rs.13,315/-- Tribunal had wrongly assessed his monthly income as Rs.12,455/-- amount of 50% was wrongly deducted towards his personal expenses, whereas 1/3rd amount was to be deducted towards personal expenses- compensation enhanced to Rs.14,02,800/-.
Title: Balkar Singh & others Vs. Ram Pal alias Sanju & others Page-295

Motor Vehicle Act, 1988- Section 166- Deceased was working as a mason and his income can be taken as Rs. 6,000/- p.m.- he was aged 21 years and multiplier of '15' has to be applied- Claim Petition was filed by mother and loss of dependency has to be taken as Rs. 3,000/- p.m. - thus, claimant is entitled to compensation of Rs. 5,04,000/- + Rs. 30,000/- for loss of love and affection.
Title: Raghu Devi Vs. Dewan Chand (deceased) & others Page-831

Motor Vehicle Act, 1988- Section 166- Deceased was working as a trained Electrician- therefore, his income can be taken as Rs. 6,000/- p.m. - 50% of the amount was to be deducted towards personal expenses of the deceased- age of the deceased is to be taken into consideration while determining the multiplier- deceased was aged 28 years and multiplier of '13' is applicable- hence, compensation of Rs.4,68,000/- awarded under the head loss of dependency.
Title: Sanjokta Devi and others Vs. Himachal Road Transport Corporation and another
Page-1005

Motor Vehicle Act, 1988- Section 166- Deceased was working in the police department- last salary drawn by him was Rs.7,500/--Rs.8,000/-- 1/4th of the amount was to be deducted towards personal expenses- deceased was aged 34 years and multiplier of '16' was applicable- thus, claimants are entitled for Rs. 9 lakh under the head 'loss of dependency'.
Title: Secretary (Home) & others Vs. Shanti Devi & others Page-1009

Motor Vehicle Act, 1988- Section 166- Deceased were students of Class 11th – they would have got employment after 2-3 years or at least they would have become labourers and would have been earning not less than Rs. 5000/- per month each- loss of dependency can be taken as Rs. 2,500/- per month - multiplier of '16' has to be applied- compensation of Rs.4,80,000/- is to be paid to the claimants along with interest @ 7.5% per annum.

Title: Sudesh Bala Vs. Union of India and others Page-844

Motor Vehicle Act, 1988- Section 166- Income from the agriculture- deceased was managing orchard- claimants will have to engage a person to manage and supervise the orchard- at least Rs. 5,000/- per month would be payable as salary to him- therefore, claimants are entitled to Rs. 5,000x12x14 = Rs. 8,40,000/- as compensation on this account.

Title: Anubha Sood and others Vs. Krishan Chand and others Page-1127

Motor Vehicle Act, 1988- Section 166- Insurance Company pleaded that brother and sister are not the legal representatives and cannot file a Claim Petition- held, that persons who were dependent upon the deceased at the time of accident can file a Claim Petition - brother & sister if dependent upon the deceased can file a Claim Petition- they were minor at the time of accident and will fall within the definition of dependent.

Title: Bajaj Allianz General Insurance Company Ltd. Vs. Gohdi Devi & others Page-418

Motor Vehicle Act, 1988- Section 166- MACT had deducted 1/3rd of amount towards the personal expenses- deceased was bachelor, therefore, 50% of the amount was to be deducted towards personal expenses- income of the deceased was Rs.4,000/- p.m.- loss of dependency would be Rs.2,000/- p.m.- deceased was 22 years of age at the time of accident- multiplier of '15' has to be applied and the compensation of Rs. 3,60,000/- (Rs.2,000/- x 12 x 15) has to be awarded towards loss of dependency.

Title: Oriental Insurance Company Ltd. Vs. Ambi Chand and others Page-1175

Motor Vehicle Act, 1988- Section 166- MACT treated income of the deceased as Rs. 15,000/-, deducted 50% and assessed loss of dependency as Rs. 7,500/-- applying multiplier of 11, assessed the loss of income as Rs. 9,80,000/- and awarded total compensation of Rs. 10,40,000/- which cannot be said to be excessive or meager- appeal dismissed.

Title: Joginder Singh & another Vs. Chanan Ram and others Page-595

Motor Vehicle Act, 1988- Section 166- Mere acquittal in a criminal case is not a ground to defeat the rights of the claimant- the findings recorded by Criminal Court will have no bearing whatsoever in the proceedings pending before MACT.

Title: Divisional Engineer Telecom Project (BSNL) & another Vs. Chet Ram & another Page-790

Motor Vehicle Act, 1988- Section 166- Rashness and negligence is an essential ingredient for maintaining the claim petition- it is for the claimant to lead evidence and to prove on preponderance of probabilities that the driver had driven the offending vehicle rashly and negligently- respondent examined 6 witnesses who proved that respondent was not driving

the vehicle but deceased was driving the vehicle at the time of accident- this evidence was not rebutted- therefore, claimants are not entitled for any compensation.
Title: Kamla Devi & others Vs. Ravinder Gupta Page-27

Motor Vehicle Act, 1988- Section 166- Tribunal had assessed the income of the deceased as Rs.3,000/- per month and loss of dependency as Rs.1,000/-- deceased was agriculturist and horticulturist by profession and it can be safely held that he was earning Rs.6,000/- p.m.- loss of dependency has to be taken as 50%- deceased was 21 years old at the time of accident - applying multiplier of '14', claimant will be entitled to Rs. 3000x12x14=Rs.5,04,000/-+ Rs. 1000/-costs=Rs. 5,05,000/-.
Title: Vidya Devi Vs. Naresh Kumar and another Page-1205

Motor Vehicle Act, 1988- Section 167- Labrourers/employees have a remedy to obtain compensation under Workmen Compensation Act, 1923- if a claim made under Workmen Compensation Act, the claimant will get compensation as per scheduled attached to the Act, however, claimants can seek higher compensation under Motor Vehicle Act- insurer pleaded that it is liable to pay compensation as per the policy- held, that insurance policy does not restrict the liability of the insurer- claimants are entitled to the compensation under law and the Insurance Company was rightly held liable to pay compensation to the claimants.
Title: Oriental Insurance Company Limited Vs. Arvind Pal and others Page-619

Motor Vehicle Act, 1988- Section 168- Claimant had claimed the compensation of Rs.12,00,000/-, whereas, he was entitled for more compensation- held, that it is the duty of Claim Tribunal to award just compensation and it can award more compensation than claimed-.
Title: Jagdish Vs. Rahul Bus Service & others Page-298

Motor Vehicle Act, 1988- Section 169- First petition was consigned to record room- it was contended that second petition is not maintainable- held, that even if first petition had been dismissed in default, second petition is maintainable.
Title: Anupam Kumar Vs. Harmeet Singh Ghai & others Page-293

Motor Vehicle Act, 1988- Section 169- It was contended that claimant had not lodged FIR and therefore, claim petition is not maintainable- held, that lodging of FIR, dismissal of criminal case or acquittal cannot be ground to deny compensation.
Title: Jagdish Vs. Rahul Bus Service & others Page-298

Motor Vehicle Act, 1988- Section 169- Petitioner filed an application for releasing the awarded amount but MACT only released 25% of the arrear- held, that compensation awarded in favour of minors, illiterate claimants or widows is to be invested- petitioner does not fall in the category of claimants specified above- no reason was assigned as to why the entire amount was not released to the claimant- petition allowed and the entire amount ordered to be released in favour of petitioner.
Title: Dixit Chauhan Vs. Jagdish Thakur and others Page-1405

Motor Vehicle Act, 1988- Section 171- Interest is to be awarded from the date of the award and not from the date of Claim Petition.
Title: Partap Chand and another Vs. Harinder Kumar and another Page-992

Motor Vehicle Act, 1988- Section 171- Interest was awarded by MACT @ 12% P.A. in all the petitions except 7 in which interest was awarded @ 7.5 % p.a.- held, that interest has to be awarded as per the prevailing rate- interest awarded @ 9% p.a. in all the claim petitions.
Title: Oriental Insurance Company Vs. Indiro & others Page-1149

'N'

N.D.P.S. Act, 1985- Section 15- 138.500 kg of poppy husk was found in the vehicle of accused - PW-1 to PW-3 did not support the prosecution version- all the seals were not found intact in the Court- no entry was made regarding taking out of the case property from Malkhana and depositing it - held, that in these circumstances, prosecution had failed to prove that contraband was recovered from exclusive and conscious possession of the accused- accused acquitted.
Title: Hardeep Singh Vs. State of H.P.(D.B.) Page-258

N.D.P.S. Act, 1985- Section 20- Accused 'P' was carrying a boru on his shoulder- accused 'P' and 'A' were holding a pithu bag from each side- they tried to run away on seeing the police but were apprehended- their search was conducted- boru contained 24 kg. of charas and pithu contained 8 kg. of charas- prosecution witnesses admitted that police officials prepared the documents together by sitting in the police station- no entry was made in the malkhana register regarding taking out of the property for sending it to FSL for analysis- further, there is no entry regarding the re-deposit or taking the case property to the Court or deposit in malkhana after it was brought from the Court- no independent witness was associated- held, that in these circumstances, case of the prosecution was not proved- accused acquitted.
Title: Deep Bahadur Vs. State of H.P. (D.B.) Page-95

N.D.P.S. Act, 1985- Section 20- Accused was carrying a bag which was containing 2 kg 500 grams charas - independent witness had not supported the prosecution version- accused was not apprised of his legal right to be searched before Magistrate or Gazetted Officer- no entry was made regarding the taking out of the case property after it was brought from the Court- it has caused serious prejudice to the accused- held, that in these circumstances, prosecution version was not proved – accused acquitted.
Title: Rajesh Kumar Vs. State of H.P. (D.B.) Page-231

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1120 grams of charas- prosecution witnesses deposed in tandem and harmony- sample was taken on 14.5.2006 and was deposited on 19.5.2006- sample of 25 grams was taken at the spot but its weight was found to be 19.3711 grams in the laboratory- held that, variation in the weight of the sample leads to an inference that sample analysed was not connected to the sample taken at the spot.
Title: State of H.P. Vs. Om Parkash (D.B.) Page-921

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2.3 k.g of charas in a bag held in right hand- PW-1 stated that Investigating Officer had stopped the ongoing vehicles and had asked the occupants of the vehicles to become witness- it is not believable that occupants would not have become independent witnesses to support the arrest, search and seizure- place of apprehension is a busy Highway and police could have easily associated independent witness- no entry was made in the malkhana register regarding the

taking out of the property for production in the Court and re-deposit of the property in malkhana- entries are required to be made in malkhana register at the time of taking out of the property and depositing the same in malkhana- held that these circumstances created doubt regarding the prosecution version- accused acquitted.

Title: Kansara Mayur Vs. State of Himachal Pradesh (D.B.) Page-958

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 8 k.g of charas- police did not have any prior information- it was a case of chance recovery- accused was unable to satisfactorily answer the queries of the police party, on which he was searched- non-association of the independent witnesses in such circumstances is not material- police officials had corroborated testimonies of each other- their version is clear, cogent and consistent – testimonies are free from exaggerations, embellishments and major contradictions- once possession has been proved, burden is upon the accused to prove that possession was not conscious- held, that prosecution version was proved beyond reasonable doubt and the accused was rightly convicted.

Title: Sesh Ram Vs. State of H.P. (D.B.) Page-1416

N.D.P.S. Act, 1985- Section 20- Accused was found to be carrying a bag which was containing 1.800 grams of charas- police officials had not gone to the residence of any person to associate him with investigation, although, houses were located at a distance of 200 meters from the place where the accused was apprehended - there was no entry regarding taking out of the case property from the Malkhana for production in the Court- it is necessary to make entry when the case property is deposited in the Malkhana or is taken out from the same - non-making of the entry makes it doubtful whether the same property was produced before the Court or not- in these circumstances, accused is entitled to be acquitted.

Title: Kamal Bahadur Rana Vs. State of Himachal Pradesh (D.B.) Page-817

N.D.P.S. Act, 1985- Section 20- An Alto car being driven by accused 'R' was stopped for checking- accused 'V' was sitting on the front seat - remaining accused 'T', 'N' and 'Z' were sitting on the rear seat- police found one bag containing 1.850 kgs of charas- independent witnesses did not depose that bag from which charas was recovered belonged to appellant 'T'- PW 'H' stated that when he made inquiries from the occupants of the vehicle, accused 'T' revealed that the bag belonged to him- this version was made for the first time in the Court- bag was concealed underneath the driver's seat and none had deposed that vehicle was hired by 'T' or that the passengers sitting on the rear seat were his relatives, friends, acquaintances or business associates- further, other persons were acquitted and it was not permissible to convict one conspirator, when others had been acquitted- held, that in these circumstances, prosecution version was not proved.

Title: Tapat Bahadur Shahi Vs. State of Himachal Pradesh (D.B.) Page-663

N.D.P.S. Act, 1985- Section 20- Petitioner was found in possession of 2.1 kg. of charas- driver of the bus was declared hostile- he and conductor of the bus admitted part of the prosecution version- police officials had corroborated their version- conviction can be made on the basis of testimonies of the police official if the same are found to be trustworthy, credible and reliable - minor contradictions are bound to come in the testimonies when they are recorded after a considerable period of time and are not sufficient to reject the prosecution version.

Title: Kartar Singh son of Sh Tula Ram Vs. State of H.P (D.B.) Page-848

N.D.P.S Act, 1985- Section 20- Search of the vehicle was conducted during which 500 grams of charas was recovered – when parcel Ex. P1 was opened in the Court, it was containing another parcel Ex. P2 sealed with seal impression 'P'- seal impression 'P' was put on the parcel when the contraband was seized- parcel was opened for analysis at FSL, Junga and the seals were bound to be removed at FSL- no entry was made in the Malkhana register regarding taking out of the property for production before the Court- case property was to be taken out after making entry in the Malkhana register and after recording the same in the daily dairy – case property was to be re-deposited in malkhana register and entry in the daily dairy was to be recorded- held, that these circumstances make it doubtful that case property remained intact- hence, accused acquitted.
Title: Sashi Kumar and another Vs. State of Himachal Pradesh (D.B.) Page-116

N.D.P.S. Act, 1985- Section 20- The person who produced the case property in the Court was not examined- no evidence was led to prove as to when the case property was taken out from the Malkhana for production before the court- Malkhana register was not produced to verify this fact- entry was required to be made when the case property was taken out from the Malkhana for its production in the court and when it was returned to be deposited in the Malkhana after its production in the court- failure to do so would make it doubtful that the case property, which was seized from the accused was sent to FSL, Junga and was produced before the court, or it was the case property of some other case- link evidence has not been established from the seizure of the case property till its production in the Court- accused acquitted.
Title: Roshan Lal Vs. State of Himachal Pradesh (D.B.) Page-1036

N.D.P.S. Act, 1985- Section 20(b)(ii)(c)- Accused was carrying a rucksack on her back- she tried to throw away the rucksack and run away from the spot on seeing the police- she was apprehended- rucksack was searched and 2.5 kg of charas was recovered- testimonies of police officials were clear, consistent, cogent and reliable – minor variations regarding the time are not sufficient to make the prosecution case doubtful - link evidence was also proved- accused had failed to discharge the burden to account for the possession of charas- she had failed to discharge the presumption that possession was not conscious - therefore, she was rightly convicted by the trial Court.
Title: Dharma Devi Vs. State of H.P. (D.B.) Page-587

N.D.P.S. Act, 1985- Section 20(b)(ii)(c)- Accused was carrying a rucksack on her back- she tried to throw away the rucksack and run away from the spot on seeing the police- she was apprehended- rucksack was searched and 2.5 kg of charas was recovered- testimonies of police officials were clear, consistent, cogent and reliable – minor variations regarding the time are not sufficient to make the prosecution case doubtful - link evidence was also proved- accused had failed to discharge the burden to account for the possession of charas- she had failed to discharge the presumption that possession was not conscious - therefore, she was rightly convicted by the trial Court.
Title: Kekti Devi Vs. State of H.P. (D.B.) Page-597

N.D.P.S. Act, 1985- Section 42- I.O specifically stated that she had prepared special information report and had handed it over to H.C with a direction to take it to SP Crime- HC stated that he had deposited the special report with SP Crime- testimonies are corroborating each other – there is no reason to disbelieve their testimonies – held that the provision of Section 42 of N.D.P.S. Act was complied.
Title: Kartar Singh son of Sh Tula Ram Vs. State of H.P (D.B.) Page-848

N.D.P.S. Act, 1985- Section 50- Accused was found in possession of a bag from which 2.1 k.g of charas was recovered- held, that Section 50 is applicable only when the contraband was found on the person of the accused - since the contraband was found from the bag and not from the person of the accused, therefore, Section 50 of N.D.P.S. Act is not applicable.
Title: Kartar Singh son of Sh Tula Ram Vs. State of H.P (D.B.) Page-848

N.D.P.S. Act, 1985- Section 50- Accused was found in possession of 5.6 k.g of charas- consent memo did not mention that accused had a legal right to be searched before a Magistrate or a Gazetted Officer- consent memo further inquired from the accused whether the accused wanted to be searched before Magistrate or a Gazetted Officer or police officer- only two options namely to be searched before Magistrate or a Gazetted Officer can be given as per law - consent was collective and should have been given individually – option was given prior to the search of the vehicle and no option to be searched was given prior to the search of the person- held, that requirements of Section 50 of the Act were not complied with.
Title: Tarsem Lal Vs. State of Himachal Pradesh (D.B.) Page-1187

'P'

Prevention of Corruption Act, 1947- Section 13(2)- **Indian Penal Code, 1860-** Section 409- Accused had withdrawn the money for the construction of Panchayat Ghar but had not utilized the same and in this manner he had misappropriated Rs.65,000/-- held, that in order to prove criminal breach of trust, prosecution is required to prove dishonest intent, converting the property to his own use, dishonestly using or disposing of the property in violation of law or agreement – statements of witnesses showed that some money was paid for construction of Panchayat Ghar- valuation certificate showed that more amount than withdrawn was spent for construction of Panchayat Ghar- the mere fact that Panchayat Ghar is not habitable will not establish the guilt of the accused.
Title: Mohinder Kumar Sharma Vs. State of H.P. Page-542

Prevention of Corruption Act, 1988- Section 13(2)- **Indian Penal Code, 1860-** Sections 467, 468, 471, 419, 420 and 120-B- a surprise checking of the record was conducted during which signatures on some of the forms were found to be forged- FIR was registered- SDM, Palampur initiated inquiry regarding the licence being forged by the accused- ADM, Kangra concluded that accused had forged the signatures- however, signatures on the forged licences, signatures of the accused and SDM were not sent for comparison- SDM admitted that accused used to bring licences in bulk and he used to sign them in bulk - hand-writing expert also found that licences were in hand-writing of the accused but this opinion is not sufficient as the hand-writing of the SDM was not sent for comparison- further, no evidence was led that applicant had paid the driving licence fee in excess of the prescribed fee, therefore, offence punishable under Section 13(2) of Prevention of Corruption Act, 1988 was not proved- held, that in these circumstances, acquittal of the accused was justified.
Title: State of H.P. Vs. Kulbhushan Sood and others (D.B.) Page-193

Protection of Women from Domestic Violence Act, 2005- Section 12- Wife was maltreated by the petitioner- her petition was allowed and the husband was prohibited from committing any act of domestic violence -he was ordered to pay maintenance @ Rs. 5,000/- along with compensation of Rs. 10,000/-- husband contended that wife is TGT Maths and was drawing salary of Rs. 9,000/-- he was compelled to tender resignation from his job and was not doing anything- held, that husband is under an obligation to maintain his wife-

statute commands that there has to be some acceptable arrangement so that wife can sustain herself- if husband is an able-bodied person capable of earning sufficient money, he cannot deny his obligation to maintain his wife - carry home salary of the husband was Rs. 45,000/-- income of the wife was taken into consideration by the Court, while awarding maintenance – wife is entitled to the status which she was enjoying in the house of her husband –hence, maintenance of Rs. 5,000/- cannot be said to be excessive.
Title: Vipul Lakhanpal Vs. Pooja Sharma Page-896

Public Premises (Eviction of Unauthorized Occupants Act) 1971- Section 4- Petitioner claimed that his grand-father had been in possession of land and after his death, he is in possession- administrator had accorded sanction to carry out additions, alterations and re-construction- additions and alterations were carried out according to the sanctioned plan- he was wrongly held to be unauthorized possession – petitioner had failed to prove his ownership over the land- letters permitting him to carry out the construction were not sufficient to establish the ownership - his plea of adverse possession implied that he is not the owner but some other person is owner of the land, held, that in these circumstances, he was rightly evicted.
Title: Manoj Singh Vs. Union of India & ors. (D.B.) Page-706

Public Premises (Eviction of Unauthorized Occupants Act) 1971- Section 5- Petitioner claimed that his grand-father had been in possession of land and after his death he is in possession of the same - administrator had accorded sanction to carry out additions and alterations and re-construction- additions and alterations were carried out according to sanctioned plan- held that the petitioner was wrongly held to be in unauthorized possession.
Title: Manoj Singh Vs. Union of India & ors. (D.B.) Page-706

'R'

Registration Act, 1908- Section 17- Plaintiff had filed a civil suit in which a compromise was effected - the tenants surrendered the possession of 1-10 bighas while 3-00 bighas was gifted to the tenants- compromise did not form part of the order- plaintiffs were not shown to be the owners of the land- right was created for the first time by means of the compromise and the compromise was required to be registered, however, it was never registered, therefore, it could not have been relied upon to pass a decree.
Title: Chobe Ram Vs. Chanderkala & ors. Page-363

'S'

Specific Relief Act, 1963- Article 65- Plaintiff claimed to be the owner in possession of the suit land- he claimed that defendants have got themselves recorded as Kabazan in connivance with settlement staff- defendant claimed to be in adverse possession- held, that there is a distinction between long possession and adverse possession- mere long possession is not equivalent to adverse possession- defendants categorically admitted that he was not in hostile possession of the land- he claimed ownership and it is inherent in the plea that someone else is owner of the land.
Title: Jai Kishan and others Vs. Sardari Lal and others Page-745

Specific Relief Act, 1963- Section 5- Plaintiff claimed that he had rented out one shop consisting of two rooms to the defendant- tenancy was terminated by serving a legal notice- correct address was mentioned in the notice and there is presumption that addressee had

received the same- mere acceptance of the rent subsequent to the delivery of notice which will not have the effect of extending the tenancy.

Title: Bansi Lal Thakur Vs. Ram Saran Thakur Page-1108

Specific Relief Act, 1963- Section 5- Plaintiff filed a Civil suit for recovery of possession pleading that plaintiff and defendant were co-sharers of the suit land- plaintiff applied for partition and the possession was delivered to him- defendant occupied the suit land forcibly- defendant pleaded that he was never dispossessed from the suit land- a wrong report was made in the rapat roznamcha- held, that joint status of co-owner is extinguished after preparation of instrument of partition- allottee becomes exclusive owner of the allotted land- defendant had not pleaded adverse possession- plaintiff is entitled to the relief of possession on the basis of his title.

Title: Satya Devi widow of late Shri Udho Ram Vs. Hari Chand son of Udho Ram Page-1380

Specific Relief Act, 1963- Section 20- Plaintiff sought specific performance of the contract by execution of a sale deed, cancellation of the sale deed executed by defendant No. 1 in favour of defendants No. 2 and 3 and cancellation of subsequent sale deed executed by defendants No. 2 and 3 in favour of defendant No. 4- defendant No. 1 stated that she had taken friendly loan from the plaintiff and had executed sale agreement as per past practice – this agreement was not to be acted upon and was executed towards security for securing the repayment of the loan- defendants No. 2 to 4 claimed that they were bonafide purchasers for consideration- defendant No. 1 examined only herself to prove her assertion, any custom, usage or practice is required to be established by leading cogent and convincing evidence - the plea of the defendants No. 2 and 3 that they were bonafide purchasers for consideration was not proved while the plea of the defendant No. 4 that he was bona fide purchaser for consideration was proved, therefore, plaintiff cannot be held entitled for the decree of specific performance and cancellation- plaintiff granted the relief of the refund of entire sale consideration along with interest @ 18% per annum.

Title: Vinay Bodh Vs. Dolekar & others Page-429

Specific Relief Act, 1963- Section 20- Plaintiff sought specific performance of the contract- it was specifically mentioned in condition No. 4 of the agreement that case No. 38/2004 is pending before High Court of H.P and sale deed will be executed only if the said case is decided in favour of seller - no evidence was led to prove that case was decided in favour of the seller- since, decision of case is the pre-condition for the execution of the sale deed, therefore, plaintiff cannot be held entitled for the relief of specific performance – however, plaintiff held entitled for the refund of the amount paid by him along with interest.

Title: Sumit Kumar son of Shri Yogendra Singh Vs. Sudesh Dogra wife of late Sh. Suresh Chander Dogra and another Page-1352

Specific Relief Act, 1963- Section 34- Plaintiff claimed that he is owner in possession of the suit land - defendants were stacking construction material and laying pipeline without his permission- defendants had not laid any claim over the suit land and the suit was decreed by the trial Court- High Court should not interfere with the concurrent findings of the fact recorded by the Court- no substantial question of law arose – appeal dismissed.

Title: Jai Singh Vs. State of H.P. and others (D.B.) Page-1057

Specific Relief Act, 1963- Section 34- Plaintiff claimed that land measuring more than 150 bighas was being irrigated through Kuhal known as ***Nal Ka Banda*** since time immemorial openly, peacefully and continuously- defendants have no right to cause interference in the flow of water- Kuhal originates from ***Sharatu Ka Nala***- ***Pataru Ka Nala*** and ***Bagh Ka Nala*** are the tributaries of ***Sharatu Ka Nala*** - defendants threatened to tap the water from ***Sharatu Ka Nala*** and ***Bagh Ka Nala***- plaintiff relied upon a rough map in which no khasra numbers were mentioned- the points from which the pipes were installed were also not mentioned- defendants got prepared a map by an expert - the factual position shown in the map, got prepared by defendants, is in conformity with the statements of the witnesses regarding the source of water- other co-villagers were not arrayed as parties- held that in these circumstances suit was rightly dismissed.

Title: Ram Swarup and others Vs. Narinder Parkash and others Page-386

Specific Relief Act, 1963- Section 38- Plaintiff claimed that defendants/State had constructed a road in which proper drainage was not provided- flow of water from the road causes damage to the house and orchard of the plaintiff- defendant claimed that proper drainage system was provided and no damage was being caused- version of the plaintiff was proved by his evidence as well as by the inspection made by the Court- suit was decreed but the decree was reversed on the ground that suit was decreed without impleading 'B', a co-owner of the property- held, that plaintiff had sought relief against the officials of the State who were under obligation to protect the life and properties of its citizens and had failed to abide by their duties- Officers of the State are liable to compensate a person for the loss sustained by him- suit could not have been dismissed on the ground that co-owner was not impleaded in the suit- defendant directed to provide drainage system to ensure that property of the plaintiff and 'B' is not damaged from flow of water.

Title: Dev Sundri and others Vs. State of H.P. and others Page-785

Specific Relief Act, 1963- Section 38- Plaintiff sought a relief of permanent prohibitory injunction claiming that he had constructed a work shed (Reniali) for the work of Iron smith- defendant No. 1 dismantled the wall of the work shed and threw the material from the land- held, that when the plaintiff had admitted that he was dispossessed from the suit land by dismantling his work shed and his material was thrown out, he was out of possession, he could not have sought the relief of injunction as necessary requirement for granting the relief of injunction is possession which is not established.

Title: Sunehru Devi (Now deceased) through LRs and others Vs. Pohlo Ram and another Page-668

Specific Relief Act,1963- Section 38- **Torts-** Defendant started raising construction of the house and in the process stacked the construction material on the retaining wall- wall fell down along with stones and excavated material on the house of the building causing damage of Rs.94,000/-- defendant denied the allegation made in the plaint- trial Court dismissed the suit- the decree was upheld in the appeal- held, that injunction can be granted to prevent the breach of an obligation and when there is invasion of the plaintiff's right to enjoy any property - injunction can also be granted when defendant was trustee of the property and invades the rights of enjoyment of such property where the damage caused or to be caused by such invasion cannot be measured in terms of money- collapse of retaining wall cannot be attributed to any omission or negligence on the part of the defendant, rather, plaintiff had dug pits for erection of pillars without raising any retaining wall –merely, because defendant had not obtained approval from the Town and Country Planning Department to raise construction is not sufficient- moreover, plaintiff had also not

obtained the permission from Town and Country Planning Department- in these circumstances, suit was rightly dismissed.

Title: Mangat Ram Vs. Dila Ram Verma Page-1422

'T'

Torts - Plaintiff filed a civil suit for recovery of the compensation against the defendants on the ground that widening work of NH at point 229/0 was carried out by defendant No. 1 - heavy blast was done as a result of which heavy boulders and rocks were thrown on the temple and other buildings causing damages to them- Insurance Company pleaded that the plaintiff was a stranger to the contract- held, that work was executed by 'G' who had taken the insurance policy- insurance company had undertaken to indemnify the 'G' for any loss, hence, suit could have been filed against the Insurance Company also.

Title: National Insurance Co. Ltd. Vs. Hanogi Mata Sansthan & ors. Page-424

Transfer of Property Act, 1882- Section 123 - Plaintiff claimed that he is owner in possession of the suit land- he had executed gift deed of the suit land in favour of his wife- gift was presented for registration before Sub Registrar but Registrar asked him to come on some other day as he was busy- defendant No. 1 came to the plaintiff and told that he could get the gift deed registered- signatures of the plaintiff were obtained on some documents which were presented for registration – plaintiff was told that documents had been registered- plaintiff subsequently came to know that sale deed and Special Power of Attorney were got executed from him- it was proved that plaintiff had no other land and, therefore, he had no justification to sell the only piece of land- gift deed was executed earlier in time and the sale deed was executed subsequently- mere non-registration of the gift is not sufficient- since, plaintiff had already executed a gift in favour of his wife, therefore, he could not have intended to sell the same land to some other person.

Title: Satya Devi and another Vs. Kartar Chand and others Page-779

'W'

Workmen Compensation Act, 1923- Section 3- Deceased was a workman- he slipped near the site of work and rolled down in the Nalla- Insurance Company pleaded that it is not liable to pay compensation and interest- no such plea was taken in the reply but this plea was taken for the first time in the appeal- terms and conditions of insurance contract were also not proved- held, that Insurance Company was rightly held liable to pay compensation with interest.

Title: New India Assurance Co. Ltd. Vs. Sommaya Shaipy and others Page-825

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

Ajay Kumar ...Appellant
VERSUS
Shubham Kumar and others ...Respondents.

FAO No.519 of 2007.
Decided on: 01.05.2015.

Motor Vehicle Act, 1988- Section 149- MACT held that owner was liable to pay compensation- driver had a learner driving licence w.e.f. 22.10.2002 to 21.4.2003- the accident had taken place on 14.10.2002, therefore, driver did not have a valid driving licence at the time of accident- held, that in these circumstances, insured had committed the breach of the terms and conditions of the policy and owner was rightly ordered to pay compensation. (Para-4 to 6)

For the Appellant: Mr.Rajesh Mandhotra, Advocate.
For the Respondents: Mr.Anup Rattan, Advocate, for respondent No.1.
Mr.Rajiv Jiwan, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Challenge in this appeal is to the award, dated 24th June, 2006, passed by Motor Accident Claims Tribunal(II), Kangra at Dharamshala, H.P., (hereinafter referred to as the 'Tribunal'), in MAC Petition No.33-J of 2003, titled Shubham Kumar versus Ajay Kumar and others, whereby a sum of Rs.2,01,200/-, with interest at the rate of 6% per annum, stands awarded in favour of the claimant (respondent No.1 herein) and the owner (appellant herein) was saddled with the liability, (for short the 'impugned award').

2. The insurer, the driver and the claimant have not questioned the impugned award on any ground, thus the same has attained finality so far as it relates to them. Only the owner/insured has challenged the impugned award on the ground that the Tribunal has fallen in error in fastening the owner with the liability.

3. I have gone through the impugned award and the record of the case.

4. Admittedly, the driver of the offending vehicle, namely, Mohinder Singh, was having learner's license valid w.e.f. 22nd October, 2002 to 21st April, 2003, while the accident had taken place on 14th October, 2002. Thus, it is apparent that the driver of the offending vehicle was not having a valid driving license on the fateful day when the accident had taken place.

5. The Tribunal has rightly made discussion in paragraph 12 of the impugned award and has rightly decided issue No.3 in favour of the insurer, by holding that the insured has committed breach of the terms and conditions contained in the insurance policy.

6. Having said so, no interference is required. Accordingly, the appeal is dismissed and the impugned award is upheld.

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

Govinda alias Rahul …Appellant
Versus
State of Himachal Pradesh …Respondent

Cr. Appeal No. 133/2011
Reserved on: 29.4.2015
Decided on: 1.5.2015

Indian Penal Code, 1860- Sections 302 and 376- Accused attempted to rape the deceased- deceased resisted on which accused gave a blow on the head of the deceased with a stone- he met 'D' and told him that he had murdered a woman and needed money to run away- 'D' told the contractor regarding the murder who advised 'D' to take the accused to Pradhan- accused made extra judicial confession before Pradhan- Pradhan informed the police on which FIR was registered- Pradhan improved his version in the Court making his statement doubtful- there were contradictions in the statements of the prosecution witnesses- making of extra judicial confession to a person who is not known to the accused is highly improbable – further name of the victim was not mentioned in the extra-judicial confession- extra-judicial confession is a weak piece of evidence- extra-judicial confession was not corroborated and was lacking in detailed particulars –held, that in these circumstances, acquittal of the accused was justified. (Para-25 to 31)

Cases referred:
Rahim Beg v. State of U.P. (1972) 3 SCC 759
Akanman Bora v. State of Assam Cr. LJ 1988 (3) 572
State of Rajasthan v. Kashi Ram (2006) 12 SCC 254

For the Appellant : Mr. Vivek Darhel, Advocate vice Mr. Virender Singh Chauhan, Advocate.
For the Respondent : Mr. M.A. Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

This appeal is instituted against Judgment dated 30.4.2011 rendered by learned Additional Sessions Judge, Fast Track court, Solan, District Solan, Himachal Pradesh in Sessions Trial No. 3FTC/7 of 2009, whereby appellant-accused (herein after referred to as 'accused'), who was charged with and tried for offence under Section 302 and 376 IPC, stands convicted under Section 302 IPC with rigorous imprisonment for life and to pay a fine of Rs.10,000/-, in default of payment of fine to further undergo rigorous imprisonment for two years. He was acquitted under Section 376 IPC.

2. Case of the prosecution in a nutshell is that on 29.11.2008, Dashoda Devi was going alone from village Barla to village Darwa for attending marriage in her relations and when she reached near Gaad Pump house in the jungle path, accused met her. He, after

seeing the deceased alone in the jungle path, with the intention to commit sexual intercourse with her, caught hold of her from behind her waist and despite the cries made by the deceased Dashoda Devi, accused did not leave her and after pushing her back, he laid her on the path and started making attempts to commit sexual intercourse with her and when the deceased resisted the attempt of the accused, accused again pushed her towards the bushes below 'Dank' and accused thereafter also came below to the bushes where deceased was lying and again attempted to forcibly commit sexual intercourse with her. When the deceased did not stop crying, accused lifted a big stone which was lying there and hit on the head of the deceased Dashoda Devi twice and after she became unconscious he attempted to have sex with her and further he again gave blow twice with the same stone on the head of the deceased Dashoda Devi. Accused went to the pump house where his companion Dipender met him to whom the accused disclosed that he had murdered one woman and demanded some money from Dipender and started saying that he will flee away from that place. Dipender told accused that he is not having any money with him and they will visit Darwa and demand money from their contractor by telephoning him. They came to their quarter at Darwa where Dipender asked the accused to sit in the room and he will come back to the room after making telephone call to their contractor. Dipender, on telephone, told contractor regarding killing of the woman by accused and on this, he asked Dipender to take the accused before Pradhan, Gram Panchayat Darwa and he will telephone the Pradhan. Dipender thereafter came to his quarter and told the accused that the telephone of contractor is disconnecting and they will go to the Pradhan and demand money from him.

3. Accused and Dipender came to Puran Chand. Accused made extra-judicial confession before Puran Chand Gupta about killing of Dashoda Devi. Pradhan took few local people to the place pointed out by the accused. They found dead body of deceased in the bushes of 'Dank' (cliff). Accused identified the stone. Pradhan informed the police. Police reached the spot. Statement of Puran Chand Gupta was recorded under Section 154 of the Code of Criminal Procedure. FIR was registered. Spot map was prepared. Photographs were taken. Dead body of deceased Dashoda Devi was sent for post-mortem examination at CHC Dharampur. Case property was deposited by SI SHO Ramesh Thakur with MHC Police Station Kasauli. MHC sent the case property to FSL Junga on 4.12.2008. Investigation was completed. Challan was put up in the Court after completion of all codal formalities.

4. Prosecution has examined as many as 19 witnesses. Accused was also examined under Section 313 CrPC. According to the accused, he was falsely implicated. Accused was convicted and sentenced as noticed herein above by the trial Court. Hence, this appeal.

5. Mr. Vivek Darhel, Advocate has vehemently argued that the prosecution has failed to prove its case against the accused.

6. Mr. M.A. Khan, Additional Advocate General has supported the judgment of trial court dated 30.4.2011.

7. We have heard the learned counsel for the parties and gone through the judgment and record very carefully.

8. PW-1 Puran Chand testified that on 29.11.2008, accused Govinda came to his shop at about 6.00 pm. Accused was working with Ashok Kumar. Accused told him that he has killed a woman by hitting stone on her head near Gaad Pump House. He,

accompanied by Bhagat Ram, Naresh, Devi Chand, Dipender and Ramesh went to the spot. Govinda took them to the spot. They noticed a woman lying dead on the spot in bushes. They identified her. Blood was oozing out from upper side of temporal bone. They informed the police post. Police came to the spot. Accused, on being asked, told that he killed the woman for sex. When she did not agree, he killed her. Police took into possession dead body vide Ext. PW-1/A. Police also seized stone vide seizure memo Ext. PW-1/B. He identified the stone. On the next day, police took them to the spot. Police seized blood stained earth from the spot vide seizure memo Ext. PW-1/D. Accused got the spot of incident identified vide memo Ext. PW-1/F. In his cross-examination, he has deposed that Dipender Thapa had come with him to the spot at 6.00 pm. Thereafter he came with them alongwith dead body to the Vipin's shop. He admitted that police took Dipender in Jeep to Kandaghat Police Station for saving him from the crowd. He received a telephonic call from Ashok at 6.00 pm telling him that Dipender had told that Govinda who is a labourer with him, has murdered a woman.

9. PW-2 Naresh Kumar deposed that on 29.11.2008, at about 6.15 pm, Puran Chand Gupta, Pradhan, Darwa told him that one Gorkha Rahul alias Govinda has pelted stone near pump house and killed a lady. He alongwith Pradhan, Puran Chand Gupta and Bhagat Ram visited the pump house at Gaad. There they found dead body of Dashoda Devi, who was also known to him as Dashoda was a neighbourer. Her dead body was stained with blood. Police also visited the spot. Police noticed dead body at the spot. Accused was also present, as he was brought by Pradhan from quarter with Gorkha namely Dipender. Police has taken into possession blood stained stone and put in a cloth parcel sealed with seal impression 'K'. Police also took into possession blood stained leaves, grass and soil from the spot.

10. PW-3 Vipin Kumar deposed that on 29.11.2008, Dipender Thapa, Karan Bahadur and Govinda had proceeded to work to the pump house. At about 6.00 pm, Dipender Thapa had come to his shop and told him that he wanted to make a call to Ashok Contractor. Dipender Thapa had made a call from his STD to contractor Ashok and thereafter he went to the shop of Puran Chand, Pradhan. Dipender Thapa was alone at that time. On 4.12.2008, he and Pradhan Puran Chand were associated in the investigation by the police. In the custody of police, accused took them to the place of occurrence. He identified the spot and told them that he killed Dashoda Devi with a stone. Police prepared Nishandehi vide ex. PW-1/F. He was declared hostile and cross-examined by Public Prosecutor. In his cross-examination, he has admitted that Dipender Thapa had told him that Rahul had murdered a woman. This fact was also disclosed by Dipender Thapa to Ashok Kumar.

11. PW-4 Bhagat Ram deposed that on 29.11.2008, Pradhan disclosed to him that one Gorkha Govinda came to his shop and disclosed to him that he killed a lady by hitting her with stone. He, accompanied by Pradhan Puran Chand, Naresh Kumar and Devi Chand went to the spot at Gaad. Police also visited the spot. Accused was with them at that time. Accused, on being asked why he killed the woman, told that he wanted to have sex with her, but she did not agree, on which he killed her. In his cross-examination, he has admitted that in his presence, accused Govinda has disclosed nothing to the Pradhan.

12. PW-5 Devi Chand, deposed that on 29.11.2008, Pradhan, Gram Panchayat Darwa called him to his shop at about 6.15 pm and told him that one Gorkha Govinda alias Rahul came to his shop and disclosed to Pradhan Puran Chand that he killed a lady by hitting with stone near Guard Pump. He accompanied Pradhan Puran Chand, Naresh,

Bhagat Ram and Devi Chand and Govinda (accused) and went to the spot i.e. Gaad Pump. They noticed body of a woman lying on the spot. Police asked accused and he told that he was working with Ashok Kumar, contractor. Accused had killed the deceased Dashoda Devi for sex.

13. PW-6 Sunder Singh deposed that on 29.11.2008, in the evening time, his aunt Dashoda Devi came from village Barla to village Darwa for attending a marriage. She told him to accompany her to village Darwa. He told that he would come later. She proceeded to Darwa to attend marriage. She used to reside at village Barla with them. He also proceeded to village Darwa at about 7-8 pm to attend the marriage. He attended the marriage at Darwa and came to know that one lady had been killed. During night period, he visited the place at guard pump where a dead body was lying in the bushes. He noticed injury on the upper side of temporal bone and blood was oozing out from the injury. He identified the dead body. In his cross-examination, he has admitted that he disclosed to the police during investigation that accused had killed Dashoda Devi to commit sex with her and on her refusal he had killed her with stone (confronted with statement mark 'B', wherein, it is not so recorded).

14. PW-7 Ashok Kumar deposed that on 29.11.2008, at about 6.15 pm, he received a telephone call. Again stated about 6.00 to 6.15 pm, he received a telephonic call from Dipender Thapa. He called him from STD shop of Vipin Kumar and told on the telephone that he has disclosed that he had killed someone and demanded money. He directed him to inform the Pradhan. He also told that he should not flee from there. In his cross-examination, he has admitted that he called Puran Chand on 29.11.2008 at 12-1.00 pm. He further stated that when he telephoned Pradhan, he disclosed to him that he has murdered someone on 29.11.2008. He did not meet Pradhan Puran Chand on 29.11.2008.

15. PW-8 Dipender Thapa is a material witness. According to him, accused told him that he had murdered a woman and demanded money. He told that he did not have any money. He came to Darwa alongwith accused. Then he called on telephone his contractor, Ashok Kumar and told that accused has told him that he (accused) had killed a woman and he had committed murder. Ashok Kumar directed to disclose the entire incident to Pradhan Puran Chand. Thereafter, he alongwith accused went to the shop of Pradhan Puran Chand where he disclosed to the Pradhan that he had murdered (voluntarily stated 'not in his presence'). There were 10-12 people. Thereafter, he came to the Tank at Darwa and slept there due to fear. On the next day, he went to Ashok Kumar, contractor.

16. PW-9 HHC Shayam Lal, is a formal witness.

17. PW-10 Jagat Ram deposed that on 29.11.2008, he alongwith police party, SHO Ram Thakur, was present near Gaad Pump House. Dead body of one woman was lying in the bushes. Case FIR No. 83 dated 29.11.2008 was registered.

18. PW-11 Dharam Chand Patwari has proved copy of Jamabandi Ext. PW-11/A and map Ext. PW-11/B.

19. PW-12 MC Jai Chand is a formal witness.

20. PW-13 Chet Ram recorded Rapat No. 34 dated 30.11.2008. ASI MA Khan handed over 19 sealed parcels to him. He entered them in the Malkhana register. Stone weighing 10 kg was also handed over to him. He sent the case property to FSL Junga on 4.12.2008 vide RC No. 60/2008 through constable Shyam Lal alongwith samples of seal 'M'

and 'K'. In his cross-examination, he has admitted that Rapat Ext. PW13/A was recorded by him, name of Gorkha was not disclosed to him.

21. According to PW-14 Manohar Lal, deceased died due head injury leading to severe blood shock, cardio respiratory arrest and finally death. The time between injury and death was instantaneous. Time between death and post-mortem was about 12-24 hours.

22. PW-15 Dr. Naresh Attri has examined accused and issued MLC Ext. PW-15/B.

23. PW-16 Balo Devi deposed that on 29.11.2008 she was going to attend a marriage at Darwa at about 3.00 pm. She was going on foot. When she reached at the pump house, then one Gorkha was standing in the way. He came from backside and pushed her with his shoulder. She turned towards him and he folded his hands for 'Namaste' and started walking swiftly on foot. One person came on the spot and remained there. Thereafter, she did not know what happened. In her cross-examination, she admitted that she has not narrated the fact of murder of her Devrani (Sister-in-law) to any person except Police on 4.12.2008.

24. PW-17 Ramesh Chand deposed that the police noticed a dead body lying in the bushes near Pump House. Puran Chand's statement was recorded under Section 154 CrPC vide Ext. PW-1/C. FIR was registered. Photographs were also taken. Dead body of the deceased was taken into possession vide seizure memo Ext. PW-1/A. Stone was recovered on 30.11.2008. Control samples of soil/ leaves were taken. He recorded statements of 5 witnesses on 30.11.2008. In his cross-examination, he has admitted that name of Gorkha was not disclosed by the Pradhan to the police when he intimated regarding the incident on 29.11.2008. He also admitted that Dipender Thapa had also been interrogated for one day in the Kasauli Police Station on 30.11.2008.

25. Case of the prosecution precisely is that accused after killing deceased Dashoda Devi made extra-judicial confession before Puran Chand. Puran Chand and other witnesses went to the spot and noticed dead body lying in the bushes. Police also reached the spot. body was taken into possession. Post-mortem was got conducted. Dashoda Devi died due to head injury. Statement of PW-1 Puran Chand was recorded under Section 154 CrPC on 29.11.2008. According to the contents of Ext. PW-1/C, Rukka, accused came to the shop of PW-1 Puran Chand and disclosed that he killed one woman near Gaad Pump House by hitting her with a stone. He informed the police post Kuthar. Police reached the spot. Police took into possession the stone, and according to him, Govinda has murdered the deceased since the deceased resisted his advances. However, Puran Chand (PW-1) deposed in the Court that accused was accompanied by Dipender Thapa. He came to the shop at 6.00 pm. PW-1 Puran Chand has made improvements in his statement recorded under Section 154 CrPC. It is settled law that Rukka or FIR need not be encyclopaedia but bare necessary facts must be stated in the same. In Ext. PW-1/C, PW-1 Puran Chand has not stated the name of the deceased who was allegedly killed by the accused. He has narrated that the accused has made disclosure statement that he had killed a woman by hitting her with a stone.

26. In case Dipender Thapa had accompanied the accused to the shop of Puran Chand, he should have definitely stated so in the statement recorded under Section 154 CrPC. PW-8 Dipender Thapa has also testified that he alongwith accused went to the shop of Pradhan Puran Chand where he (accused) disclosed to Puran Chand that he has

committed murder, though voluntarily stated that 'not in his presence'). Thus, there is doubt whether the accused went to the shop of Puran Chand in the company of Dipender or not, when it is not so stated in the Rukka, Ext. PW-1/C. PW-13, in his cross-examination has admitted that in the Rapat, Ext. PW-13/A, name of Gorkha was not disclosed to him. Similarly, PW-17, Ramesh Thakur SI has also admitted in his cross-examination that the name of Gorkha was not disclosed by the Pradhan to the police when he intimated about the incident on 29.11.2008. In case, accused had made disclosure statement before Puran Chand, he would have definitely told this fact while informing police post Kuthar. PW-1 Puran Chand has testified in his examination-in-chief that he accompanied Bhagat Ram, Naresh, Devi Chand and Dipender Thapa and they went to the spot. However, PW-8, Dipender Thapa deposed that he alongwith accused went to the shop of Pradhan Puran Chand and thereafter he went to the Tank at Darwa and slept there. Thus, there is major contradiction in the statements of PW-1 Puran Chand and PW-8 Dipender Thapa. According to the PW-1 Puran Chand, PW-8 had accompanied him to the spot but PW-8 has deposed that he had gone to sleep in his Dera, after accused made extra-judicial confession.

27. Case of the prosecution is that Dipender Thapa (PW-8) had gone to the shop of PW-3 Vipin Kumar to make a telephonic call. PW-3 Vipin Kumar deposed that at about 6.00 pm, Dipender came to his shop and told that he had killed Dashoda Devi. Statement of PW-3 was recorded on 4.12.2008. Statements of all the witnesses are required to be recorded immediately. According to PW-16 Balo Devi, accused had pushed her with shoulder and thereafter she turned towards him. He folded his hands. Thus, prosecution tried to establish that the accused was on the path near Pump House and was identified by Balo Devi. In her cross-examination, PW-16 has admitted that she has not narrated that accused murdered her Devrani (Sister-in-law), to any person except the Police on 4.12.2008. It is not believable that in case, she had identified the accused on 29.11.2008, and he has murdered her Devrani on 29.11.2008, this fact was bound to be disclosed by her to her family members.

28. Case of the prosecution is based on circumstantial evidence. In order to prove the case based on circumstantial evidence, it is necessary to complete the entire chain of events. All the circumstances must point towards the guilt of the accused alone. In the instant case, prosecution has failed to complete the entire chain of events linking the accused with the commission of alleged offence. Mr. M.A. Khan, has argued that the accused has murdered the deceased since she resisted the attempts of the accused to rape her. Accused has been acquitted of charge under Section 376 IPC. Mr. Khan has also argued that the accused made extra-judicial confession before Puran Chand (PW-1), Bhagat Ram(PW-4) and Devi Chand (PW-5). However, fact of the matter is that in view of the variance in the statements of PW-1 recorded under Section 154 CrPC and statement recorded before the court, the alleged extra-judicial confession by accused is doubtful. According to PW-8, Dipender Thapa, 10-12 people were already at the spot when he visited the shop of PW-1 alongwith accused. The extra-judicial confession is required to be made before a particular person and not in front of so many people as stated by PW-8 Dipender Thapa. Thus, the prosecution has failed to prove its case against the accused beyond reasonable doubt.

29. Their lordships of the Hon'ble Supreme Court in **Rahim Beg v. State of U.P.** reported in (1972) 3 SCC 759, have held that where extra-judicial confession is alleged to have been made to a person having no history of previous association between the witness and the confessing accused as may justify the inference that the accused could repose

confidence in him, it is highly improbable that the accused would have gone to him and blurt out a confession. Their Lordships have held as under:

> **" 18. We may now deal with the evidence regarding the extra-judicial confession of the two accused to Mohammad Nasim Khan (P.W.4) and the recovery of ornaments belonging to the deceased from the two accused. It is primarily upon these two pieces of prosecution evidence that the conviction of the accused has been based. So far as the confession to Mohd. Nasim Khan is concerned, we find that, according to the said witness, the two accused came to him at his house in Sakunpur on August 4, 1969 and told him about their having raped and killed the daughter of Ramjas by strangulating her as well as regarding the removal of her ornaments. Mohammad Nasim Khan belongs to another village. There was no history of previous association between the witness and the two accused as may justify the inference that the accuse could repose confidence in him. In the circumstances, it seems highly improbable that the two accused would go to Mohammad Nasim Khana and blurt out a confession. It is also no clear as to why the two accused should try to run away on seeing the police party coming with Mohammad Nasim Khan if Mohammad Nasim Khan had gone to the police at the request of the accused. According to Mohammad Nasim Khan, Gur Sewak PW was with the police Sub Inspector when the Sub-Inspector came with Mohammad Nasim Khan to his house and apprehended the accused. The evidence of Ramjas PW however, shows that Gur Sewak PW went with Ramjas to the mortuary on the night between 3 and 4 August, 1969 and that on August 4, 1969 Gur Sewak remained with Ramjas throughout the day at Rae Bareli. It was on August 5, 1969 that, according to Ramjas, he and Gur Sewak returned to their village after throwing the dead body of Kesh Kali in Sain river. It would thus appear that Ramjas PW who, being the father of the deceased, had no particular reason to damage the prosecution case and to support the accused has contradicted Mohammad Nasim Khan has on the point that Gur Sewak PW was with the police Sub-Inspector on August 4, 1969. The fact that Mohammad Nasim Khan has deposed regarding the presence of Gur Sewak with the police Sub-Inspector with a view to support the prosecution case even though, according to Ramjas PW, Gur Sewak was not with the police Sub-Inspector shows that Mohammad Nasim Khan has scant regard for truth. The evidence of extra-judicial confession is a weak piece of evidence. The evidence in this respect adduced by the prosecution in the present case is not only of a frail nature, it is lacking in probability and does not inspire confidence.**

In this case, there was no previous association of the accused with PW-1 Puran Chand except that PW-1 stated that accused and Dipender used to come to buy articles from his shop.

30. A Division Bench of Gauhati High Court in **Akanman Bora v. State of Assam** reported in Cr. LJ 1988 (3) 572, has held that since there was no disclosure of name

of the victim, extra-judicial confession was a weak piece of evidence. It was found to be infirm. It was held that:

> **"12. The Village Defence Party members PW 5 Prasad Saikia and PW 6 Padmaswar Bora intercepted the accused in the night of 22-5-1981. It is in their evidence that on quarry the accused disclosed to them that he committed murder of a person at Dhunaguri village. They took the accused to Bangalmara police post and handed him over to the Officer-in-Charge of that post. Both the witnesses were independent and disinterested. They had no reason whatsoever to falsely manufacture the statement of extra-judicial confession of the accused to falsely implicate him. However, that extra-judicial confession suffers from infirmity, as there was no disclosure of the name of the victim. extra-judicial confession is a weak piece of evidence. When it suffers infirmity, as in the instant case, it further loses its evidentiary value. Therefore, the type of extra-judicial confession narrated by PWs 5 and 6 in no way helps the prosecution.**

In the instant case also, as noticed above, PW-1 stated that accused proclaimed before him that he has killed a woman without naming her.

31. Their lordships of the Hon'ble Supreme Court in **State of Rajasthan v. Kashi Ram** reported in (2006) 12 SCC 254, have held that extra-judicial confession is a weak piece of evidence and it must be proved like any other fact. Their Lordships have held as under:

> **" 14. On appeal, the High Court reversed the findings of fact recorded by the trial court and acquitted the respondent. Before adverting to the other incriminating circumstances we may at the threshold notice two of them, namely, the circumstance that the respondent made an extra-judicial confession before PWs 3 and 4, and the circumstance that recoveries were made pursuant to his statement made in the course of investigation of the waist cord used for strangulating Kalawati (the deceased) and the keys of the locks which were put on the two doors of his house. The High Court has disbelieved the evidence led by the prosecution to prove these circumstances and we find ourselves in agreement with the High Court. There was really no reason for the respondent to make a confessional statement before PWs 3 and 4. There was nothing to show that he had reasons to confide in them. The evidence appeared to be unnatural and unbelievable. The High Court observed that evidence of extrajudicial confession is a weak piece of evidence and though it is possible to base a conviction on the basis of an extra-judicial confession, the confessional evidence must be proved like any other fact and the value thereof depended upon the veracity of the witnesses to whom it was made. The High Court found that PW 3 Dinesh Kumar was known to Mamraj, the brother of deceased Kalawati. PW 3 was neither a Sarpanch nor a ward member and, therefore, there was no reason for the respondent to repose faith in him to seek his protection. Similarly, PW 4 admitted that h e was not even acquainted with the accused. Having regard to these facts and circumstances, we agree with the High Court that the case of the prosecution that the**

respondent had made an extra-judicial confession before PWs 3 and 4 must be rejected."

In the instant case, extra-judicial confession is alleged to have been made before PW-1, Puran Chand. Extra-judicial confession is not corroborated and lacking detailed particulars. Facts and circumstances of the case rule out possibility of making alleged extra-judicial confession before PW-1 Puran Chand.

32. Accordingly, the appeal is allowed. Judgment dated 30.4.2011 rendered by learned Additional Sessions Judge, Fast Track court, Solan, District Solan, Himachal Pradesh in Sessions Trial No. 3FTC/7 of 2009 is set aside. Accused is acquitted of the offence under Section 302 IPC by giving him benefit of doubt. He be released forthwith, if not required in any other case by the Police. Fine amount, if any, deposited by the accused, be refunded to him. Registry is directed to issue the release warrants of the accused and send the same to the Superintendent of Jail, concerned immediately.

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

Harish Chander & others ...Petitioners
Versus
Financial Commissioner and others ...Respondents

CWP No. 2813 of 2013
Date of decision: 1.5.2015

H.P. Land Revenue Act, 1954- Section 45- Petitioners filed an application before Learned A.C. 2nd Grade stating that they were in possession and their possession be recorded in the revenue record- correction of revenue record was ordered by Learned A.C. 2nd Grade- this order was challenged unsuccessfully before Sub Divisional Collector and Divisional Commissioner - orders were set aside by Financial Commissioner- petitioners claimed that amount of Rs.10,000/- was received by predecessor-in-interest of the respondent and the possession was delivered at the spot- held, that oral sales were not permissible in the year 1980 when amount was paid- sale was effected for more than Rs. 100/- and could have only been made by way of registered document - statement was vague and will not amount to the sale - land had vested in BBMB at the time of making of statement- borrowing of Rs. 10,000/- and putting the predecessor-in-interest of the petitioners in possession will not amount to acquiring right or interest. (Para-4 to 16)

Case referred:

Tara Chand and others versus Virender Singh and another, ILR, HP, 2015, (XLV)-II, Page, 367

For the Petitioners: Mr. Digvijay Singh, Advocate.

For the Respondents: Mr.V.K. Verma, Mr.Rupinder Singh, Additional Advocate Generals with Ms.Parul Negi, Deputy Advocate General, for respondent No. 1.
Mr. G.R. Palsra, Advocate, for respondents No. 2 to 6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (Oral).

By medium of this writ petition, the petitioners have called in question the order passed by the Financial Commissioner (Appeals), whereby he accepted the appeal preferred by the private respondents and rejected the claim of the petitioners seeking correction of entries in revenue records.

The facts in brief may be noticed.

2. The predecessor-in-interest of the petitioners filed an application before the Assistant Collector IInd Grade, Sundernagar on 13.12.1987 stating that he was in possession of Khasra No. 441 and 442, kita 2 measuring 1116.0 Sq. meters situate in village Ropa since 1980 and therefore, his possession be recorded in the revenue record. The Assistant Collector IInd Grade vide his order dated 29.2.1988, ordered the correction of the revenue records w.e.f. Rabi Girdwari on 1988. This order was challenged by the private respondents before the Sub Divisional Commissioner, who upheld the same. In further challenge, even the Divisional Commissioner upheld this order, constraining the private respondents to approach the Financial Commissioner, who finally allowed the petition and quashed the orders passed by all the authorities below.

3. The petitioners have challenged this order as being based on assumptions and presumptions, conjectures and surmises. They have further averred that once the consideration amount of Rs.10,000/- had been received by the predecessor-in-interest of the respondents and possession delivered to their predecessor-in-interest, then there was nothing wrong with the orders passed by the revenue authorities in ordering the entry of possession in favour of the petitioners in the revenue records.

4. The private respondents 2 to 6, who are the successors of Lal Man, have in their reply averred that in the year 1980 when an amount of Rs.10,000/- is alleged to have been paid to their predecessor Lal Man by the predecessor-in-interest of the petitioners, then oral sales were not permissible and whereas under Section 17 of the Registration Act, the sale deed was compulsorily required to be registered since the value of the sale consideration was more than Rs.100/-. It is also submitted that Lal Man at the relevant time had no right, title and interest or authority to sell the land as he was neither its owner nor in possession and the same at that time belonged to the Bhakra Beas Management Board. It is also contended that the A.C. IInd Grade had no power to record the statements of the parties and further had no jurisdiction to change the revenue entries on the basis of the impermissible oral sale.

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

6. It would be seen from the records that the possession of the petitioners had been ordered to be recorded only on the basis of a statement alleged to have been made by Sh.Lal Man before the Assistant Collector IInd Grade on 19.2.1988 when the proceedings were infact pending before it. It is recorded therein that he had received Rs.10,000/- from Sadhu, father of Mangat Ram as sale consideration and he therefore, had no objection in case the possession of Mangat Ram is recorded over the land in dispute.

7. Interestingly, this statement bears a thumb impression, whereas it has been proved on record that Sh.Lal Man was literate and therefore, there was no occasion for him to have put his thumb impression on the statement. The relevant portion of the statement reads thus:-

> *"That khata khatauni min 68/183, Khasra No. 441, 452, area 1116 sq. mt. has been given in 'Bhai Bandi' to Shri Sadhu S/o Sidhu, who are growing vegetables, they are not paying me any rent but they have given me Rs.10,000/- in the shape of a sale, I owe them back the said money and at this juncture I do not possess the money to return them."*

8. Apparently, this statement is absolutely vague and by no standards can be construed to be an agreement of sale. Above all, where was the necessity of recording such statement particularly when the predecessor-in-interest of the petitioners is alleged to have paid the entire sale consideration. Why he did not choose to file a suit for specific performance for having the agreement enforced? Why did he approach the revenue authorities instead of the Civil Court, is not forthcoming. After all any person who had paid the entire sale consideration would be more interested in getting the agreement enforced and claim title, rather than just seeking a mere paper entry regarding possession in the revenue record.

9. That apart, it has come on record that the land at the time when the statement was recorded was in fact vested with the BBMB and therefore, the statement of Sh. Lal Man was otherwise of no consequence.

10. Above all, what surprise me is the fact that though the order dated 29.2.1988 was itself under challenge initially before the Sub Divisional Collector and thereafter before the Divisional Commissioner himself, yet an officer that too of the rank of the Divisional Commissioner would still choose to rely upon the revenue entries which in turn were admittedly based upon the impugned orders itself that too by attaching presumption of truth to it in accordance with Section 45 of the H.P. Land Revenue Act, 1954 (for short 'Act'). The relevant observation is extracted below:-

> *"I have considered the arguments put forth by the parties and have also gone through the record and law. It transpires from the record that as per statement of Sh. Lalman, predecessor-in-interest of the petitioners recorded by the AC IInd grade Sunder Nagar on 19.02.1988 has categorically stated that he had received Rs.10,000/- from the predecessor in interest of the present respondents in the shape of sale of land and has admitted that the land under dispute is possessed by the present respondents. Record further shows that on this statement, the AC IInd Grade Sunder Nagar has passed the order on 29.02.1988 for correction of revenue entries on the patent facts prevailing on the spot for which he is competent to do. It is also on the record that after attestation of the mutation of correction it had been implemented in the subsequent Jamabandi of Muhal Ropa prepared in year 1988-89, 1993-94, 1998-99 and 2003-04. These entries incorporated in the above Jamabandis, have got presumption of truth in accordance with Section 45 of the H.P. Land Revenue Act, 1954. The petitioners could not establish their claim raised by them in the present revision. There is no illegalities or irregularities in the orders passed by both the courts below. Hence, the revision fails."*

11. The aforesaid passage reflects complete ignorance and lack of legal knowledge of the Divisional Commissioner or else there was no occasion for him to have invoked the provisions of Section 45 of the Act when the order passed by the A.C.IInd Grade on 29.02.1988 on the sole basis of which the revenue entries had admittedly been ordered to be corrected was itself under challenge before him.

12. It is in similar circumstances that a coordinate Bench of this Court (Justice Rajiv Sharma) in ***CMPMO No.421 of 2014*** titled ***Tara Chand and others*** *versus* ***Virender Singh and another***, decided on 19.03.2015, was constrained to make the following observations:

> *"13 This Court is of the considered view that the Assistant Collector or Collector, Commissioner and Financial Commissioner (Appeals), must have the requisite legal background to adjudicate the matters under the H.P. Land Revenue Act, 1953. They determine the valuable rights of the parties. The quasi judicial authorities are also required to take notice of the facts and thereafter to apply the law. The adjudication by the revenue authorities has certain trappings of the Court as well.*
>
> *14. Their lordships of the Hon'ble Supreme Court in the case of* ***Thakur Jugal Kishore Sinha vrs. The Sitamarhi Central Co-operative Bank Ltd. And another****, reported in* ***AIR 1967 SC 1494****, have held that the Assistant Registrar discharging functions of Registrar under S. 48 read with S. 6 (2) of Bihar and Orissa Co-operative Societies Act is a Court. Their lordships have held as under:*
>
>> *"11. It will be noted from the above that the jurisdiction of the ordinary civil and revenue courts of the land is ousted under s. 57 L4 Sup. Cl/67-12 of the Act in case of disputes which fell under S. 48. A Registrar exercising powers under S. 48 must therefore be held to discharge the duties which would otherwise have fallen on the ordinary civil and revenue courts of the land. The Registrar has not merely the trappings of a court but in many respects he is given the same powers as are given to ordinary civil courts of the land by the Code of Civil Procedure including the power to summon and; examine witnesses on oath, the power to order inspection of documents, to hear the parties after framing issues, to review his own, order and even exercise the inherent jurisdiction of courts mentioned in s. 151 of the Code of Civil Procedure. In such -a case, there is no difficulty in holding that in adjudicating upon a dispute referred under s. 48 of the Act, the Registrar is to all intents and purposes a court discharging the same functions and ,duties in the same manner as a court of law is expected to do.*
>>
>> *20. It was sought to be argued that a reference of a dispute had to be filed before the Registrar and under sub-s. 2(b) of s. 48 the Registrar transferred it for disposal to the Assistant Registrar and therefore his position was the same as that of a nominee under the Bombay Cooperative Societies Act. We do not think that contention is sound merely because sub-s. (2) (c) of s. 48 authorises the Registrar to refer a dispute for disposal of an arbitrator or arbitrators. This procedure was*

however not adopted in this case and we need not pause to consider what would have been the effect if the matter had been so transferred. The Assistant Registrar had all the powers of a Registrar in this case as noted in the delegation and he was competent to dispose of it in the same manner as the Registrar would have done. It is interesting to note that under r. 68 sub-r. (10) of the Bihar and Orissa Cooperative Societies Rules, 1959 :

> *"In proceedings before the Registrar or arbitrator a party may* be *represented by a legal practitioner."*

In conclusion, therefore, we must hold that the Assistant Registrar was functioning as a court in deciding the dispute between the bank and the appellant and Jagannath Jha."

15. Their lordships of the Hon'ble Supreme Court in the case of ***Union of India vrs. R. Gandhi President, Madras Bar Association & connected matter****, reported in* ***(2010) 11 SCC 1****, have held that so far as technical members are concerned, mere experience in civil service, is not enough and to be technical members of tribunals, persons concerned should be persons with expertise in the area of law concerned or allied subjects and mere experience in civil service cannot be treated as technical expertise in the area of law concerned. Their lordships have further held that the rule of law can be meaningful only if there is an independent and impartial judiciary to render justice. An independent judiciary can exist only when persons with competence, ability and independence with impeccable character man the judicial institutions. Their lordships have held as under:*

"106. We may summarize the position as follows:

(a) A legislature can enact a law transferring the jurisdiction exercised by courts in regard to any specified subject (other than those which are vested in courts by express provisions of the Constitution) to any tribunal.

(b) All courts are tribunals. Any tribunal to which any existing jurisdiction of courts is transferred should also be a Judicial Tribunal. This means that such Tribunal should have as members, persons of a rank, capacity and status as nearly as possible equal to the rank, status and capacity of the court which was till then dealing with such matters and the members of the Tribunal should have the independence and security of tenure associated with Judicial Tribunals.

(c) Whenever there is need for `Tribunals', there is no presumption that there should be technical members in the Tribunals. When any jurisdiction is shifted from courts to Tribunals, on the ground of pendency and delay in courts, and the jurisdiction so transferred does not involve any technical aspects requiring the assistance of experts, the Tribunals should normally have only judicial members. Only where the exercise of jurisdiction involves inquiry and decisions into technical or special aspects, where presence of technical members will be useful

and necessary, Tribunals should have technical members. Indiscriminate appointment of technical members in all Tribunals will dilute and adversely affect the independence of the Judiciary.

(d) The Legislature can re-organize the jurisdictions of Judicial Tribunals. For example, it can provide that a specified category of cases tried by a higher court can be tried by a lower court or vice versa (A standard example is the variation of pecuniary limits of courts). Similarly while constituting Tribunals, the Legislature can prescribe the qualifications/eligibility criteria. The same is however subject to Judicial Review. If the court in exercise of judicial review is of the view that such tribunalisation would adversely affect the independence of judiciary or the standards of judiciary, the court may interfere to preserve the independence and standards of judiciary. Such an exercise will be part of the checks and balances measures to maintain the separation of powers and to prevent any encroachment, intentional or unintentional, by either the legislature or by the executive.

108. The Legislature is presumed not to legislate contrary to rule of law and therefore know that where disputes are to be adjudicated by a Judicial Body other than Courts, its standards should approximately be the same as to what is expected of main stream Judiciary. Rule of law can be meaningful only if there is an independent and impartial judiciary to render justice. An independent judiciary can exist only when persons with competence, ability and independence with impeccable character man the judicial institutions. When the legislature proposes to substitute a Tribunal in place of the High Court to exercise the jurisdiction which the High Court is exercising, it goes without saying that the standards expected from the Judicial Members of the Tribunal and standards applied for appointing such members, should be as nearly as possible as applicable to High Court Judges, which are apart from a basic degree in law, rich experience in the practice of law, independent outlook, integrity, character and good reputation. It is also implied that only men of standing who have special expertise in the field to which the Tribunal relates, will be eligible for appointment as Technical members."

16. In the case of State of ***Gujarat and another vrs. Gujarat Revenue Tribunal Bar Association and another****, reported in* ***(2012) 10 SCC 353****, their lordships of the Hon'ble Supreme Court have held that where there is a lis between the two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority i.e. a situation where, (a) a statutory authority is empowered under a statute to do any act; (b) the order of such authority would adversely affect the subject; and (c) although there is no lis or two contending parties, and the contest is between the authority and the subject; and (d) the statutory authority is required to act judicially under the statute, the decision of the such authority is a quasi judicial decision. Their lordships have held as under:*

"18. Tribunals have primarily been constituted to deal with cases under special laws and to hence provide for specialized adjudication alongside the courts. Therefore, a particular Act/set of Rules will determine whether the functions of a particular Tribunal are akin to those of the courts, which provide for the basic administration of justice. Where there is a lis between two contesting parties and a statutory authority is required to decide such dispute between them, such an authority may be called as a quasi-judicial authority, i.e., a situation where, (a) a statutory authority is empowered under a statute to do any act (b) the order of such authority would adversely affect the subject and (c) although there is no lis or two contending parties, and the contest is between the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is a quasi judicial decision. An authority may be described as a quasi-judicial authority when it possesses certain attributes or trappings of a 'court', but not all. In case certain powers under C.P.C. or Cr.P.C. have been conferred upon an authority, but it has not been entrusted with the judicial powers of the State, it cannot be held to be a court.

21. The present case is also required to be examined in the context of Article 227 of the Constitution of India, with specific reference to the 42nd Constitutional Amendment Act 1976, where the expression 'court' stood by itself, and not in juxtaposition with the other expression used therein, namely, 'Tribunal'. The power of the High Court of judicial superintendence over the Tribunals, under the amended Article 227 stood obliterated. By way of the amendment in the sub article, the words, "and Tribunals" stood deleted and the words "subject to its appellate jurisdiction" have been substituted after the words, "all courts". In other words, this amendment purports to take away the High Court's power of superintendence over Tribunals. Moreover, the High Court's power has been restricted to have judicial superintendence only over judgments of inferior courts, i.e. judgments in cases where against the same, appeal or revision lies with the High Court. A question does arise as regards whether the expression 'courts' as it appears in the amended Article 227, is confined only to the regular civil or criminal courts that have been constituted under the hierarchy of courts and whether all Tribunals have in fact been excluded from the purview of the High Court's superintendence. Undoubtedly, all courts are Tribunals but all Tribunals are not courts.

22. The High Court's power of judicial superintendence, even under the amended provisions of Article 227 is applicable, provided that two conditions are fulfilled; firstly, such Tribunal, body or authority must perform judicial functions of rendering definitive judgments having finality, which bind the parties in respect of their rights, in the exercise of the sovereign judicial power transferred to it by the State, and secondly such Tribunal, body or authority should be the subject to the High Court's appellate or revisional jurisdiction.

23. In S.P. Sampath Kumar v. Union of India, AIR 1987 SC 346, this Court held that, in the Central Administrative Tribunal (hereinafter referred to as the 'CAT'), the presence of a judicial member was in fact a requirement of fair procedure of law, and that the administrative Tribunal must be presided over in such a manner, so as to inspire confidence in the minds of the people, to the effect that it is highly competent and an expert body, with judicial approach and objectivity and, thus, this Court held that the persons who preside over the CAT, which is intended to supplant the High Court must have adequate legal training and experience. This Court further observed that it was desirable that a high- powered committee, headed by a sitting Judge of the Supreme Court who has been nominated by the Chief Justice of India to be its Chairman, should select the persons who preside over the CAT, to ensure the selection of proper and competent people to the office of trust and help to build up its reputation and accountability. The Tribunal should consist of one Judicial Member and one Administrative Member on any Bench.

24. In L. Chandra Kumar v. Union of India & Ors., AIR 1997 SC 1125, this Court held that the power of judicial review of the High Court under Article 226 of the Constitution of India, being a basic feature of the Constitution cannot be excluded. In this context, the Court held:

> *"88....It must not be forgotten that what is permissible to be supplanted by another equally effective and efficacious institutional mechanism is the High Courts and not the judicial review itself......."*

The Court further observed that the creation of this Tribunal is founded on the premise that, specialised bodies comprising of both, well trained administrative members and those with judicial experience, would by virtue of their specialised knowledge, be better equipped to dispense speedy and efficient justice. The contention that the said Tribunal should consist only of a judicial member was rejected, and it was held that such a direction would attack the primary grounds of the theory, pursuant to which such Tribunals were constituted.

25. In V.K. Majotra & Ors. v. Union of India & Ors., AIR 2003 SC 3909, this Court reversed the judgment of the Allahabad High Court wherein, direction had been issued that the Vice Chairman of the CAT could be only a retired Judge of the High Court, i.e., a Judicial Member and that such a post could not be held by a Member of the Administrative Service, observing that such a direction had put at naught/obliterated from the statute book, certain provisions without striking them down.

26. A Constitution Bench of this Court in Statesman (Private) Ltd. v. H.R. Deb & Ors., AIR 1968 SC 1495, examined the provisions of Sections 7(3)(d) and g(1) of the Industrial Disputes Act, 1947, which contain the expression 'judicial office', and held that a person holds 'judicial office' if he is performing judicial functions. The scheme of Chapters V and VI of the Constitution deal with judicial office and

judicial service. Judicial service means a separation of the judiciary from the executive in public services. The functions of the labour court are of great public importance and are quasi-judicial in nature, therefore, a man having experience of the civil side of the law is more suitable to preside over it, as compared to a person working on the criminal side. Persons employed performing multifarious duties and, in addition, performing some judicial functions, may not truly fulfil the requirement of the statute. Judicial office thus means, a fixed position for the performance of duties, which are primarily judicial in nature.

27. In Kumar Padma Prasad v. Union of India & Ors., (1992) 2 SCC 428, this Court held that the expression, `judicial office' in the generic sense, may include a wide variety of offices which are connected with the administration of justice in one way or another. The holder of a judicial office under Article 217(2)(a), means a person who exercises only judicial functions, determines cases inter- se parties and renders decisions in purely judicial capacity. He must belong to the judicial services which is a class in itself, is free from executive control, and is disciplined to hold the dignity, integrity and independence of the judiciary. The Court held that `judicial office' means a subsisting office with a substantive position, which has an existence independence from its holder.

……..

33. During the course of arguments before the High Court, learned Additional Advocate General had conceded that the judgments and orders passed by the Tribunal can be challenged under Article 227 of the Constitution. Thus, it has been conceded before the High Court that the High Court has supervisory control over the Tribunal, to the extent that it can revise and correct the judgments and orders passed by it. In such a fact-situation, the consultation/concurrence of the High Court, in the matter of making the appointment of the President of the Tribunal is required.

34. The object of consultation is to render the consultation meaningful to serve the intended purpose. It requires the meeting of minds between the parties involved in the process of consultation on the basis of material facts and points, to evolve a correct or at least satisfactory solution. If the power can be exercised only after consultation, consultation must be conscious, effective, meaningful and purposeful. It means that the party must disclose all the facts to other party for due deliberation. The consultee must express his opinion after full consideration of the matter upon the relevant facts and quintessence."

17. In the case of ***Satya Pal Anand vrs. State of Madhya Pradesh and another****, reported in* ***(2014) 7 SCC 244****, their lordships of the Hon'ble Supreme Court have held that the Registrars, Joint Registrars of the Co-operative Societies and other officials discharging quasi-judicial functions are supposed to be conscious of competing rights and decide issues justly, fairly and by legally sustainable orders. The State Government was directed to*

appoint suitable persons as Registrars, Joint Registrars, etc. commensurate with the functions exercised under scheme of State Cooperative Societies Act. Their lordships have held as under:

> *"20. Having determined the question raised, we would like to emphasize the need for appointment of suitable persons not only as Registrar, Joint Registrar etc. but as Chairman and members of the tribunal as well. While discharging quasi-judicial functions Registrar, Joint Registrars etc. have to keep in mind that they have to be independent in their functioning. They are also expected to acquire necessary expertise to effectively deal with the disputes coming before them. They are supposed to be conscious of competing rights in order to decide the case justly and fairly and to pass the orders which are legally sustainable.*
>
> *21. In this behalf, we would like to refer to judgment dated 3.9.2013 passed in the Review Petition (C) No.2309/2012 (Namit Sharma case). In that case, one unfortunate feature that was noted was that experience over the years has shown that the orders passed by Information Commissions have, at times, gone beyond the provisions of the Right to Information Act and that Information Commissions have not been able to harmonise the conflicting interests indicated in the preamble and other provisions of the Act. The reasons for this experience about the functioning of the Information Commissions could be either that the persons who do not answer the criteria mentioned in Sections 12(5) and 15(5) have been appointed as Chief Information Commissioner or that the persons appointed even when they answer the aforesaid criteria, they do not have the required mind to balance the interests indicated in the Act. It was therefore insisted that experienced suitable persons should be appointed who are able to perform their functions efficiently and effectively. In this behalf certain directions were given and one of the directions was that while making recommendation for appointment of CIC and Information Commissioners the Selection Committee must mention against name of each candidate recommended the facts to indicate his eminence in public life (which is the requirement of the provision of that Act), his knowledge and experience in the particular field and these facts must be accessible to the citizens as part of their right to information under that Act, after the appointment is made.*
>
> *22. Taking clue from the aforesaid directions, and having gone through the similar dismal state of affairs expressed by the petitioner in the instant petition about the functioning of the cooperative societies, we direct that the State Government shall, keeping in mind the objective of the Act, the functions which the Registrar, Joint Registrar etc. are required to perform and commensurate with those, appointment of suitable persons shall be made. Likewise, having regard to the fact that the Chairman of the Tribunal is to be a judicial person, namely, Former Judge of the High Court or the District Judge, we are of the opinion that for appointment of the Chairman and the Members of the*

> *Tribunal, the respondent- State is duty bound to keep in mind and follow the mandate of the Constitution Bench judgment of this Court in R.Gandhi (supra). Thus, for appointment of the Chairman and Members of the Tribunal, the selection to these posts should preferably be made by the Public Service Commission in consultation with the High Court."*
>
> *18. In the case of Mamuda Khateen and ors. Vrs. Beniyan Bibi and ors., reported in AIR 1976 Calcutta 415, the Full Bench has held that where an appeal is barred by limitation and an application is made under Section 5 of the Limitation Act for condonation of delay alongwith the memorandum of appeal, until the application under Section 5 of the Limitation Act is allowed, the appeal cannot be finally allowed or admitted. It has been held as follows:*
>
> > *"7. It seems to us that when an appeal is barred by limitation and an application is made under Section 5 of the Limitation Act for condonation of the delay along with the memorandum of appeal, until the application under Section 5 is allowed the appeal cannot be filed or admitted at all. In other words, till a favourable order is made on the application under Section 5 the appeal is non est. In that event, the question of rejecting a memorandum of appeal does not arise at all at this stage."*
>
> *22. It is reiterated that the functions discharged by the revenue authorities under the H.P. Land Revenue Act, 1953 are quasi-judicial in nature. They determine the lis between the parties. Their decision is binding upon the parties subject to appeal. The orders passed by the appellate authority are open to supervision under Article 226 and 227 of the Constitution of India. Under the scheme of the H.P. Land Revenue Act, 1953, in certain contingencies the revenue authorities can convert themselves into Courts and their orders are to be treated as decrees."*

13. The very object of Constitution of Revenue Courts in the scheme of administration of justice was to provide an additional and speedy forum. It is, therefore, of uttermost importance to ensure that the revenue authorities work in a proper, effective and efficacious manner while exercising their power to hear and dispose of quasi-judicial matters of appeal, revision etc. which require some basic knowledge of law. While making decisions, the Revenue Courts must not lack judicious approach.

14. The Revenue Courts make decisions about fundamental issues which affect the rights of the parties and are treated as final unless challenged. It is, therefore, very critical that the Revenue Courts make fair decisions and must possess some basic knowledge of law as they have a sacrosanct duty to administer justice.

15. The Revenue Courts are conferred with the discretion to adjudicate upon quasi-judicial matters and such discretion is governed by the maxim "*discretio est discerner per lagan quid sit justum (*discretion consists in knowing what is just in law). Discretion in general is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution, to discern between falsity and truth, between shadow and substance, between equity and colourable glosses and pretences and not to do according to the will and

private affections or illwill. It has to be done according to the rules of reasons and justice, not according to private opinion. It has to be done according to law and not humour. It is not be arbitrary vague and fanciful but legal and regular.

16. Reverting back to the facts, the Financial Commissioner has rightly concluded that the basic question regarding borrowing of Rs.10,000/- and putting the predecessor-in-interest of the petitioners in possession over the land temporarily, even if taken to be correct, cannot be equated with acquiring of right or interest, which otherwise was required to be established before a competent Court, that too after leading evidence to this effect.

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

****

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

Jagjeevan Singh and another …Petitioners.
Versus
State of H.P. and another ..Respondents.

CWP No. 618 of 2013
Date of decision: 1st May, 2015

Constitution of India, 1950- Article 226- Petitioner sought a writ of certiorari for quashing an order of the cabinet to shift Divisional Office of HPPWD from Balakrupi to Tanda- held, that a decision to shift the office of DFO was a policy decision and the Court will not interfere with the same except where the policy is contrary to Law or Constitution or is arbitrary or irrational - merely because certain section of the public does not approve the decision is no ground to interfere with the same- petition dismissed. (Para-6 to 11)

Cases referred:
Nand Lal and another vs. State of H.P. and others, 2014 (2) HLR (DB) 982
Census Commissioner and others vs. R. Krishnamurthy (2015) 2 SCC 796

For the Petitioners: Mr. R.K.Sharma, Senior Advocate, with Mr. Gaurav Thakur, Advocate.
For the Respondents : Mr. Virender Kumar Verma, Mr. Rupinder Singh, Additional Advocate Generals, with Ms. Parul Negi, Dy. Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (*Oral*)

By medium of this petition, the petitioner has sought writ of certiorari for quashing order dated 2.2.2013 (Annexure P-27) whereby the State Government in its

Cabinet meeting decided to shift back the Divisional Office of HPPWD (for short 'Division') from Balakrupi to Tanda.

2. The petitioners have averred that in teeth of more than 25 resolutions of various Panchayats, the decision of the respondents to shift back the division from Balakrupi to Tanda is illegal, malafide, discriminatory and appears to be a political motivated to harass the public or else such a decision would not have been arrived at.

3. In response to the writ petition, the respondents in their reply have stated that shifting of the division to Tanda is a conscious decision taken by the Cabinet keeping in view the work load of Kangra Division which has the jurisdiction over six sub-divisions. The present work load in this division is of `4279.62 lacs. Moreover, because of the Medical College at Tanda, more attention to the building works was required to be paid as the sanctioned work of these buildings alone was `4863.64 lacs.

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

5. Mr. V.K. Verma, learned Additional Advocate General has raised preliminary objection regarding the very maintainability of the writ petition on the ground that impugned decision regarding shifting of division is a policy matter and, therefore, should not be interfered with by the Courts. While on the other hand, learned counsel for the petitioners would argue that this Court can always exercise powers of judicial review even in policy matters when the same is contrary to law or is in violation of the provisions of the Constitution or is arbitrary or irrational and Courts must perform their constitutional duties by striking it down.

6. A similar question came up for consideration before the learned Division Bench of this Court (of which I was one of the member) in ***CWP No. 621 of 2014*** titled ***Nand Lal and another*** vs**. *State of H.P. and others*** reported in ***2014 (2) HLR (DB) 982*** where the petitioners therein had challenged the decision of the Government to open a Government Degree College at Diggal on the ground that the same should be opened at Ramshehar (Nalagarh) because the Panchayats of the area of Ramshehar had made demand for sanctioning and opening of the College at Ramshehar which was more feasible and centrally located. This Court held as under:

> "*4. Heard. The moot question for consideration in this writ petition is-whether the petitioners can question the decision made by the Government for opening a Government Post Graduate College at Diggal, District Solan?*
>
> *5. During the process of consideration of the issue, the residents of various Gram Panchayats of Ramshehar area made resolution(s) and represented to the Government for sanctioning and opening a Degree College at Ramshehar (Nalagarh), District Solan, instead of at Diggal, District Solan. After considering all the documents and keeping in view the policy-norms, governing the field, the respondents made decision to open the said college at Diggal.*
>
> *6. The petitioners are aggrieved for the reason that the State Government has not made decision in accordance with the facts, their contentions read with norms and policy.*

7. It is a beaten law of land that Government decision and policy cannot be subject matter of a writ petition, unless its arbitrariness is shown in the decision making process.

8. It is averred that Panchayats of the area of Ramshehar have made demand for sanctioning and opening the said college at the said place, which is centrally located and is feasible also.

9. The Apex Court in Sidheshwar Sahakari Sakhar Karkhana Ltd. Vs. Union of India and others, 2005 AIR SCW 1399, has laid down the guidelines and held that Courts should not interfere in policy decision of the Government, unless there is arbitrariness on the face of it.

10. The Apex Court in a latest decision reported in Manohar Lal Sharma Vs. Union of India and another, (2013) 6 SCC 616, also held that interference by the Court on the ground of efficacy of the policy is not permissible. It is apt to reproduce paragraph 14 of thesaid decision as under:

> *"14. On matters affecting policy, this Court does not interfere unless the policy is unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power. The impugned policy that allows FDI up to 51% in multi-brand retail trading does not appear to suffer from any of these vices."*

14. The Apex Court in the case titled as Mrs. Asha Sharma versus Chandigarh Administration and others, reported in 2011 AIR SCW 5636 has held that policy decision cannot be quashed on the ground that another decision would have been more fair, wise, scientific or logical and in the interest of society. It is apt to reproduce para 10 herein:

> *"10. The Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances. The Court may not strike down a policy decision taken by the Government merely because it feels that another decision would have been more fair or wise, scientific or logic. The principle of reasonableness and nonarbitrariness in governmental action is the core of our constitutional scheme and structure. Its interpretation will always depend upon the facts and circumstances of a given case. Reference in this regard can also be made to Netai Bag v. State of West Bengal [(2000) 8 SCC 262 : (AIR 2000 SC 3313)]."*

15. It appears that the respondents have examined all aspects and made the decision. Thus, it cannot be said that the decision making process is bad. The Court can not sit in appeal and examine correctness of policy decision. The Apex Court in the case titled as Bhubaneswar Development Authority and another versus Adikanda Biswal and others, reported in (2012) 11 SCC 731 laid down the same principle. It is apt to reproduce para 19 of the judgment herein:

> *"19. We are of the view that the High Court was not justified in sitting in appeal over the decision taken by the statutory authority under Article 226 of the Constitution of India. It is trite law that the power of*

judicial review under Article 226 of the Constitution of India is not directed against the decision but is confined to the decision making process. The judicial review is not an appeal from a decision, but a review of the manner in which the decision is made and the Court sits in judgment only on the correctness of the decision making process and not on the correctness of the decision itself. The Court confines itself to the question of legality and is concerned only with, whether the decision making authority exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached an unreasonable decision or abused its powers."

7. The aforesaid judgment was followed by the learned Division Bench of this Court (of which I was one of the member) in ***CWP No. 4625 of 2012 titled Gurbachan*** vs**.** ***State of H.P. and others,*** decided on 15th July, 2014, which pertained to the shifting of the veterinary dispensary from village Kosri to village Lunus, in Tehsil Nalagarh, District Solan, H.P. This Court after reiterating what had been stated in ***Nand Lal's*** case (supra) refused to interfere and observed that this Court cannot sit in appeal and examine the correctness of a policy decision.

8. The scope of judicial review and its exclusion was a subject matter of a recent decision by three Judges of the Hon'ble Supreme Court in ***Census Commissioner and others vs. R. Krishnamurthy (2015) 2 SCC 796*** and it was held that it is not within the domain of Courts to embark upon enquiry as to whether particular public policy is wise and acceptable or whether better policy could be evolved, Court can only interfere if policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded on ipse dixit offending Article 14. It was held as under:

"23. The centripodal question that emanates for consideration is whether the High Court could have issued such a mandamus commanding the appellant to carry out a census in a particular manner.

24. The High Court has tried to inject the concept of social justice to fructify its direction. It is evincible that the said direction has been issued without any deliberation and being oblivious of the principle that the courts on very rare occasion, in exercise of powers of judicial review, would interfere with a policy decision.

25. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue Notification regarding the manner in which the census has to be carried out and the Central Government has issued Notifications, and the competent authority has issued directions. It is not within the domain of the Court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the Executive. If a policy decision or a Notification is

arbitrary, it may invite the frown of Article 14 of the Constitution. But when the Notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner.

26. In this context, we may refer to a three-Judge Bench decision in Suresh Seth V. Commr., Indore Municipal Corporation, (2005) 13 SCC 287 wherein a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956 so that a person may be debarred from simultaneously holding two elected offices, namely, that of a Member of the Legislative Assembly and also of a Mayor of a Municipal Corporation. Repelling the said submission, the Court held: (SCC pp. 288-89, para 5)

> *"5……In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under out constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court Employees' Welfare Assn. v. Union of India (1989) 4 SCC 187 (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in state of J & K v A.R. Zakki, 1992 Supp (1) SCC 548. In A.K. Roy v. Union of India, (1982) 1 SCC 271, it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature."*

27. At this juncture, we may refer to certain authorities about the justification in interference with the policy framed by the Government. It needs no special emphasis to state that interference with the policy, though is permissible in law, yet the policy has to be scrutinized with ample circumspection.

28. In N.D. Jayal and Anr. V. Union of India & Ors.(2004) 9 SCC 362, the Court has observed that in the matters of policy, when the Government takes a decision bearing in mind several aspects, the Court should not interfere with the same. In Narmada Bachao Andolan V. Union of India (2000) 10 SCC 664, it has been held thus: (SCC p. 762, para 229)

> *" 229. "It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on*

a policy decision so undertaken. The court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution."

29. In this context, it is fruitful to refer to the authority in Rusom Cavasiee Cooper V. Union of India, (1970) 1 SCC 248, wherein it has been expressed thus: (SCC p. 294, para 63)

"63….It is again not for this Court to consider the relative merits of the different political theories or economic policies… This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of Parliament in enacting a law".

30. In Premium Granites V. State of Tamil Nadu, (1994) 2 SCC 691 while dealing with the power of the courts in interfering with the policy decision, the Court has ruled that: (SCC p.715, para 54)

"54. it is not the domain of the court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy could be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution of India or any other statutory right."

31. In M.P. Oil Extraction and Anr. V. State of M.P. & Ors.(1997) 7 SCC 592, a two-Judge Bench opined that: (SCC p. 611, para 41)

"41…….. The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State."

32. In State of M.P. V. Narmada Bachao Andolan & Anr.(2011) 7 SCC 639, after referring to the State of Punjab V. Ram Lubhaya Bagga (1998) 4 SCC 117 , the Court ruled thus: (SCC pp. 670-71, para 36)

"36. The Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies [pic]are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power. (See Ram Singh Vijay Pal Singh v. State of U.P., (2007) 6 SCC 44, Villianur

Iyarkkai Padukappu Maiyam v. Union of India, (2009) 7 SCC 561 and State of Kerala v. Peoples Union for Civil Liberties, (2009) 8 SCC 46.)"

33. From the aforesaid pronouncement of law, it is clear as noon day that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. In certain matters, as often said, there can be opinions and opinions but the Court is not expected to sit as an appellate authority on an opinion."

9. Aforesaid exposition of law would go to show that policy matters cannot normally be interfered with by the Courts, except where the policy is contrary to law or is in violation of the provisions of the Constitution or is arbitrary or irrational and the Courts must then perform their constitutional duties by striking it down.

10. Therefore, the moot question required to be considered is as to whether merely because certain section of the general public does not subscribe and approve the decision of the Government for transferring the division from Balakrupi to Tanda, can the same be nullified on this ground alone. It is more than settled that individual interest must yield in favour of societal and public interest and this Court would only interfere with policy decision if the petitioners can carve out a case falling within the parameters as set out in para 9 supra.

11. The requirement of having a full fledged Government Medical College at Tanda is of paramount importance as the same shall cater to the medical needs of nearly half of the State because of its strategic location. Once an amount of `4863.64 lacs is being spent on the building works of this College, it is then obvious that these works will have to be overseen, monitored and supervised. Therefore, in such circumstances, no fault can be found with the decision of the respondents whereby they took a decision to transfer the Divisional Office of the HPPWD from Balakrupi to Tanda. The petitioners have failed to point out as to how and in what manner this decision is either arbitrary or irrational much less capricious or whimsical.

12. In view of the aforesaid discussion, I find no ground to interfere in this petition, hence the same is dismissed along with pending application(s) if any. The parties are left to bear their own costs.

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

Smt. Kamla Devi & others …Appellants.
Versus
Shri Ravinder Gupta …Respondent.

FAO No. 214 of 2008
Decided on: 01.05.2015

Motor Vehicle Act, 1988- Section 166- Rashness and negligence is an essential ingredient for maintaining the claim petition- it is for the claimant to lead evidence and to prove on preponderance of probabilities that the driver had driven the offending vehicle rashly and negligently- respondent examined 6 witnesses who proved that respondent was not driving the vehicle but deceased was driving the vehicle at the time of accident- this evidence was not rebutted- therefore, claimants are not entitled for any compensation. (Para- 4 to 8)

For the appellants: Mr. H.C. Sharma, Advocate.
For the respondent: Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is award, dated 04.12.2007, made by the Motor Accident Claims Tribunal-II, Mandi, H.P., Camp at Karsog (for short "the Tribunal") in Claim Petition No. 40 of 2003, titled as Smt. Kamla Devi and others versus Shri Ravinder Gupta, whereby the claim petition filed by the appellants came to be dismissed, however, Rs.50,000/- came to be awarded under 'No Fault Liability' (for short "the impugned award").

2. The owner-insured-respondent herein has not questioned the impugned award on any count, thus, has attained finality so far it relates to him.

3. Learned counsel for the appellants-claimants argued that the vehicle, i.e. maruti car, bearing registration No. HP-30-0097, was driven by the respondent herein, namely Shri Ravinder Gupta, rashly and negligently on 31.12.2002, near Chindi and caused the accident, in which deceased, namely Shri Prem Singh, sustained injuries and succumbed to the injuries.

4. It is beaten law of land that *sine qua non* for maintaining the claim petitions is rash and negligent driving of the vehicle by its driver.

5. It was for the claimants-appellants to lead evidence and to prove by preponderance of probabilities that the driver had driven the offending vehicle rashly and negligently.

6. The respondent-Ravinder Gupta has examined six witnesses. All of them have stated that Ravinder Gupta was not driving the offending vehicle at the relevant point of time, but, it was Prem Singh, who had snatched the keys from Ravinder Gupta and driven the car, which met with the accident.

7. Learned counsel for the appellants-claimants half heartedly argued that FIR was registered against Ravinder Gupta and there is evidence on the file that he was driving the offending vehicle at the relevant point of time, but was not able to shatter the evidence led by Ravinder Gupta. The fact of the matter is that it was deceased-Prem Singh who was driving the offending vehicle at the time of the accident, as held by the Tribunal while passing the impugned award.

8. Having glance of the above discussions, I am of the considered view that the impugned award is well reasoned, legal one and needs no interference.

9. Accordingly, the appeal is dismissed and the impugned award is upheld, as indicated hereinabove.

10. Send down the record after placing copy of the judgment on Tribunal's file.

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

Manohar Lal .....Appellant
Versus
Sukh Bahadur & others ...Respondents

FAO No. 399 of 2007
Decided on : 1.05.2015

Motor Vehicle Act, 1988- Section 149- Driver was driving the Mahindra Jeep whose gross weight is 2270 kilograms, therefore, it falls within the definition of light motor vehicle and endorsement of PSV is not required in the driving license– Insurance Company had not led any evidence that accident had taken place due to the reason that driver of the offending vehicle was competent to drive one kind of vehicle and he was found driving different kind of vehicle – held that in these circumstance, Tribunal had fallen in error in saddling the owner and the driver with the liability. (Para-5 to 23)

Cases referred:
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Lal Chand versus Oriental Insurance Co. Ltd., 2006 AIR SCW 4832,
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant : Mr. Y.P. Sood, Advocate.
For the respondents: Mr. Sanjeev Kuthiala, Advocate for respondents No. 1 & 2.
Mr. J.S. Bagga, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject mater of this appeal is the award, dated 18th June, 2007, made by the Motor Accident Claims Tribunal-II, Fast Track, Kullu, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No. 71 of 2004, titled Sh. Sukh Bahadur & another versus Sh. Manohar Lal & others, whereby compensation to the tune of Rs.1,75,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants and the owner and the driver came to be saddled with the liability (hereinafter referred to as the "impugned award").

2. The claimants, the driver and the insurer have not questioned the impugned award, on any count. Thus, it has attained finality so far as it relates to them.

3. The insured-owner has challenged the impugned award on the ground that the driver was having the valid and effective driving licence at the time of accident and he has not committed any breach.

4. Thus, the only issue to be determined in this appeal is-whether the Tribunal has rightly discharged the insurer-Oriental Insurance Company from the liability and saddled the owner and the driver with the same.

5. Admittedly, the driver was driving Mahindra Jeep bearing registration No. HP-34-0432, the gross weight of which is 2270 kilograms, as per the Registration Certificate, Ext. R-3, is a light motor vehicle.

6. I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle", as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively of the Motor Vehicles Act, 1988, (hereinafter referred to as 'the MV Act') herein:

> *"2. ....*
>
> *(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.*
>
> *xxx xxx xxx*
>
> *(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.*
>
> xxx xxx xxx
>
> *(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.*
>
> *xxx xxx xxx*
>
> *(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."*

7. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

8. At the cost of repetition, definition of "light motor vehicle" includes the words "transport vehicle" also. Thus, the definition, as given, mandates the "light motor vehicle" is itself a "transport vehicle", whereas the definitions of other vehicles are contained in Sections 2(14), 2 (16), 2 (17), 2 (18), 2 (22), 2 (23) 2 (24), 2 (25), 2 (26), 2 (27), 2 (28) and 2 (29) of the MV Act. In these definitions, the words "transport vehicle" are neither used nor included and that is the reason, the definition of "transport vehicle" is given in Section 2 (47) of the MV Act.

9. In this backdrop, we have to go through Section 3 and Section 10 of the MV Act. It is apt to reproduce Section 3 of the Act herein:

> ***"3. Necessity for driving licence. -*** *(1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.*
>
> *(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government."*

10. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

11. My this view is supported by Section 10 of the MV Act, which reads as under:

> *"**10. Form and contents of licences to drive.** - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*
>
> *(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-*
>
> *(a) motor cycle without gear;*
>
> *(b) motor cycle with gear;*
>
> *(c) invalid carriage;*
>
> *(d) light motor vehicle;*
>
> *(e) transport vehicle;*
>
> *(i) road-roller;*
>
> *(j) motor vehicle of a specified description."*

12. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stands deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

13. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180**

of 2002, decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

> *"The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgment hereunder:-*
>
> > *"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.*
> >
> > *..*
> >
> > *17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."*
>
> *In the given circumstances of the case PSV endorsement was not required at all."*

14. The mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

> *"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place;*

Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. ....

21. ....

22. ....

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

15. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. ....

10. ....

11. ....

12. ....

13. ....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. ....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

16. Having glance of the above discussions, I hold that the endorsement of PSV was not required.

17. It is also not a case of the insurer that the accident was due to the reason that the driver of the offending vehicle was competent to drive one kind of the vehicle and was found driving different kind of vehicle, which was the cause of the accident.

18. The Apex Court in a case titled as **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** held that it has to be pleaded and proved that the driver was having licence to drive one kind of vehicle, was found driving another kind of vehicle and that was the cause of accident. If no such plea is taken, that cannot be ground for discharging the insurer. It is apt to reproduce para 84 of the judgment herein:

"84. Section 3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle which he intends to drive. Section 10 *of the Act enables Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in sub-section (2) of said section. The various types of vehicles described for which a driver may obtain a licence for one or more of them are (a) Motorcycles without gear, (b) motorcycle with gear, (c) invalid carriage, (d) light motor vehicle, (e) transport vehicle, (f) road roller and (g) motor vehicle of other specified description. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in*

broad types mentioned in sub-section (2) of Section 10. They are `goods carriage', `heavy-goods vehicle', `heavy passenger motor-vehicle', `invalid carriage', `light motor-vehicle', `maxi-cab', `motorcycle', `omnibus', `private service vehicle'. In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal. A person possessing a driving licence for `motorcycle without gear', for which he has no licence. Cases may also arise where a holder of driving licence for `light motor vehicle' is found to be driving a `maxi-cab', `motor-cab' or `omnibus' for which he has no licence. In each case on evidence led before the tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence. Emphasis added."

19. In the said judgment, the Apex Court has also laid down principles, how can insurer avoid its liability. It is apt to reproduce relevant portion of para 105 of the judgment in **Swaran Singh's case (supra):**

"105. ....

(i) ....

(ii) ....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by *the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v)........................

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and

the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

20. In a case titled as **Lal Chand versus Oriental Insurance Co. Ltd.,** reported in **2006 AIR SCW 4832,** the owner had performed his duties and obligations, which he was required to do and satisfied himself that the driver was having valid driving licence. The Apex Court held the insurer liable. It is apt to reproduce paras 8, 9 and 11 of the judgment herein:

> *"8. We have perused the pleadings and the orders passed by the Tribunal and also of the High Court and the annexures filed along with the appeal. This Court in the case of United India Insurance Co. Ltd. v. Lehru & ors., reported in 2003 (3) SCC 338, in paragraph 20 has observed that where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). He will, therefore, have to check whether the driver has a driving licence and if the driver produces a driving licence, which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take test of the driver, and if he finds that the driver is competent to drive the vehicle, he will hire the driver.*
>
> 9. In the instant case, the owner has not only seen and examined the driving licence produced by the driver but also took the test of the driving of the driver and found that the driver was competent to drive the vehicle and thereafter appointed him as driver of the vehicle in question. Thus, the owner has satisfied himself that the driver has a licence *and is driving competently, there would be no breach of Section 149(2)(a)(ii) and the Insurance Company would not then be absolved of its liability.*
>
> *10. ....*
>
> *11. As observed in the above paragraph, the insurer, namely the Insurance Company, has to prove that the insured, namely the owner of the vehicle, was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant point of time."*

21. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** hereinbelow:

> "10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the

extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence *possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."*

22. Admittedly, the driver was having driving licence to drive 'light motor vehicle'. This Court has held in so many cases, FAO No. 538 of 2007, titled as Oriental Insurance Company Ltd. versus Sh. Khem Chand & others, decided on 27.02.2015, being one of them, that the driver who was having licence to drive "light motor vehicle", requires no "PSV" endorsement.

23. Having said so, I am of the considered opinion that the Tribunal has fallen in error in saddling the insured-owner and the driver with the liability and exonerating/discharging the insurer from the liability. Accordingly, the insurer-Oriental Insurance Company is saddled with the liability.

24. The impugned award so far as it relates to right of recovery is set aside.

25. The Registry is directed to release the award amount in favour of the claimants, strictly as per the terms and conditions, contained in the impugned award.

26. The appeal is disposed of and the impugned award is modified, as indicated hereinabove.

27. Send down the record after placing a copy of this judgment on the file.

****

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

Oriental Insurance Co. Ltd. ...Appellant.
Versus
Shri Kishan Chand & others ...Respondents.

FAO No. 186 of 2008
Decided on:01.05.2015

Code of Civil Procedure, 1908 - Order 9 Rule 4- claimant had filed a Claim Petition, which was dismissed in default and application under Order 9 Rule 4 was also withdrawn by the claimant- held, that procedural wrangles and tangles, hyper technicalities and mystic maybes should not be a ground to dismiss the Claim Petition – a fresh petition can be filed under Order 9 Rule 4, if it is not barred by limitation. (Para-7 to 14)

Code of Civil Procedure, 1908- Order 22- Insurer pleaded that owner has died and appeal had abated - held that provisions of Order 22 regarding the abatement have not been made applicable to MACT, therefore, Claim Petition would not abate on the death of the owner/insured. (Para-15 to 20)

Motor Vehicle Act, 1988- Section 149- Insurance Company covered the risk of 8 persons including 5 passengers; therefore, deceased cannot be called to be a gratuitous passenger and insurance company is liable to pay indemnify the insured. (Para-21 to 25)

Cases referred:

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354

Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646

For the appellant:	Mr. Deepak Bhasin, Advocate.
For the respondents:	Ms. Archana Dutt, Advocate, for respondent No. 1.
	Mr. Abhyendra Gupta, Advocate, vice Mr. Nimish Gupta, Advocate, for respondents No. 2 and 4.
	Name of respondent No. 3 stands already deleted.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is award, dated 29.02.2008, made by the Motor Accident Claims Tribunal, Chamba Division, Chamba, (H.P.) (for short "the Tribunal") in MAC Petition No. 19 of 2006, titled as Sh. Kishan Chand versus The Oriental Insurance Company Ltd. and others, whereby compensation to the tune of Rs. 1,78,770/- with interest @ 9% per annum from the date of petition till realization came to be awarded in favour of the claimant-injured with a direction to the appellant-insurer to satisfy the award (for short "the impugned award").

2. The claimant-injured, the driver and the owner-insured have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling the insurer with liability.

4. Thus, the only questioned to be determined in this appeal is - whether the appellant-insurer came to be rightly saddled with liability or otherwise?

5. Learned counsel for the appellant-insurer argued that the claim petition filed by the claimant-injured was not maintainable for the following reasons:

> (1) That the claimant-injured had filed a claim petition, which came to be dismissed in default, constraining the claimant-injured filed an application under Order 9 Rule 4 of the Code of Civil Procedure (for short "CPC") for setting aside the dismissal, which was also withdrawn by the claimant-injured;

(2) That during the pendency of the claim petition, the owner-insured has died, thus, the appeal has abated in terms of the mandate of Order 22 CPC; and

(3) That the claimant-injured was a gratuitous passenger.

6. The arguments of the learned counsel for the appellant-insurer, though attractive, are devoid of any force for the following reasons:

7. Granting of compensation is a social one and it is for the welfare of the victims of the vehicular accidents. The purpose of granting compensation in terms of the mandate of Chapters XI and XII of the Motor Vehicles Act, 1988 (for short "the MV Act") is for the welfare of the claimants, who have become victims of vehicular accident, in order to save them from social evils, like starvation etc.

8. The aim and object of awarding compensation is just to ameliorate the sufferings of the claimants and the Courts/Tribunals have to decide the matter as early as possible, that too, summarily in terms of the mandate of Chapter XII of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act").

9. The Apex Court and other High Courts have held that the Courts should not succumb to the procedural wrangles and tangles, hypertechnicalities and mystic maybes and that should not be a ground to dismiss the claim petition and to defeat the rights of the claimants.

10. The same principle has been laid down by the Apex Court in the cases titled as **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354; Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627;** and **Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another**, reported in (**2013) 10 Supreme Court Cases 646,** and by this Court in **FAO No. 339 & 340 of 2008,** titled as NIC versus Parwati & others; **FAO No. 172 of 2006,** titled as Oriental Insurance Company versus Shakuntla Devi & others; **FAO No. 396 of 2012,** titled as Asha & others versus Moti Ram & others and **FAO No. 4248 of 2013,** titled as Magni Devi & others versus Suneel Kumar & others, decided on 13.03.2015.

11. It is beaten law of land that limitation cannot be a ground to defeat the claim petitions. The MV Act has gone through a sea change in the year 1994 and the provision dealing with limitation was deleted and the claim petitions can be filed at any point of time. Thus, limitation cannot come in the way of the claimants for filing claim petitions.

12. The next argument of the learned counsel for the appellant-insurer that the claim petition was not maintainable because the first claim petition came to be dismissed in default, was not restored, is not tenable for the reason that in terms of Order IX Rule 4 CPC, a fresh suit can be filed, provided it is not hit by limitation.

13. It is apt to reproduce the relevant portion of the dismissal order, dated 18.02.2005, made by the Tribunal, Exhibit RJ, herein:

"Present: None.

Case called thrice during the day, but none appeared for the parties. Hence, the petition is dismissed in default. It be consigned to the record room after due completion."

The first claim petition was dismissed in default in absence of all the parties, thus, fresh claim petition was maintainable.

14. Order of dismissal in default is not a decree in terms of the mandate of Section 2 (2) (b) of CPC. It is apt to reproduce Section 2 (2) CPC herein:

> *"2. ....*
>
> *(2)"decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-*
>
> *(a) any adjudication from which an appeal lies as an appeal from an order, or*
>
> *(b) any order of dismissal for default.*
>
> *Explanation. - A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and party final."*

Thus, it can be safely said that doctrine of *res judicata* is not applicable.

15. The claim petition is to be taken to its logical end without any delay, that too, summarily. The cumbersome procedure is not to be followed in view of the mandate of Sections 169 and 176 (b) of the MV Act.

16. Sections 169 and 176 (b) of the MV Act read as under:

> *"**169. Procedure and powers of Claims Tribunals** :- (1) In holding any inquiry under section 168 , the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.*
>
> *(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material object and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.*
>
> *(3) Subject to any rules that may be made in this behalf, the Claims Tribunal?may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of and matter relevant to the inquiry to assist it in holding the inquiry.*
>
> *........................*

***176. Power of State Government to make rules** :-*
A State Government may make rules for the purpose of carrying into effect the provisions of sections 165 to 174, and in particular, such rules may provide for all or any of the following matters, namely:-
(a) ....
(b) the procedure to be followed by a Claims Tribunal in holding an inquiry under this Chapter;
..............................."

17. The States have framed Rules in terms of Sections 169 and 176 (b) of the MV Act and some of the provisions of CPC have been made applicable. The State of Himachal Pradesh has also framed the Himachal Pradesh Motor Vehicle Rules, 1999 (hereinafter referred to as "the Rules").

18. It is apt to reproduce Rule 232 of the Rules herein:

*"**232. The Code of Civil Procedure to apply in certain cases:-***

The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall so far as may be, apply to proceedings before the Claims Tribunal, namely, Order V, Rules 9 to 13 and 15 to 30; Order IX; Order XIII; Rule 3 to 10; Order XVI, Rules 2 to 21; Order XVII; Order XXI and Order XXIII, Rules 1 to 3."

19. This Rule provides which of the provisions of the CPC are applicable. Order XXII of the CPC deals with abatement and the provisions of said Order have not been made applicable. Only on this count, the argument of the learned counsel for the appellant-insurer, that the claim petition was abated, merits to be turned down.

20. These provisions of law provide that all the provisions of CPC are not applicable, thus, the claim petitions cannot be dismissed in view of the procedural wrangles and tangles, as stated hereinabove.

21. The next argument of the learned counsel for the appellant-insurer that the claimant-injured was travelling in the offending vehicle as a gratuitous passenger, is also devoid of any force because the insurance contract, Exhibit RA, covers the risk of eight persons, i.e. driver, conduct, owner and five passengers. It is apt to reproduce the relevant portion of Exhibit RA herein:

Details of the Vehicle Insured

Number of Vehicle HP 44 0140	*Licensed Carrying Capacity*		*Cubic Capacity Horse Power*
Make & year of Manufacture *Mahindra 1998*	*Gross Vehicle Weight in kg.*	*Passenger Carrying Capacity*	
Engine No.	*2270 kgs*	*2+5+1 = 8*	*62 HP*
Chassis No.			

22. While going through the insurance contract, one comes to an inescapable conclusion that the risk of five passengers is covered.

23. Viewed thus, it can be safely said that the claimant-injured was not a gratuitous passenger. The appellant-insurer has to plead and prove that the owner-insured has committed any willful breach in terms of the insurance contract, has failed to prove the said issue.

24. Having said so, the Tribunal has not committed any error in saddling the appellant-insurer with liability.

25. It is also apt to record herein that the appellant-insurer has not led any evidence, thus, has failed to discharge the onus to prove issues No. 3 to 9.

26. Accordingly, the appeal is dismissed and the impugned award is upheld, as indicated hereinabove.

27. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award after proper verification.

28. Send down the record after placing copy of the judgment on Tribunal's file.

****

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

Pooja Devi .....Appellant
Versus
General Manager, Punjab Roadways & others ...Respondents

FAO No. 479 of 2007
Decided on : 1.05.2015

Motor Vehicle Act, 1988- Section 166- Claimant had boarded the bus- she sustained injuries in the accident and was taken to PGI, Chandigarh- her right arm was amputated below elbow- she was only 13 years old and a student of class 6th – she sustained 80% disability- Tribunal awarded compensation of Rs. 2,09,400/- with interest @ 7.5% per annum from the date of the Claim Petition - held, that Tribunal had not assessed the just compensation- it had not taken into consideration the physical frame of the injured/claimant, her marriage prospects, amenities, future income, pain and sufferings and other prospects- claimant was aged 13 years and would have become earning hand after five years, even a housewife is earning Rs. 6,000/- per month by making contribution towards her family- keeping in view the percentage of disability, loss of income can be taken as Rs. 4,000/- per month and applying multiplier of '15', claimant would be entitled for Rs. 7,20,000/- under the head 'loss of earning' – amount of Rs. 50,000/- awarded towards the 'future medical treatment'- amount of Rs. 40,000/- awarded under the head 'pain and sufferings'- Rs. 1,00,000/- awarded under the head 'future pain and sufferings'- Rs. 1,00,000/- awarded under the head 'loss of amenities of life' and Rs. 2,00,000/- awarded under the head 'marriage prospects'- thus, total amount of Rs. 12,31,400/- awarded to the petitioner. (Para-12 to 34)

Cases referred:
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771

For the appellant : Mr. J.R. Poswal, Advocate.
For the respondents: Nemo for respondent No. 1.
Mr. Ashish Verma, Advocate vice Mr. Anuj Nag, Advocate, for respondent No. 2.
Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 3 & 4.
Mr. B.M. Chauhan, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Despite service, there is no representation on behalf of respondent No. 1, hence he is set ex-parte.

2. By the medium of this appeal, the appellant has challenged the award, dated 14th August, 2007, made by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, (hereinafter referred to as 'the Tribunal') in MAC Petition No. 91 of 2004, titled **Pooja Devi versus the General Manager, Punjab Roadways, Ropar & others**, whereby compensation to the tune of Rs.2,09,400/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization, was awarded in her favour and against the respondents (hereinafter referred to as the "impugned award").

3. Before I deal with the facts of the case and the findings recorded in the impugned award by the Tribunal, I deem it proper to record herein that the Tribunal has dealt with the claim petition casually and has not reached to the claimant-injured.

4. The appellant-claimant-injured being victim of the motor vehicular accident, which was caused on 25th May, 2004, at about 1.45 p.m., on National High Way No. 21, at Chehri near Chharol, District Bilaspur, by the contributory negligence of Gurnam Singh, driver of bus bearing registration No. PB-12-C-9004 and Rakesh Kumar, driver of tempo Tata Pick Up 207 bearing registration No. HP-20-C-0266, while driving the said vehicles, rashly and negligently, had invoked the jurisdiction of the Tribunal in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988, (for short "the Act"), for grant of compensation to the tune of Rs.15,00,000/-, as per the break-ups given in the claim petition.

5. It is averred in the claim petition that the claimant had boarded the offending bus, sustained injuries in the accident, was taken to P.G.I., Chandigarh, where she remained admitted from 25.05.2004 to 31.05.2004, which resulted in amputation of her right arm, above elbow. Thereafter, she was taken for treatment to Anandpur Civil Hospital, where she remained admitted from 31.05.2004 to 16.06.2004.

6. FIR No. 77/2004, dated 25.05.2004, under Sections 279, 337, 201 of the Indian Penal Code and 184 & 187 of the Motor Vehicles Act, was lodged in Police Station Sadar, District Bilaspur. Investigation was conducted and challan was presented against both the drivers under Sections 279, 337 & 338 of the Indian Penal Code before the Chief Judicial Magistrate, Bilaspur, H.P. The claimant, who was 13 years of age and a student of sixth class at the time of accident, has suffered 80% disability, which has shattered her physical frame and has made her permanently disabled.

7. The respondents contested the claim petition on the grounds taken in their memo of objections.

8. Following issues came to be framed by the Tribunal on 11.07.2005

> "1. *Whether the petitioner has sustained injuries in the accident which took place due to the rash and negligent driving of bus No. PB-12-C-9004 by respondent No. 2 and driver of tempo Pick 207 No. HP-20-C-0266, respondent No. 5? .....OPP*
>
> *2. If issue No. 1 supra is proved in affirmative, to what amount of compensation, the petitioner is entitled to and from which of the respondents? ...OPP*
>
> *3. Whether the driver of the offending vehicle i.e. respondent No. 5 was not having a valid and effective driving license at the time of the accident, if so, its effect? ...OPR-6*
>
> *4. Relief."*

9. The claimant examined Ramesh Chand (PW-1), Chaman Lal (PW-2) and Dr. Navtej Pal (PW-3). Driver of bus Gurnam Singh appeared in witness box as RW-1 and Driver of Tempo Pick Up Rakesh Kumar appeared in the witness box as RW-2. The insurer of the tempo i.e. respondent No. 5 and the owner of the bus, i.e. respondent No. 1 have not led any evidence.

10. The Tribunal dealt with the claim petition casually and awarded compensation to the tune of Rs.2,09,400/- with interest @ 7.5% per annum to the claimant from the date of the claim petition till its realization, which is too meager.

11. All the witnesses have stated that both the drivers have driven the offending vehicles rashly and negligently, caused the accident in which the claimant suffered injuries, which has remained unrebutted.

12. The Tribunal has come to the conclusion that the claimant-injured was traveling in the offending bus, the accident was outcome of the rash and negligent driving of both the drivers and the claimant was also negligent. The Tribunal has held that 60% of the compensation was to be satisfied by the insurer of the tempo and 30% of the same was to be satisfied by the owner and driver of the offending bus, i.e. the General Manager, Punjab Roadway and Gurnam Singh, respectively, jointly and severally.

13. The drivers, the owners of the offending vehicles and the insurer of the tempo have not questioned the impugned award. Thus, it has attained finality, so far as it relates to them.

14. Keeping in view the averments contained in the claim petition read with the reply filed by the respondents and the evidence on record, I deem it proper to hold that the claimant was not negligent in any way and the driver of the tempo was negligent to the extent of 60% and the driver of the bus was negligent to the extent of 40%.

15. Having said so, the claimant has proved that both the drivers had driven the offending vehicles rashly and negligently. The insurer of the offending vehicle-tempo is saddled with the liability to the extent of 60% and the owner of the bus, i.e. respondent No. 1 is saddled with the liability to the extent of 40%. Accordingly, the findings returned by the Tribunal on issue No. 1 are modified.

16. Before I deal with Issue No. 2, I deem it proper to deal with issue No. 3.

17. It was for the insurer of the tempo-New India Assurance Company to lead evidence, but it has failed to discharge the onus. At the cost of repetition, it has not questioned the impugned award. Thus, the findings returned by the Tribunal on issue No. 3 are also upheld.

18. The findings returned by the Tribunal on Issue No. 2 are trash and unreasonable for the following reasons.

19. Admittedly, the appellant-claimant-injured was admitted in the hospital for about one month i.e. w.e.f. 25th May, 2004 to 16th June, 2004.

20. The Tribunal has awarded a meager amount while ignoring the facts that the claimant has suffered too much, was not in a position to move, was bed ridden, had undergone pain and sufferings and has to undergo pain and sufferings forever and has lost marriage prospects. The accident has shattered her physical frame and she has become dependant.

21. The Tribunal has not assessed the just compensation. It had to take into consideration the physical frame of the injured-claimant, marriage prospects, amenities of life, future income, pain and sufferings and other prospects.

22. The question is - how to grant compensation in such injury cases? The concept of granting compensation is outcome of Law of Torts. The Tribunal, while considering the case for grant of compensation, has to do some guess work.

23 The Apex Court in case titled as **R.D. Hattangadi** versus **M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** had discussed all aspects and laid down guidelines how a guess work is to be done and how compensation is to be awarded under various heads. It is apt to reproduce paras 9 to 14 of the judgment hereinbelow:

> *"9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss.*

So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.

10. It cannot be disputed that because of the accident the appellant who was an active practising lawyer has become paraplegic on account of the injuries sustained by him. It is really difficult in this background to assess the exact amount of compensation for the pain and agony suffered by the appellant and for having become a life long handicapped. No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame.

11. In the case Ward v. James, 1965 (1) All ER 563, it was said:

> *"Although you cannot give a man so gravely injured much for his "lost years", you can, however, compensate him for his loss during his shortened span, that is, during his expected "years of survival". You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet Judges and Juries have to do the best they can and give him what they think is fair. No wonder they find it well-nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The Judges have worked out a pattern, and they keep it in line with the changes in the value of money."*

12. In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards.

13. This Court in the case of C.K. Subramonia Iyer v. T. Kunhikuttan Nair, AIR 1970 SC 376, in connection with the Fatal Accidents Act has observed (at p. 380):

"In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable."

14. In Halsbury's Laws of England, 4th Edition, Vol. 12 regarding non-pecuniary loss at page 446 it has been said :-

"Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award.

The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."

24. The said judgment was also discussed by the Apex Court in case titled as **Arvind Kumar Mishra** versus **New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085**, while granting compensation in such a case. It is apt to reproduce para-7 of the judgment hereinbelow:

"7. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases - and that is now recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand."

25. The Apex Court in case titled as **Ramchandrappa** versus **The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787** also laid down guidelines for granting compensation. It is apt to reproduce paras 8 & 9 of the judgment hereinbelow:

"8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.

9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."

26. The Apex Court in case titled as **Kavita** versus **Deepak and others**, reported in **2012 AIR SCW 4771** also discussed the entire law and laid down the guidelines how to grant compensation. It is apt to reproduce paras 16 & 18 of the judgment hereinbelow:

"16. *In Raj Kumar v. Ajay Kumar (2011) 1 SCC 343, this Court considered large number of precedents and laid down the following propositions:*

"The provision of the motor Vehicles Act, 1988 ('the Act', for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.

The heads under which compensation is awarded in personal injury cases are the following:

"Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

v) (Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

17. …………………………

18. In light of the principles laid down in the aforementioned cases, it is suffice to say that in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and inability to lead a normal life and enjoy amenities, which would have been enjoyed but for the disability caused due to the accident. The amount awarded under the head of loss of earning capacity are distinct and do not overlap with the amount awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses."

27. The Tribunal has awarded Rs.1,08,000/- to the claimant under the head 'loss of future income', which is too meager.

28. Admittedly, the claimant was 13 years of age at the time of accident. After a lapse of about five years, she would have become an earning hand. By a guess work, even a house wife is earning more than Rs.6,000/- per month by making contribution towards her family by maintaining the household works and other marital and family matters. But the claimant is not in a position to render any service towards her family and has become dependant. If we take her as a labourer or housewife, she would have been earning not less than Rs.6,000/- per month. Keeping in view the percentage of the disability, it can safely be held that the claimant has lost source of income to the tune of Rs.4,000/- per month. Thus, she is deprived of the earning capacity to the tune of Rs.4,000/- per month. The multiplier applied by the Tribunal is just and appropriate. Accordingly, the claimant is held entitled to the sum of Rs.4,000/- x 12 = Rs.48,000 x 15 = Rs.7,20,000/- (rupees seven lacs twenty thousands only) under the head 'loss of earning'.

29. Admittedly, the claimant had spent a lot of money on her treatment and has to go for treatment in future also. The Tribunal has only awarded the amount of Rs.9,400/-

under the head 'expenditure on medicines'. The Tribunal has lost sight of the very important fact that the claimant has to undergo treatment in future also. Accordingly, the compensation amount to the tune of Rs.9,400/- (rupees nine thousand four hundred only) awarded under the head 'expenditure on medicines', is maintained and she is also held entitled to the sum of Rs.50,000/- (rupees fifty thousands only) under the head 'expenditure on future treatment'.

30. The Tribunal has awarded Rs.1,000/- (rupees one thousand only) under the head 'taxi charges', Rs.6,000/- (rupees six thousands only) under the head 'attendant charges' and Rs.5,000/- (rupees five thousands only/-) under the head 'special diet, is maintained.

31. The Tribunal has not awarded just and appropriate compensation to the claimant under the head 'pain and sufferings', because she has to undergo pain and sufferings throughout her life. Thus, she is held entitled to the tune of Rs.40,000/- (rupees forty thousands only) under the head 'pain and sufferings undergone' and Rs.1,00,000/- (rupees one lac only) under the head ' future pain and sufferings'.

32. The Tribunal has only awarded Rs.20,000/- to the claimant under the head 'loss of amenities of life', which is too meager, is held entitled to the sum of Rs.1,00,000/- (rupees one lac only) under the head 'loss of amenities of life'.

33. The Tribunal has fallen in error in granting compensation to the tune of Rs.20,000/- under the head 'loss of suitable match' to the claimant. At least, the amount of Rs.2,00,000/- (rupees two lacs only) was to be awarded to the claimant under the head 'marriage prospects'. Had she been in good health, she would have enjoyed the charm of marital life, of which she is deprived of. Accordingly, she is held entitled to the sum of Rs.2,00,000/- (rupees two lacs only) under the head 'marriage prospects'.

34. Having glance on the aforesaid discussion, the claimant is entitled to Rs.7,20,000/- under the head 'loss of future income'; Rs.9,400/- under the head 'expenditures on medicines', Rs.50,000/- under the head 'expenditure on future treatment'; Rs.1,000/- under the head 'taxi charges', and Rs.6,000/- under the head 'attendant charges', Rs.5,000/- under the head 'special died, Rs.40,000/- under the head 'pain and sufferings undergone', Rs.1,00,000/- under the head 'future pain and sufferings', Rs.1,00,000/- under the head 'loss of amenities of life' and Rs.2,00,000/- under the head 'marriage prospects', total amounting to Rs.12,31,400/- (rupees twelve lacs thirty one thousands four hundred only) and the amount of compensation is enhanced to Rs.12,31,400/- with interest at the rate of 7.5% per annum from the date of the impugned award till its realization.

35. In view of the aforesaid discussion, it is held that 60% of the compensation amount shall be deposited by the insurer of the tempo i.e. the New India Assurance Company and 40% of the compensation amount shall be deposited by the owner of the bus, i.e. the General Manager, Punjab Roadways Ropar, within six weeks before the Registry.

36. On deposition, 75% of the compensation amount be deposited in the name of the claimant in the fixed deposit and 25% be released in her favour through payees' cheque account.

37. Accordingly, the impugned award is modified, as indicated above and the appeal is disposed of.

38. Send down the record after placing a copy of this judgment on the file.

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

Ranjodh Singh ...Appellant
Versus
State of Himachal Pradesh ...Respondent

Cr. Appeal No. 274/2011
Reserved on: 29.4.2015
Decided on: 1.5.2015

Indian Evidence Act, 1872- Section 3- Evidence of the witnesses cannot be discarded on the ground of relationship. (Para-31 and 32)

Indian Penal Code, 1860- Sections 302 and 201- Accused told that deceased had not returned from Sujanpur- people got suspicious and conducted search of the house of the accused- blood stained bed-sheet, Chadar, Dupatta and a blanket were recovered from an almirah in the house- matter was reported to the police – inquiry was made from the accused – he confessed to the killing of the deceased- accused made a disclosure statement that he had killed his wife and had concealed her body in a septic tank - deceased was recovered from septic tank but she was breathing- she succumbed to her injuries subsequently- a danda was recovered on the basis of disclosure statement made by the accused- blood stained clothes were also recovered from the house of the accused- blood was detected on the shirt and Salwar of the deceased- held, that chain of circumstances were complete and the accused was rightly convicted by the Court. (Para-28 to 30)

Cases referred:

Babu Lal and others v. State of Madhya Pradesh AIR 2004 SC 846
Vinay Kumar Rai and another v. State of Bihar (2008) 12 SCC 202
Israr v. State of U.P. AIR 2005 SC 249

For the Appellant : Mr. T.S. Chauhan, Advocate.
For the Respondent : Mr. P.M. Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against judgment dated 7.7.2011 rendered by learned Sessions Judge, Hamirpur, Himachal Pradesh in Sessions Trial No. 28 of 2010, whereby appellant-accused (herein after referred to as 'accused'), who was charged with and tried for offence under Sections 302 and 201 of Indian Penal Code, has been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs.20,000/- for offence under Section 302 IPC, and in default of payment of fine to further undergo imprisonment for six months, and under Section 201 IPC, he has been sentenced to rigorous

imprisonment for three years and to pay a fine of Rs.20,000/-, and in default of payment of fine, to further undergo imprisonment for six months.

2. Case of the prosecution, in a nutshell, is that on 21.7.2010, at about 10.00 pm, accused called Pawna Devi alias Pano Devi on telephone whether Raj Kumari (deceased) had come to their house or not and Pano Devi replied in negative. Thereafter, Pano Devi asked her brother-in-law, Roshan Lal on telephone as to whether Raj Kumari had come to his house or not and Roshan Lal also replied in negative. Pano Devi further told Roshan Lal that accused Ranjodh Singh was asking about Raj Kumari as she had not returned home from Sujanpur. On 22.7.2010 at about 8.30 AM, Roshan Lal, Desh Raj, Praveen Kumar, Pawna Devi alias Pano Devi, Maya Devi, Nirmala Devi and Naseeb Devi went to the house of the accused in order to know whereabouts of Raj Kumari. After reaching at his house, Roshan Lal inquired from accused about Raj Kumari and he told them that Raj Kumari did not return home since the previous day from Sujanpur. Roshan Lal was not satisfied with the reply of the accused. They got suspicious and started searching the house. They recovered blood stained bed-sheet, Chadar, Dupatta and a blanket from an almirah in the house. After recovery of blood stained clothes, they became more suspicious. Desh Raj went to the police station, Sujanpur, where he gave application, Ext. PW.2/A. SI/SHO, Ramesh Chand, alongwith other police officials went to the house of accused. The police and Roshan Lal again asked the accused about the whereabouts of Raj Kumari and accused confessed that after killing Raj Kumari, with a Danda on the previous night, he wrapped the dead body in a gunny bag and threw the same in Beas river. Thereafter, SHO Ramesh Chand recorded statement of Roshan Lal under Section 154 CrPC Ext. PW1/A. Consequently, FIR was registered under Sections 302 and 201 IPC. The accused while in police custody made disclosure statement that he had concealed his shirt and Pyjama in a heap of bricks in the verandah. He got recovered blood stained shirt and Pyjama from the heap of bricks. He also made disclosure statement that he had concealed the dead body of Raj Kumari in septic tank. Accused led police party to the septic tank. Raj Kumari was recovered from the septic tank. She was alive at that time. She was sent by the IO to Community Health Centre Sujanpur for medical treatment. Medical Officer referred Raj Kumari to Dr. RP Medical College, Tanda and she was further referred to PGI. On 24.7.2010, accused made disclosure statement about Danda (handle of axe). Thereafter he got recovered the Danda. Raj Kumari died on 25.7.2010. Investigation was completed. Challan was put up after completing all the codal formalities. Accused was convicted and sentence as noticed herein above. Hence this appeal.

3. Prosecution has examined as many as 24 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence and examined two witnesses in his defence.

4. Mr. T.S. Chauhan, Advocate has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. P.M. Negi, Deputy Advocate General has supported the judgment of trial court dated 7.7.2011.

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

7. PW-1 Roshan Lal testified that on 21.7.2010 at about 10.15 pm, Pano Devi, his sister in law, informed on telephone that whether her sister Raj Kumari had come to

his house or not. He told her that she did not come to his house. Pano Devi told that accused was enquiring about her. On 22.7.2010, he contacted accused on telephone. He inquired if Raj Kumari had returned to the matrimonial house or not. He told that she has not returned. He alongwith his wife Nirmala Kumari, Kashmiri Devi, Pano Devi, Maya Devi, Parveen Kumar and Desh Raj as well as his mother left for the house of the accused. They inquired about Raj Kumari. However, accused was not giving satisfactory reply. They got suspicious. They started searching the house. They noticed mobile and Chappal of Raj Kumari in the house. They became more suspicious. When they opened the almirah, blood stained clothes fell down on the floor. Accused told that during previous night he gave beatings to Raj Kumari for coming late and killed her by giving Danda blows. Thereafter he wrapped the body of deceased in a gunny bag and threw in the Beas river. He deputed Desh Raj to report the matter to the Pradhan. He sent Desh Raj to the police station. Police recorded his statement vide Ext. PW1/A. Blood stained bedsheet, Dupatta, one blanket in the shape of Galaf, were taken into possession vide memo Ext. PW1/B. He identified the Galaf Ext. P2, Chadar Ext. P3, Duptta Ext. P4 and blanket Ext. P5. Accused was interrogated by the police. Accused told that he has concealed his clothes underneath the heap of bricks. These were recovered vide Ext.PW1/E. He identified Shirt Ext. P7 and Trousers Ext. P8. Inquest reports Ext. PW1/F and PW1/G were prepared by the police. He denied the suggestion in his cross-examination that Raj Kumari was suffering from mental ailment.

8. PW-2 Desh Raj is brother of the deceased. According to him, Pano Devi telephoned Roshan Lal, PW-1 informing that Raj Kumari was not at home. He, Roshan Lal and Naseeb Devi, his mother, Nirmala Devi, Parveen Kumar and Kashmiri Devi went to the house of accused on 22.7.2010. They asked the accused about Raj Kumari. When police came to the house of accused, accused made confession about the murder of Raj Kumari. He was declared hostile and cross-examined by the learned Public Prosecutor. Learned trial Court noticed his demeanour. He was laughing while answering the questions. Court observed that he appeared to have consumed liquor.

9. PW-3 Parveen Kumar deposed that he had also accompanied his family members. They asked the accused about Raj Kumari. He replied that she has not returned home from Sujanpur. His Bhabhi Maya Devi opened the almirah in the room and blood stained clothes fell down from the almirah on the floor. Accused admitted that he had killed Raj Kumari and thrown body of Raj Kumari in a jute bag in Beas river. Desh Raj went to the police station.

10. PW-4 Seema Devi deposed that she accompanied Desh Raj to the police Station. Desh Raj made report Ext. PW-2/A. They returned to the spot followed by police. She went inside the room alongwith police officials and almirah was opened. Blood stained clothes were found in the same. She was also declared hostile but in her cross-examination by the learned public prosecutor, she has admitted that when accused was questioned, he told that on previous night, he had thrown body of Raj Kumari after killing her, in the river. Thereafter, she alongwith Desh Raj, had gone to the police station. Body of Raj Kumari was taken out of the septic tank by calling sweepers. She identified Danda, Ext. P9.

11. PW-5 Pawna Devi deposed that accused telephoned at their house in the evening. Call was attended by her. Accused inquired about Raj Kumari. She telephoned her brother-in-law Roshan Lal about the telephone call made by accused. She telephoned the accused and told that Raj Kumari was not at home and whether she has returned to the

house by that time or not. In the morning, all the family members went to the house of accused. She denied the suggestion that Raj Kumari was suffering from giddiness or palsy.

12. PW-6 Maya Devi also deposed that she accompanied her relations to the house of the accused. When she opened almirah in the room, some clothes i.e. bed sheet, blanket, Dupatta etc. fell down from upper most shelf of the Almirah. She noticed blood on the same. She told her Jeth Roshan Lal and Nirmala Devi about it. They advised to keep the clothes as such. Then they came out in the courtyard. Roshan Lal, PW-1, asked accused about the blood on the clothes. Accused admitted that he had killed Raj Kumari and thrown the body in a gunny bag in the Beas river.

13. PW-7 Nirmala Devi deposed that on 21.7.2010, during night, Pawna alias Pano made a telephone call to her inquiring about the whereabouts of Raj Kumari. She also told her that accused was inquiring about her. She informed Roshan lal about it. In the next morning, they telephoned the accused and he told that Raj Kumari was not traceable. They all went to the house of accused. Accused was asked by them but he replied that Raj Kumari had not come home. They started searching the house. They found her mobile phone and chappal in the house. Maya Devi opened the almirah in the room in her presence. Some clothes i.e. blanket, Chuni and bed sheet fell down from almirah. They were stained with blood. Accused was asked about it. He told that he had killed his wife for not returning home on time. Desh Raj went to the police station.

14. PW-8 Onkar Chand deposed that on 21.7.2010, his father telephoned him at about 10.00 pm and informed that his mother had gone to Sujanpur in the morning on that day but had not returned. In the morning on 22.7.2010, he again telephoned the house of his maternal uncle. He suspected that there might have been some quarrel between his parents and that some untoward incident might have taken place. Accused used to quarrel with his wife. He called his father and noticed that he was under some fear and told him by that time that he had no information about mother. Then he came back from Chandigarh to his house and reached about 1.00 pm. He went to the septic tank site. Body of his mother was already lying outside the septic tank. Mother was moved to the hospital. She was shifted to Tanda and thereafter to PGI, where she died. After post-mortem, dead body was brought back for cremation.

15. PW-9 Surinder Kumar deposed that accused made disclosure statement Ext. PW-9/A that he has kept one Danda /stick concealed near his kitchen.

16. PW-10 Manoj Kumar deposed that on 22.7.2010, he received a telephonic call from the police station Sujanpur that a dead body was to be retrieved. He arranged for three sweepers. Body was recovered vide Ext. PW-1/A. He signed the same.

17. PW-11 Ranjit Singh deposed that on 22.7.2010, accused was in police custody. At about 8/8.30 pm, accused made statement and told the IO Ramesh Chand that he had concealed the body of his wife in his septic tank after killing her and he could get the same recovered. Statement was recorded vide Ext. PW11/A.

18. PW-12 Mani Ram deposed that accused led them to his septic tank and lifted the lid of the septic tank and showed body of his wife. Body was noticed in the torch light. Stair case was arranged. He went inside the septic tank. Body was lying in the septic tank. There was knee deep water in the septic tank.

19. PW-13 Dr. Kunal Kaushal has examined the deceased Raj Kumari on 22.7.2010. According to him, injuries could be inflicted with Danda, Ext. P9.

20. PW-14, PW-15, PW-16 and PW-17 are formal in nature.

21. PW-18 Raghujeet Singh submitted that the case property was deposited with him.

22. PW-19 Ravinder Nath deposed that he took parcel to the CHC Sujanpur and produced the same before the Medical Officer. He opened one Beul Danda without axe and gave his opinion Ext. PW13/C.

23. PW-20 Asha Kumari deposed that accused has called her and asked her to milk the buffalo. She went to the house of accused. Sandla Devi tried to milk the buffalo but milk could not be collected. Raj Kumari was not present in the house.

24. PW-21 Sunita is daughter of deceased. She was residing with her maternal uncle for the last two months. She had gone to the house of her Bua at village Plahi 12/13 days prior to the incident. On 21.7.2010, accused telephoned the son of her Bua that her mother was not at home. She has gone somewhere. She was told about it next morning by her cousin Sanjeev Kumar. She alongwith her cousin sister Amita came to her house. They reached at 2.00 pm. Police had already come. She asked her father about her mother. He told her that he had killed her and thrown body in the river Beas.

25. PW-22 Dr. S.P. Mandal has conducted post mortem examination on 26.7.2010. According to him, cause of death was Oedema of brain due to head injuries. These injuries were ante mortem and caused by blunt weapon. Post-mortem report is Ext.PW-22/B.

26. PW-23 ASI Shamsher Singh deposed that at the instance of accused, body of Raj Kumari was recovered from septic tank with the help of sweepers. She was alive. She was taken to Sujanpur Hospital. She was referred to Dr. RP Medical College Tanda. On 24.7.2010, accused made disclosure statement in the presence of Manoj Kumar and Surinder Kumar, vide Ext. PW-9/A. One handle of axe, Ext. P9 was recovered. Site map was prepared. Raj Kumari was referred to PGI Chandigarh. He went to PGI and got post-mortem conducted.

27. PW-24 SI Ramesh Chand deposed that he alongwith ASI Shamsher Singh and HC Pawan Kumar went to village Tihra and inspected the house. He found blood stained clothes in one room. He recorded statement Ext. PW-1/A of Roshan Lal under Section 154 of the Code of Criminal Procedure. He also took photographs. He prepared spot map, Ext. PW24/A. Shirt Ext. P7, Trousers Ext. P8 were recovered. Accused made disclosure statement Ext. PW11/A that after killing his wife he had put dead body in septic tank and body was recovered vide Ext. PW-10/A. Body of Raj Kumari was taken out of septic tank. Sweepers told that Raj Kumari was alive when she was brought outside the septic tank. He directed ASI Shamsher Singh to shift Raj Kumari to the hospital at Sujanpur.

28. Accused has made extra-judicial confession before PW-1 Roshan Lal that he has killed his wife by giving Danda blows and after wrapping body of Raj Kumari in a gunny bag had thrown in Beas river. According to PW-2 Desh Raj, when police came to the house of accused, accused made confession about murder of Raj Kumari. Though he was declared hostile, but his demeanour was noticed by the trial Judge. PW-8 Parveen Kumar is the brother of deceased. According to him also, accused had admitted that he has killed Raj

Kumari and thrown body in Beas river. PW-4 Seema Devi though declared hostile, but in her cross-examination by the Public Prosecutor, has admitted that when accused was questioned, he told that on previous night he had thrown body of Raj Kumari after killing her, in the river. PW-6 Maya Devi deposed that PW-1 Roshan Lal asked accused about blood on clothes, then accused admitted that he has killed Raj Kumari and thrown body in a gunny bag in Beas river. PW-7 deposed that when accused was asked about blood on the clothes, he told that he has killed his wife and thrown body in a gunny bag in the river. PW-8 Onkar Chand, son of accused asked his father about the whereabouts of his mother, but he could not reply. When police was interrogating the accused, he told the police that he had killed his mother and thrown body in the river. PW-20 Asha Kumari has not seen Raj Kumari when she was asked to milk buffalo of the accused. PW-21 Sunita asked about the whereabouts of mother, then accused told her that he has killed her and thrown body in Beas river.

29. Accused has earlier told the witnesses, as noticed herein above, that he has killed his wife and thrown body in the river but he made disclosure statement vide Ext. PW-11/A to the effect that he has killed his wife and concealed the body in septic tank. Body was retrieved from the septic tank by PW-12 Mani Ram. Raj Kumari was breathing. She was sent to CHC Sujanpur. Medical Officer at Sujanpur referred her to Dr. RP Medical College Tanda and Medical Officer at Tanda further referred her to PGI Chandigarh. Danda was recovered on the basis of disclosure statement made by accused vide Ext. PW-9/A. PW-13 Dr. Kunal Kaushal has opined that injuries could be inflicted by Danda, Ext. P9. Raj Kumari has died due to ante mortem injuries inflicted with a blunt weapon as per statement of Dr. S.P. Mandal, PW-22.

30. Mr. T.S. Chauhan has argued that all the witnesses are close relations of the deceased and their statements could not be believed. However, it is settled law that statements of witnesses, who are related to the victim, can be relied upon if they inspire confidence. Statements made by the close relations of deceased are natural and believable. PW-8, son of accused and PW-21, daughter of accused, have also deposed against their father. It has come in the statement of PW-8 Onkar Chand, that his father used to give beatings to his mother. It has also come on record that the deceased had gone to Sujanpur and had come late in the evening. Accused has given beatings to the deceased with Danda and presuming her to be dead had dumped her in the septic tank. It was only a coincidence that she did not die immediately but died later on at PGI. Prosecution has recovered blood stained clothes from the house of accused (Ext. P2 to Ext P5). Shirt (Ext. P7) and Pyjama (Ext. P8) were also recovered. Blood of group 'B' was detected on quilt cover, bed sheet, blanket, Dupatta and shirt of accused. Blood was also detected as per Ext. PW24/F on Pyjama and stick/Danda. Blood was also detected on the shirt and Salwar of the deceased. Mr. Chauhan has vehemently argued that the prosecution has failed to attribute any motive against the accused and in case of circumstantial evidence, motive plays a very important role. It is settled law that when chain of events is complete, as is in the present case, motive is not that important. Prosecution has fully proved the case against the accused.

31. Their Lordships of the Hon'ble Supreme Court in **Babu Lal and others v. State of Madhya Pradesh** reported in AIR 2004 SC 846 have held that credible evidence of witnesses could not be discarded on the ground of relationship. Their lordships have held as under:

> **"[8] The materials on record clearly established that the deceased was in mentally fit condition, though battered in the physical frame. The High**

Court has rightly held that presence of P.Ws. 1 and 2 did not result in any presumption of tutoring, when the FIR was recorded. Merely because there was a thumb impression on the FIR, and not the signature as stated by P.W. 1, that does not falsify the prosecution version. The same has been clarified by the High Court. It has to be noted that P.W. 16, who had scribed the FIR, stated that the contents were read over to the deceased, who had thereafter put his thumb impression. In fact the defence itself has suggested to P.W. 1 during cross-examination that the thumb impression was taken on the paper first and thereafter the writings were inserted. In other words, there was acceptance of the fact that the thumb impression was there but writings were done later which have been denied by P.W. 1. We do not find any reason to discard the dying declaration only on this ground. The High Court has also found in analysing the evidence that the plea relating to anti-dating or anti-timing of the FIR is a myth. Though some of the accused persons have been acquitted by the trial Court, the High Court has carefully analysed the evidence and have sifted the grain from the chaff and disengaged truth from falsehood. Merely because some persons have not been named in the FIR and have given the benefit of doubt, that cannot be a reason for discarding the dying declaration or the evidence of the witnesses."

32. Their lordships of the Hon'ble Supreme Court in **Vinay Kumar Rai and another v. State of Bihar** reported in (2008) 12 SCC 202 have held that merely because eye-witnesses are family members, their evidence can not be discarded. Their lordships have held as under:

"11. Merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. We shall also deal with the contention regarding interestedness of the witnesses for furthering prosecution version.

"5. ....Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

[6] In Dalip Singh and Ors. v. The State of Punjab, (AIR 1953 SC 364) it has been laid down as under :-

"26. A witness is normally to be considered independent unless he or she springs from sources which are l ikely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is ofter a sure guarantee

of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

[7] The above decision has been followed in Guli Chand and Ors. v. State of Rajasthan (1974 (3) SCC 698) in which Vadivelu Thevar v. State of Madras (AIR 1957 SC 614) was also relied upon.

[8] We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh's case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed :

"25. We are unable to agree with the learned Judges of the a High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in - 'Rameshwar v. State of Rajasthan', (AIR 1952 SC 54 at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

[9] Again in Masalti and Ors. v. State of U. P., (AIR 1965 SC 202) this Court observed :

"14........But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses ....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

To the same effect is the decisions in State of Punjab v. Jagir Singh, (AIR 1973 SC 2407); Lehna v. State of Haryana, (2002 (3) SCC 76) and Gangadhar Behera and Ors. v. State of Orissa, (2002 (8) SCC 381). The above position was also highlighted in Babulal Bhagwan Khandare and Anr. v. State of Maharashtra, (2005 (10) SCC 404) and in Salim Sahab v. State of M. P., (2007 (1) SCC 699)."

33. Their lordships of the Hon'ble Supreme Court in **Israr v. State of U.P.** reported in AIR 2005 SC 249 have held that relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Their lordships have held as under:

> **"12. We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible."**

34. Accordingly, there is no merit in the present appeal and the same is dismissed, so also the pending applications, if any.

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

State of Himachal Pradesh ...Appellant.
Versus
Mizuta Natsuhiro ...Respondent.

Cr.MP(M) No. 308 of 2015.
Date of decision: 1.5.2015

Code of Criminal Procedure, 1973- Section 378- Accused was found sitting in the Volvo Bus on seat No. 30- he got perplexed on seeing the police- conductor disclosed that luggage of the accused was inside the dickey and was marked with chalk - one bag bearing Mark seat No. 30 was taken out and during the search 190 grams of charas was recovered – accused was acquitted by the Trial Court- an application was filed seeking leave to appeal against the order passed by trial Court- independent witnesses had turned hostile- merely because, prosecution witnesses corroborated each other and link evidence was established is not sufficient when the bag was not produced before the Court- Trial Court had appreciated the facts properly- hence, leave to appeal refused. (Para- 7 to 11)

For the petitioner: Mr. M.A.Khan, Additional Advocate General with Mr. Anup Rattan, Additional Advocate General.

For the respondent: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

Through the instant Cr.M.P(M) the appellant has sought grant of leave to appeal against the impugned findings of acquittal rendered in favour of respondent/accused by the learned Special Judge-II (Additional Sessions Judge), Kullu, in Sessions Trial No. 49 of 2014 decided on 1.1.2015.

2. The facts necessary for rendering an adjudication on the Cr.MP(M) No. 308 of 2015 are that on the evening of 13.3.2014 at about 6.30 p.m when a police party headed by PW-9 HC Vinay Kumar and consisting of Head Constable Hitesh Kumar, HHG Jagdish Chand, driver of official vehicle No. HP-34-A-9984 was on Nakabandi duty at Temporary

Check Post Bajaura with Constable Mukesh Kumar, constable Naresh Kumar and Constable Vikram, then one Volvo Bus of Yak Bus Service bearing No. UP-83-T-1704 came from Manali side and was going to Delhi, was signaled to stop. Thereafter HC Vinay Kumar, HC Hitesh Kumar and Constable Naresh Kumar boarded the bus and started checking the bus and when they reached near Seat No. 30 the accused on seeing the police party got perplexed and on asking the accused he disclosed his name Mizuta Natsuhiro. The investigator asked the conductor about the luggage of the accused and the conductor disclosed that the luggage of the accused was inside the dickey of the bus where seat Nos. of the passengers have been marked with chalk. Thereafter, the investigator got the accused alighted from the bus and one bag with Mark seat No. 30 belonging to accused was taken out from the dickey of the bus by conductor of the bus and the bag as well as the accused were taken to temporary check post. Thereafter, investigator PW-9 Head Constable Vinay Kumar gave his personal search to the accused but nothing incriminating was recovered. Thereafter, the bag of the accused was checked by investigator and inside the bag one transparent polythene envelope was found in which two shoes of red coloured were kept and on checking the shoes, transparent envelopes were found which were containing black colour substance in pan cake and round shape and when the said black coloured substance was checked, it was found charas. The recovered charas was weighed with the help of an electronic scale and its weight was found 190 grams. Out of the recovered 190 grams charas, one sample of ten gram charas was taken and put in a cloth parcel and sealed with three seal of 'M'. Thereafter, investigating officer completed all the codal formalities.

3. After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court. The trial Court charged the accused for his having committed offence punishable under Section 20 of the NDPS ACt, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 10 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C. the accused was given an opportunity to adduce evidence in defence and he chose not to adduce any evidence in defence.

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

6. The State of H.P. is aggrieved by the judgement of acquittal, recorded by the learned trial Court. Shri M.A.Khan, ld. Additional Advocate General, has concertedly and vigorously contended that the findings of acquittal, recorded by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that leave to appeal be granted by this Court.

7. Admittedly, accused Mizuta Natsuhiro, as proved by ticket Ext.P-1 was occupying seat No. 30 and contraband was recovered from a rucksack kept in the dickey of the bus. The accused is sought to be connected with the ownership of the rucksack on the score of and on the strength of the rucksack wherefrom a polythene bag was retrieved wherein two shoes were found in which charas weighing 190 grams was recovered, bearing an inscription thereon compatible to the number of the seat occupied by the accused in the bus nomenclatured as Volvo Bus bearing No. UP-83-T-1704 bound from Kullu to Delhi. The prosecution has concerted to convey that the accused-respondent owned it, given the

analogity qua seat No. 30 occupied by the accused and the inscription borne on the rucksack wherefrom charas weighing 190 grams was allegedly recovered.

8. Even though the prosecution witnesses have deposed in tandem and in harmony qua each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, portraying proof of unbroken and unsevered links, in the entire chain of the circumstances, hence, it is argued that when the prosecution case stood established, it would be legally unwise for this Court to refuse to grant leave to appeal against the impugned findings of acquittal.

9. Besides, it is contended that when the testimonies of the official witnesses unravel the fact of their being bereft of any inter se and intra se contradictions hence, consequently when they too enjoy credibility they were undiscardable.

10. However, independent witnesses PW-8 and PW-10 turned hostile and omitted to lend support to the prosecution case. The mere fact of the prosecution witnesses having deposed in corroboration with each other besides in tandem qua each of the links of the prosecution case commencing from search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL, nonetheless the aforesaid proof lent by or existing in the deposition of the official witnesses qua each of the links in the prosecution case hence having come to be substantiated does not hold good for the prosecution nor does it prod an inference that the genesis of the prosecution version as such has come to be proved, especially the preponderant fact of recovery of charas weighing 190 grams having been effectuated from 'rucksack' found in the dickey of the bus though inscribed with a seat number analogous to the one demonstrated by ticket Ext.P-1 as held by the accused besides occupied by the latter when preeminently the rucksack remained not produced in Court. Non production of rucksack in Court, in its entirety belies the factum deposed by the prosecution witnesses that on its search and seizure by the Investigating Officer charas weighing 190 grams was recovered from the pair of shoes kept inside a polythene enclosed in the rucksack. The omission of production of rucksack in Court for reiteration reinforcibly gives impetus to the formidable conclusion that the entire edifice of the genesis of the prosecution story of charas having come to be recovered in the manner alleged by the prosecution gets shattered. Besides, as a necessary sequel, the findings of acquittal rendered by the learned trial Court in favour of accused respondent suffers from no infirmity, especially when there is also no evidence on record personifying the fact that inscription, if any, of seat No. 30 on the rucksack though analogous to the seat occupied by the accused was scribed by the accused or that hence the rucksack was owned by the accused as also when there is non-existence of any germane evidence on record personifying the fact that the two shoes wherefrom charas was recovered were owned by the accused.

11. In view of the above discussion, the learned trial Court is to be concluded to have appreciated the evidence in a mature and balanced manner and its findings, hence, do not necessitate interference. Therefore, the application for leave to appeal is dismissed being devoid of any merit and the findings rendered by the learned trial Court are affirmed and maintained.

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

United India Insurance Company Ltd. .....Appellant.
Versus
Madhvender Kuthleharia and others ...Respondents

FAO (MVA) No. 137 of 2009.
Date of decision: 1st May, 2015.

Motor Vehicle Act, 1988- Section 149- Insurer pleaded that driver did not have a valid and effective driving licence at the time of accident- held, that it was for the insurer to plead and prove that owner had committed willful breach of the terms and conditions of the policy- insurer had not led any evidence to prove the breach of the terms and conditions of the policy and it was rightly held liable. (Para-11 to 14)

Cases referred:

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

For the appellant:	Mr. Rajiv Jiwan, Advocate.
For the respondents:	Mr. R.L. Chaudhary, Advocate, for respondent No.1.
	Mr. Suneet Goel, Advocate, for respondent No.2.
	Nemo for respondent No.3.

The following judgment of the court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Insurer has questioned the judgment and award dated 29.11.2008, made by the Motor Accident Claims Tribunal-cum- Presiding Officer, Fast Track Court, Mandi, H.P., in Claim Petition. Nos. 126/02, 243/2005 titled *Madhvender Kuthleharia versus Kusum Lata Sood and others,* whereby compensation to the tune of Rs.5,37,000/- with 7.5% interest was awarded in favour of the claimant and insurer/appellant herein came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. Claimant/injured, owner Kusum Lata Sood and driver Amarnath have not questioned the impugned award on any ground, thus, it has attained finality so far it relates to them.

3. The insurer-United India Insurance Company has questioned the impugned award on the ground that the driver was not having a valid and effective driving licence at the time of accident. Thus, the only question to be determined in this appeal is whether the owner has committed any willful breach?

4. The claimant filed a claim petition before the Tribunal for the grant of compensation to the tune of Rs.3 lacs, as per break-ups given in the claim petition, on the ground that on 20.7.2002, he was going on his scooter towards Mandi-Pandoh, on his extreme left side of the road and when he reached at Jagar, near Pandoh, one private bus bearing registration No. HP-34-A-0925 came from Kullu side towards Mandi, hit the scooter and he sustained injuries, rendering him permanently disabled.

5. The owner, driver and insurer have filed replies to the claim petition and resisted the claim petition.

6. The Tribunal, after examining the pleadings and the documents of the parties, framed following issues:

(i) *Whether the claimant sustained injuries in the Motor Vehicle Accident caused by the Rash and Negligent driving of the respondent No.2 as alleged? OPP*

(ii) If the above issue is proved in the affirmative the quantum of compensation, the claimant is entitled and from whom? OPP

(iii) Whether the breach of the terms and conditions of the Insurance Policy was occasioned or not? OPR3.

(iv) Relief.

7. The claimant examined Dr. D.K. Arora as PW1, Prithvi Raj PW2, Pawan Kumar PW3, Narender Kumar PW4 and claimant himself stepped in to the wetness-box as PW5.

8. The owner has examined Vidya Sagar as RW1 and Amar Nath driver himself stepped into the witness-box as RW2.

9. The insurer has not led any evidence. Thus, the evidence led by the claimant, owner and driver has remained unrebutted.

10. In this appeal, the findings recorded on Issues No. 1 and 2 are not in dispute, thus upheld.

11. **Issue No.3.** It was for the insurer to discharge the onus, but it has failed to do so. However, I have gone through the statements of RW1 and RW2. The Tribunal has discussed the said statements in para 18 of the impugned award, is well reasoned, needs no interference.

12. It was for the insurer to plead and prove that the owner has committed any willful breach in terms of Sections 147 and 149 of the Motor Vehicles Act read with **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531**. It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. ....

(i) ....

(ii) ....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the

insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v)……………………

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

13. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a

> *fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."*

14. Applying the test, the Tribunal has rightly recorded the findings and saddled the insurer with the liability and are upheld.

15. Viewed thus, the impugned award is upheld and appeal is dismissed.

16. Registry is directed to release the amount in favour of the claimants strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

17. Send down the record, forthwith, after placing a copy of this judgment.

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

Cr. Appeal No. 72 of 2012 with Cr. Appeal Nos. 46 and 126 of 2012.
Reserved on: April 30, 2015.
Decided on: May 02, 2015.

1. **Cr. Appeal No. 72 of 2012**
   Azam ……Appellant.
   Versus
   State of H.P. …….Respondent.
2. **Cr. Appeal No. 46 of 2012**
   Shamshudin ……Appellant.
   Versus
   State of H.P. …….Respondent.
3. **Cr. Appeal No. 126 of 2012**
   Sheharudin ……Appellant.
   Versus
   State of H.P. …….Respondent.

Indian Penal Code, 1860- Section 395- PW-2 had kept boxes of nose pins and other ornaments in her home- 4-5 persons entered in the room armed with pistols and darat- they searched the almirah and took away the ornaments- mobile phone and chains were also taken away- prosecution witnesses stated that door was opened after some time- it was not believable that door could be opened from inside when it was bolted from outside- in case, door was opened by pushing it, latch would have broken but police had not seized the broken latch- further, prosecution version that accused entered the house when PW-3 used the toilet, cannot be believed- presence of witnesses to the disclosure statement was

doubtful- local police was not informed about the recovery nor independent witness was associated at the time of seizure of the mobile phone- independent witnesses ought to have been joined at the time of recovery -further recovery was made from an open place which was not believable - DNA profile matched with one accused but the Medical Officer did not depose that sample was preserved by her- Medical Officer, CH, Sundernagar was not examined to prove preservation of blood sample- it was not believable that door of gold smith could be opened by pushing it inside- held, that these circumstances create doubt regarding prosecution version- accused acquitted. (Para-25 to 37)

For the appellant: Mr. Naresh Kumar Tomar, Advocate for appellant in Cr. Appeal No. 72 of 2012.
Mr. N.K.Thakur, Sr. Advocate, with Mr. Inder Sharma, Advocate, for appellant in Cr. Appeal No. 46 of 2012.
Mr. Ajay Sharma, Advocate, for appellant in Cr. Appeal No. 126 of 2012.
For the respondent: Mr. M.A.Khan, Addl. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since common questions of law and facts are involved in these appeals, all these appeals were taken up together for hearing.

2. These appeals are directed against the common judgment dated 23.12.2011/29.12.2011, rendered by the learned Addl. Sessions Judge, Mandi, H.P., in Sessions Trial No. 10 of 2010, whereby the appellants-accused (hereinafter referred to as the "accused", namely, Azam, Shamshudin and Sheharudin), who were charged with and tried for offence punishable under Section 395 IPC, have been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years each and to pay fine of Rs. 10,000/- each and in default of payment of fine, they were further ordered to undergo simple imprisonment for six months each. Accused Kasim was acquitted by the learned trial Court for offence under Section 395 IPC.

3. The case of the prosecution, in a nut shell, is that PW-1 Shyam Lal is running shop of Goldsmith at Sundernagar, Bhojpur. He had gone to Shimla on 8.9.2009. His wife Sushma, PW-2 and his servant Raju were present in the shop. Sushma brought boxes of nose pins containing five trays and other ornaments to her home from the shop on 8.9.2009. They were kept by her in the almirah. Shyam Lal and his family members were sleeping in the house on 9.9.2009. Somebody knocked at the door at 1:30 AM. Sushma opened the door. Krishna Devi PW-3, mother of Shyam Lal was standing on the door. 4-5 persons were accompanying her. As soon as Sushma opened the door, one person entered inside the room. He was armed with pistol. He put the pistol on the head of Shyam Lal. Other persons entered inside the room. They were also armed with the pistols. The fourth person was armed with the darat. They searched the almirah. Other family members also arrived in the room. They were made to sit in the room. Tilak Raj, the younger brother of Shyam Lal and his wife also arrived after sometime. They were also threatened. Bag containing various ornaments was taken out of the almirah. The chains of Sushma and Krishna were snatched. Two mobile phones were also taken away. The accused left the

room with all the articles. The matter was reported to the police and entry in the daily diary Ext. PW-10/A was recorded. Statement of the complainant Shyam Lal Ext. PW-1/A was recorded and sent to the Police Station. FIR Ext. PW-11/A was registered. Empty wrappers of Shikhar Gutka make Ext. P-4 and P-5, and one bottle of Godfather beer were taken into possession vide seizure memo Ext. PW-1/B. It was found that Gutka was spitted on the mat lying on the floor. Piece of mat was cut and seized vide memo Ext. PW-1/C alongwith the lock and key. These were sealed in separate parcel with seal A. Seal impression was taken on separate piece of cloth. Site plan Ext. PW-27/D was prepared. Shyam Lal produced ledger book, bill and drat, which were seized vide seizure memo Ext. PW-1/F. Accused Shehruddin was arrested on 15.11.2009. He made disclosure statement Ext. PW-6/A on 18.11.2009 that he had concealed mobile phone in the house of his sister, which he could got recovered. He got the phone Ext. P-2 recovered from an attaché kept inside the room. The mobile phone was sealed with seal 'V' and seized vide seizure memo Ext. PW-18/B. Site plan of the place of recovery Ext. PW-27/E was prepared. This mobile was sold by Vijay Kumar to Shyam Lal vide bill No. PW-26/A. Accused Shehruddin told during interrogation that Raju and Nuru met him and told him to go to Himachal and to return after committing dacoity. He, Raju, Nuru, Afzal, Islam and Azam came to Himachal in Scorpio bearing regn. No. DL-3CY-8786, being driven by Shamsuddin. Raju stayed at Kiratpur. Shehruddin, Nuru, Afzal, Islam and Azam went to the house of Mehfooz. Mehfooz brought two pistols. One pistol was with Nuru. Mehfooz handed over one pistol to Afzal and one to Islam. The vehicle was stopped at Kangu from where Nuru, Afzal, Islam, Azam and Shehrudin went on foot to the house of the complainant. Shamsuddin and Mahfoz waited in the vehicle. All of them went to Delhi after committing theft. The articles stolen during theft were distributed in Delhi. The mobile phone fell in the share of Shehrudin, which was sold by him to Kasam. Kasam returned the phone because money transaction could not be completed. Nuru, Azam and Islam had sold jewellery to Mittal Jewelers. The police seized Scorpio bearing regn. No. DL-3CY-8786 on 23.11.2009 from Ganda Nala Hajuri Khas. Visiting cards were found inside the vehicle, which were seized vide seizure memo Ext. PW-8/C. Accused Azam, Shamsuddin and Islam were arrested on 26.11.2009. Mohammad Azam made a statement on 8.12.2009 under Section 27 of the Indian Evidence Act that he could get gold recovered from Shamli Bazaar. Azam showed shop of Mittal Jewellers in Bara Bazaar, Shamli. Memo Ext. PW-24/B was prepared. Shamsudin made a statement under Section 27 of the Indian Evidence Act that he could get the gold recovered from his house, which was kept by him outside his house in a tarpaulin. Memo Ext. PW-5/B was prepared in this behalf. He led the police to his house from where one polythene bag was recovered which was opened and it was found to be containing gold nose pins. Nose pins were taken to shop No. 224 and Madan Lal owner of the shop separated artificial gold and real gold. It weighed 20.760 grams. Artificial gold and gems weighed 5.150 grams. These were seized vide seizure memo Ext. PW-24/D. The site plan was also prepared. Dr. Sanjay Pathak collected saliva samples. He also conducted their medical examination and issued MLCs Ext. PW-14/B to Ext. PW-14/E. Salvia sample and piece of mat picked up from the spot were sent to FSL, Junga for analysis vide letter Ext. PW-22/A. An application Ext. PW-15/A was moved for taking blood Sample. Dr. Babita Chaursia, PW-15 supervised taking samples. The blood samples were handed over to the police. These were sent to FSL for analysis. Report Ext. PW-20/A was issued by the FSL. Gold was also recovered from PW-23 Manoj Kumar who was running shop at Bara Bazaar, Shamli. The statements of the witnesses were recorded. 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 29 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution case. According to them, they were falsely implicated. The learned trial Court convicted accused Azam, Shehrudin and Shamsudin, as noticed hereinabove. Accused Kasim was acquitted. Hence, these appeals on behalf of the accused persons.

5. M/S. N.K.Thakur, Sr. Advocate with Mr. Inder Sharma, Ajay Sharma and Naresh Kumar Tomar, Advocates, appearing on behalf of the respective accused, have vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, learned Addl. AG, for the State has supported the judgment of the learned trial Court dated 23/29.12.2011.

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

7. PW-1 Shyam Lal, testified that he was running a shop of goldsmith at Sundernagar. His wife use to work with him in the shop. He had gone to Shimla on 8.9.2009. His wife and his servant Raju were present in the shop. He returned from Shimla in the evening. He and his wife slept in their room. Children slept in their room. There was a knock on his door at about 1:00 AM. He heard the muffled voice of his mother. His wife switched on the light and opened the door. As soon as she opened the door somebody pushed her. There were 2-3 persons on the door. One of the persons put the pistol on the head of his wife. She was taken to a side. He was behind her. Another person slapped him and put the pistol on his head and took him to a side. His mother was caught by two persons. A pistol was put on her head. She was also brought inside the room. They were made to sit inside the room with pistol pointing towards their heads. The children also came inside the room on hearing noise. They were also made to sit alongwith them. There were four persons who came inside their room. One was standing on the door. The wife of his younger brother Mamta also came to their room on hearing the noise. One of the person snatched her chain and brought her inside the room. She was also made to sit with them. His younger brother Tilak Raj came after her. He was also dragged inside the room. He was slapped twice-thrice. One of the persons was armed with darat. Two of the persons covered them and two went to the Almirah. One hit the lock of almirah with darat and broke it. The other started searching the almirah and the room. There were two bags inside the almirah. One was bigger and the other was smaller. The small bag was having cash and bigger was having gold. He put the smaller bag in the bigger bag. They had kept two mobiles on the TV set. They picked up the mobile phones, took away the bags and all of them came out of the room. They bolted the door from outside. He caught the door and tried to open it. It opened after some time. They went out and started shouting. They could not find out as to where those persons went. The people came after some time because their houses were at some distance. He telephoned the police. The police came and inspected the spot. His statement Ext. PW-1/A was recorded. The police also took the photographs. The police cut the piece of the mat where they had spitted. It was sealed in a parcel. The lock of the Almirah was also seized by the police vide memo Ext. PW-1/C. The police also seized the accounts book Ext. PW-1/D, bill Ext. PW-1/E and one darat vide seizure memo Ext. PW-1/F. Vijay and Mohan Lal had put their signatures on this memo. He identified darat Ext. P-1. The identification of the accused was got conducted in the month of December in Sub Jail, Mandi. He identified three persons. The police took him to Shamli. The gold was melted and converted into a piece. The police also recovered 20 grams of nose pins. This was identified by Vijay Kumar and memo Ext. PW-1/G was prepared. It was seized vide

memo Ext. PW-1/H. In his cross-examination, he deposed that he told the police that he had heard muffled voice. His mother was caught from arms by two persons. 2-3 slaps were given to his brother. One person hit the lock with the blunt side of darat. He had kept two mobiles on TV set and had pulled the door and it opened. (Confronted with Ext. PW-1/A where it is not so recorded).

8. PW-2 Sushma Devi also supported the version of PW-1 Shyam Lal. According to her, all the accused went outside the room and bolted from outside. Her husband pulled the door from inside. The door opened after sometime but the accused had left by that time.

9. PW-3 Krishna Devi, mother of PW-1 Shyam Lal also deposed the manner in which the accused entered the house. According to her, she was going to toilet at mid night. One person was standing on the door. She thought her younger son was standing. She caught him by the arm and inquired Bablu where you were going. He put his hand on her mouth and pointed a pistol on her head. He threatened to kill her in case she would shout. Two persons caught her arms. They told her that they were police officials. They made inquiry about the person who runs a shop at Sundernagar. She replied that he is her son and he was sleeping in the room. They took her inside the room. She was not allowed to make any noise. Her daughter-in-law, Sushma opened the door. They pushed her inside the room. They pointed pistol at her head and also on the head of her daughter-in-law. The person with darat and empty handed started searching the room. The lock was broken with the blunt side of the darat. The accused went away with the bag and the mobiles. They bolted the door from outside the room. Shyam Lal pulled at the door and the door opened after some time.

10. PW-4 Vijay Kumar proved cashbook Ext. PW-1/D, bill Ext. PW-1/E. According to him, one darat Ext. P-1 was seized by the police vide memo Ext. PW-1/F on 10.9.2009. One nugget of gold was produced by Manoj alias Boby owner of Mittal Jewellers. He examined it. It weighed 250 gms. He had issued certificate Ext. PW-1/G. In his cross-examination, he deposed that he did not know Manoj Kumar. The police had taken them to the shop of Manoj Kumar. The police told them that they knew about the shop of Manoj Kumar and they had to accompany the police to his shop. The police had telephoned them and told them to come to the shop of Manoj Kumar. In the cross-examination by the Advocate, appearing on behalf of accused Azam, he deposed that the shop of Manoj Kumar was open and Manoj Kumar made the statement in his presence.

11. PW-5 Const. Mohan Lal, deposed that the police recovered mat over which the assailants had spitted in his presence on 9.9.2009 vide seizure memo Ext. PW-1/C. The police also recovered one piece of broken lock and one key vide the same memo. These were sealed in separate parcels with seal ‘A’. Accused Azam made a disclosure statement in his presence and in the presence of Bhinder and Sanjeev Kumar that he could show the shop and could get recover the ornaments sold by him, Islam and Noordin. Memo Ext. PW-5/A was prepared. The memo was signed by him, Binder and Sanjeev Kumar as witnesses and also by the accused. Accused Shamsudin made a disclosure statement on the same day in his presence and in the presence of Bhinder and Sanjeev Kumar that he could get recovered some ornaments concealed by him outside his house in a tarpaulin. Memo Ext. PW-5/B was prepared and it was signed by him alongwith Bhinder and Mohan Lal. In his cross-examination, he deposed that he did not remember the time when the disclosure statement was made in the Police Station Sundernagar. However, it was day time.

12. PW-6 Puran Chand deposed that the accused Sheharudin made a statement that he had concealed a black coloured mobile with his sister. He could get it recovered. Memo Ext. PW-6/A was prepared.

13. PW-7 Binder Kumar deposed that on 8.12.2009, ASI Vijay Kumar and other police officials were present in the Police Station. Accused Azam was present in the Police Station. He made a statement that he could get the ornaments recovered from Shamli in Uttar Pradesh. Memo Ext. PW-5/A was prepared and signed by him, Sanjeev and Mohan Lal alongwith the accused. Thereafter, accused Samshudeen made the statement that he could get recovered the ornaments from a tarpaulin outside his house. Memo Ext. PW-5/B was prepared and signed by him, Sanjeev and Mohan Lal alongwith the accused. In his cross-examination, he deposed that he went to the Police Station in connection with the personal work. He did not remember the time when he visited the Police Station. He did not remember the time of making the statements or the time at which the investigation was completed. He did not remember the time at which he left the Police Station. He reached at home at 6:00 PM. He did not go to Delhi.

14. PW-8 Sant Ram, deposed that accused Sheharudin made disclosure statement that he has kept mobile in his rented accommodation at Nehru Vihar and he could get it recovered. Statement Ext. PW-8/A was recorded and signed by him, HC Chaman Lal and thumb mark by the accused was also put. They took accused Sheharudin to his rented accommodation from where he got mobile recovered which was kept by him in an attache. Memo Ext. PW-8/B was prepared and signed by him, HC Chaman Lal and thumb mark by the accused was also put. He had gone with the police party to search for the accused in Delhi, Mustafabad and Hazuirkhas. One black coloured Scorpio bearing regn. No. DL-3CY-8786 was parked near ganda nalla. It was the same vehicle wanted by the police. The key of the vehicle was attached to the lock of the front door. The door was opened. Visiting cards were found inside the vehicle and were seized by the police. The vehicle was seized by the police vide seizure memo Ext. PW-8/C. Ashwani Kumar, produced one agreement mark-B which was seized vide memo Ext. PW-8/D. In his cross-examination, he submitted that they left the Police Station on 19.11.2009 in a hired Scorpio. He alongwith Vijay Kumar and HC Chaman Lal were in that vehicle. They reached Delhi on the same day. He did not remember the time. He did not know who had hired the Scorpio vehicle. He did not remember its colour. They had stopped many times on the way to Delhi. He did not inquire the name of the driver. They went to the house of sister of accused Sharudin where his statement Ext. PW-8/A was recorded. He did not remember who were present in the house of sister of accused. The statement was recorded by ASI Vijay Kumar. Thereafter, they went to Nehru Vihar. He admitted that no person of Delhi police or resident of Delhi was associated during investigation. He did not remember the colour of the vehicle in which they went to Delhi on 22.11.2009.

15. PW-9 Subhash Bashin, JMIC-II, Amb, has recorded the statements of the accused regarding their willingness for identification vide Ext. PW-9/B to PW-9/E.

16. PW-14 Dr. Sanjay Pathak, has examined the accused and issued MLCs Ext. PW-14/B to Ext. PW-14/E.

17. PW-17 HC Krishan Chand, made the statement that the case property was deposited with him and he deposited the same in the malkhana by making appropriate entry.

18. PW-21 Ashwani Kumar deposed that he was owner of vehicle bearing regn. number DL-3CY-8786. He had purchased the vehicle from Rajender Yogi. He issued certificate Ext. PW-21/A. He proved agreement Ext. PW-21/B.

19. PW-22 Dr. Aparna Sharma, has proved report Ext. PW-20/A. According to her, Ext. 2, 3, 4 & 5 yielded degraded DNA and STR amplification through PCR was not successful despite repeated attempts. The I.O. was again asked to send fresh samples to generate the DNA profile of the accused. According to her, on the basis of analysis performed on the exhibits, it was concluded that DNA profile obtained from exhibit 1 (piece of mat having spitting of gutka) matched fully with DNA profile from exhibit 6-d (blood sample of Islam).

20. PW-23 Manoj Kumar deposed that in the month of September, 2009, 4-5 boys, one lady and children came to his shop. They asked for exchanging the gold. The accused Azam and Shehruddin were accompanying those boys. One Neeru and Islam showed the identity cards. They handed over200 grams of gold in the form of broken ornaments in the form of nose rings, rings, karas, chains and ear rings. He deducted 15% as per the conditions/quality of the ornaments. The gold was 200 grams after melting it. He handed over the ornaments, namely, 8 karas, two chains, 3-4 pair of ear rings, nose pins and Rs. 1,50,000/- as per the market price. In his cross-examination, he admitted that Mittal Jewelers is not a registered jeweler. He had maintained a copy regarding the transaction. It was a rough copy because it is not to be shown to any person. He had made entry in the rough copy regarding the transaction. They maintaind the rough copy for about 1-2 months and thereafter, they dispose of the same. They did not obtain the signatures of the person delivering the articles. Signatures of the persons who came to him were not obtained by him. He has not taken any receipt of Rs. 1,50,000/- paid to the accused. He did not pay sale tax and income tax. They were only charging labour charges.

21. PW-24 HC Chaman Lal deposed that accused Shehruddin made a statement Ext. PW-8/A that earlier statement made by him was false to mislead the police and he had kept the stolen mobile in Nehru Vihar in his tenanted house which could be got recovered from him. Memo was prepared which bears his signatures and signatures of Sant Ram. Recovery memo Ext. PW-8/B was prepared which bears his signatures and signatures of Sant Ram as witnesses. Azam, Islam and Shamsuddin were taken to Shamli on 9.12.2009. Azam pointerd out one shop Mittal Jewelers and told that the gold was sold in this shop. It was verified by Islam. The gold was sold in this shop. Memo is Ext. PW-24/B which bears his signatures and Azam put his signatures and Islam put his thumb impression. The shop was closed. Inquiry was made from Shamsuddin. He told that he could get the ornaments recovered from his house. The accused showed the place from where gold ornaments namely nose pins and nose rings were got recovered by him. The weight of gold was found to be 20.760 grams and weight of stones was found to be 5.150 grams. These were kept in piece of paper and were wrapped in a piece of cloth. These were seized vide memo Ext. PW-24/D. In his cross-examination, he could not narrate the number of days when he remained with the police during the course of investigation. He did not remember the registration number or colour of the vehicle. They had gone in Scorpio vehicle. He did not remember the registration number and colour of the same. No person accompanied them from the complainant party. He could not tell as to who had hired the jeep. He could not tell the name of the driver. They had not associated any local police official. The local police was not associated at Shamli.

22. PW-25 Krishan Lal, has proved receipt No. 086885 vide Ext. PW-25/A. According to him, the vehicle Scorpio 8786 crossed the barrier on 8.9.2009 towards Himachal. He admitted in his cross-examination that receipt Ext. PW-25/A was not in his handwriting but in the hand writing of his employee. He could not tell the State to which vehicle bearing regn. no. 8786 belonged. The receipt was for the small vehicle. He could not narrate the description of any other vehicle mentioned in the counterfoil. He could not narrate as to how he remembered the description of Scorpio.

23. PW-27 ASI Vijay Kumar, deposed that a telephonic information was received in the police post Slapper on 9.9.2009 that a dacoity had been committed in the house of Shyam Lal. The statement of Shyam Lal was recorded. Photographs were taken. The statements of the witnesses were also recorded. Disclosure statements made by the accused under Section 27 of the Indian Evidence Act were also recorded. Recoveries were effected of the gold and telephone. In his cross-examination, he admitted that he has not associated the local police. Volunteered that local beat Constable was present but he was not cooperating them. He had not made any complaint regarding this fact because he was short of time. He also admitted that the recovery was got effected by Shamsuddin from open place underneath the tarpaulin. No local witness was associated because it was similar community inhabited by people of one community. He further deposed in his cross examination by Sh. Vikash Sharma, Advocate that Azam made a disclosure statement on 8.12.2009 in the presence of Binder Kumar and Sanjeev Kumar. They had visited the Police Station by chance in connection with their work. He could not tell the details of the work. In his further cross-examination, he admitted that there was no identification mark on the recovered gold to connect it with the stolen gold. Four revolvers could not be recovered in this case.

24. PW-28 Madan Lal, was declared hostile. He denied the suggestion by the learned Public Prosecutor that the police came to him on 9.12.2009.

25. PW-29 Shashikant Verma proved letter Ext. PW-18/A, call details Ext. PW-18/B, customers identification form Ext. PW-19/C and identity proof (election card) Ext. PW-18/D.

26. The case of the prosecution, precisely, is that the accused entered the house of PW-1 Shyam Lal, complainant when PW-3 Krishna Devi came out to use the toilet. According to PW-1 Shyam Lal, he heard the muffled noise of his mother. His wife opened the door after switching on the light. The accused were armed with pistols. They pointed the pistols on their heads and entire family was made to sit together. One of the accused opened the almirah by using darat. Jewelery and cash was removed and the accused fled away after bolting the door from outside.

27. PW-1 Shyam Lal, deposed that the door was opened after some time. Similar statement is made by PW-2 Sushma Devi and PW-3 Krishna Devi. It cannot be believed that the door could be opened from inside when it was bolted from outside. In case, the door was to be opened, even hypothetically, by pushing it, latch would have broken. The police has not recovered any broken latch or the door.

28. The manner in which the prosecution has narrated the entry of the accused to the house is also doubtful. According to PW-3, Krishna Devi, she went out to use the toilet and accused entered their house. It is not believable that 4-5 persons, fully armed were waiting for her to come out to use the toilet in order to enter the house and that too at 1:30 AM.

29. The case of the prosecution is that accused Azam made the disclosure statement vide Ext. PW-5/A that he could show the shop and could recover the ornaments sold by him. The memo was signed by Binder and Sanjeev Kumar. Accused Shamshudin has also made the disclosure statement Ext. PW-5/B to the effect that he could recover some ornaments concealed by him outside his house in a tarpaulin. PW-5 Const. Mohan Lal, in his cross-examination, has admitted that he did not remember the time when the statement was made. Statements Ext. PW-5/A and PW-5/B were also signed by PW-7 Binder Kumar. His presence in the Police Station is doubtful. According to him, he went to the Police station in connection with some personal work. The Police requested him to sit. He reached the Police Station during day time. He did not remember the time. He did not remember the time at which he left the Police Station or making statements or investigation completed. He did not remember as to when he has taken character certificate. The report was handed over to him by MHC. He did not know whether entry was made by MHC in the daily diary or not. He produced the report in the Tehsil on the next day. He took the character certificate on 9.12.2009. His signatures were obtained by clerk of the Tehsil at the time of delivery of the character certificate. He had not seen the register of the character certificate. The character certificate has not been proved. He was supposed to know the time when he reached the Police Station and left from there.

30. According to PW-8 Const. Sant Ram, mobile phone Ext. P-2 was recovered vide memo Ext. PW-8/B. He had gone with the police party in search of the accused. One black coloured Scorpio bearing regn. No. DL-3CY-8786 was parked near gandanala. The key of the vehicle was attached to the lock of the front door. In his cross-examination, he deposed that they left for Delhi on 19.11.2009 in a hired Scorpio. They reached Delhi on the same day. However, he did not remember the colour of the vehicle. He also admitted that no person of Delhi or Delhi Police was associated in the investigation. The mobile phone has been recovered from Nehru Vihar. The police has neither informed the local police nor any independent witnesses were associated at the time of seizure of mobile phone vide seizure memo Ext. PW-8/B. Both the witnesses of Ext. PW-8/B are police officials.

31. According to the prosecution, the accused Azam has made disclosure statement on 8.12.2009 that he could get the gold ornaments recovered from Shamli town. This statement was witnessed by PW-7 Binder Kumar, Mohan Lal and Sanjeev Kumar. We have already discussed the statement of PW-7 Binder Kumar. His presence in the Police Station is doubtful. Similarly the statement of Shamshudin was recorded under Section 27 of the Indian Evidence Act that he could recover ornaments concealed by him outside his house in a tarpaulin. It was also witnessed by PW-7 Binder Kumar and Mohan Lal. The shop was got identified by accused Azam vide Ext. PW-24/B. Ext. PW-24/B has been witnessed by the official witnesses. No independent witnesses were associated at the time of preparing Ext. PW-24/B. The police has also not even informed the local police. The gold was recovered vide memo Ext. PW-24/D at the instance of accused Shamshudin. Ext. PW-24/D has also not been signed by any independent witness. It was signed by police officials Const. Chaman Lal and Baldev Singh. The reason assigned by the I.O. for not associating the independent witnesses is that the neighbor also belonged to the same community. The independent witnesses ought to have been associated at the time when Ext. PW-24/B and PW-24/D were prepared. Similarly, we have already noticed that when the mobile phone Ext. P-2 was recovered, no independent witnesses were associated by the police.

32. The case of the prosecution is that the gold was recovered from the shop of PW-23 Manoj Kumar. PW-23 Manoj Kumar in his statement has admitted that Mittal Jewelers is not a registered jeweler. He had maintained a copy regarding the transaction. It

is a rough copy because it is not to be shown to any person. He used to make entry in the rough copy regarding the transaction. They maintain the rough copy for about 1-2 months and thereafter, they dispose of the same. They did not obtain the signatures of the person delivering the articles. Signatures of the persons who came to him were not obtained by him. He has not taken any receipt of Rs. 1,50,000/- paid to the accused. Local police has not been associated at Shamli and even the house of the accused was also not got identified by any person.

33. PW-27 ASI Vijay Kumar, the I.O. in the case, in his cross-examination has admitted that the recovery from Shamsuddin was made from open place underneath the tarpaulin. It is not believable that accused would have kept the gold underneath the tarpaulin which was accessible to all. PW-27 ASI Vijay Kumar in his further cross-examination has deposed that Azam has made disclosure statement. Binder Kumar and Sanjeev Kumar had visited the Police Station by chance in connection with some work. He could not narrate the details of the work. He has also admitted that there was no identification mark on the recovered gold. He has also admitted that four revolvers could not be recovered in this case. The recovery of revolvers/pistols was very important since the case of the prosecution is that the accused have threatened the family of PW-1 Shyam Lal by pointing pistols on their heads. Since the revolvers/pistols have not been recovered, it casts doubt on the entire version of the prosecution as to whether the accused were carrying revolvers/pistols at all.

34. Mr. M.A.Khan, learned Addl. Advocate General for the State has vehemently argued that the vehicle used in the case bearing registration No. DL-3CY-8786, was recovered. He further submitted that the vehicle had entered Himachal. He has also drawn the attention of the Court to Ext. PW-24/A. We have gone through Ext. PW-24/A. In Ext. PW-24/A, vehicle No. 8786 has only been recorded but the registration number allotted to a particular State is also to be pre-fixed before the number. Ext. PW-24/A has not been even signed by PW-25 Krishan Lal. Rather, Ext. PW-25/A does not bear the signatures of any person or verification of any person.

35. Mr. M.A.Khan, learned Addl. Advocate General for the State has further argued that the prosecution has obtained the DNA profile of the accused. PW-22 Dr. Aparna Sharma has proved report Ext. PW-20/A. The following observations have been made in Ext. PW-20/A:

> **"Observations:**
>
> i). Exhibits P-1, 6a, 6b, 6c & 6d yielded good quality DNA and it was possible to amplify all the fifteen autosomal STR loci and amelogenin (X & Y) using AmpF/STR Identifier PCR Amplification Kit.
>
> ii). The genotype profile of the source of exhibit 6d (Sh. Islam) matched fully with the genotype profile obtained from exhibit-1 (source: piece of mat having spitting with Gutka) at all the fifteen STR loci.
>
> **Conclusion:**
>
> On the basis of the above analysis performed on the aforesaid exhibits, it was concluded that the DNA profile obtained from exhibit-1 (piece of mat having spitting of gutka) matched fully with DNA profile from exhibit 6-d (Blood sample of Sh. Islam)."

36. The DNA profile matched fully with DNA profile from blood sample of Islam only. The report qua other accused is not conclusive that the DNA profile matched with

their blood samples. The blood samples of the accused have been obtained by PW-15 Dr. Babita Chaursia. It has come in the statement of PW-22 Dr. Aparna Sharma that the I.O. was asked to provide fresh samples to generate the DNA profile of the accused. PW-15 Dr. Babita Chaursia has not deposed that the Medical Officer has kept the samples of blood preserved by the Medical Officer, CH Sundernagar. The Medical Officer, CH Sundernagar, has not been examined to establish that he had preserved the blood samples of the accused. According to the conclusion of Ext. PW-20/A, the DNA profile obtained from exhibit-1 matched fully with DNA profile from exhibit 6-d, the blood sample of Sh. Islam and not of the accused.

37. Mr. M.A.Khan, learned Addl. Advocate General has also drawn the attention of the Court to Ext. PW-24/A to establish that the Medical Officer, CH Sundernagar has preserved the blood samples, however, in the absence of examination of Medical Officer, CH Sundernagar, it cannot be conclusively said that he had preserved the blood samples.

38. PW-1 Shyam Lal is goldsmith and thus the doors of his house are bound to be strong and the same could not be opened by pushing it from inside and that too, when the door was bolted from outside by the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 395 IPC.

39. Accordingly, in view of the analysis and discussion made hereinabove, the appeals are allowed. Judgment of conviction and sentence dated 23/29.12.2011, rendered by the learned Addl. Sessions Judge, Mandi, H.P., in Sessions Trial No. 10 of 2010, is set aside. Accused persons are acquitted of the charges framed against them by giving them benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case.

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

****

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

Deepak Arora and another …Decree-Holders
Versus
Vijay Khanna …Applicant/Judge-Debtor

OMP No. 44 of 2015 In
Ex. Petition No. 10 of 2013
Reserved on 23.4.2015
Date of decision: 2.5.2015

Code of Civil Procedure, 1908- Sections 144- Judgment debtor claimed that he had deposited an amount of Rs. 4,68,25,228/-, whereas he is liable to pay only Rs. 3,70,49770.80- he sought the refund of the excess amount - Decree holder contended that judgment debtor had not objected to attachment of the property and the principle of res-judicata will apply to the present case- held, that amount of Rs. 63,11,334/- was not

awarded to the decree holder - the Court can only recover the amount, which is awarded under the decree- decree holder cannot be allowed to enrich himself unjustly and to retain the amount, which was not awarded to him - petition allowed and the excess amount ordered to be refunded to the J.D. (Para 9 to 22)

Cases referred:

Rajkishore Mohanty and another Vs. Kangali Moharana and others AIR (59) 1972 Orissa 119

Barkat Ali and others Vs. Badrinarain AIR 2001 Rajasthan 51

The Sale Tax Officer, Banaras and others Vs. Kanhaiya Lal Makund Lal Saraf, AIR 1959 SC 135,

Renusagar Power Co. Ltd. Vs. General Electric Co. 1994 Supp (1) SCC 644:

Indian Council for Enviro-Legal Action Vs. Union of India and others (2011) 8 SCC 161

State Bank of India and others Vs. S.N. Goyal (2008) 8 SCC 92

For the Decree Holders: Mr.R.L. Sood, Senior Advocate with Mr.Ashwani K. Sharma and Mr.Arjun Lal, Advocate.

For the Applicant/Judgment Debtor: Mr.Ajay Mohan Goel and Mr.Rajesh Mandhotra, Advocates.

The following judgment of the Court was delivered:

<u>Tarlok Singh Chauhan J.</u>

By medium of this application under Section 151 read with Section 144 C.P.C, the applicant/judgment debtor has sought refund of the excess amount deposited by him with a further direction to recall the order dated 24.2.2015 (mentioned as 23.2.2015), whereby this Court had directed to release of the amount deposited by the judgment debtor in favour of the decree holder.

2. It is alleged by the judgment debtor that as against the amount of Rs.2,84,25,372/- along with proportionate interest, he has deposited a sum of Rs.4,68,25,228/-, whereas the total amount due to the Decree Holder as per the award is as follows:-

"a)	*Amount due as on 26.5.208:*	*Rs.1,84,58,030/-*
b)	*Interest from 26.5.2008 @: Rs.12% p.a.*	*Rs. 99,67,342/-*
	Total:	*Rs.2,84,25,372/-*
c)	*Cost as awarded by Ld. Arbitrator:*	*Rs.15,00,000/- and interest on the amount of Rs.1,84,58,030/- @ 18% per annum from 1.1.2013 till date of deposit i.e. 21.2.2015.*
d)	*Interest of two years 1.1.2013: to 31.12.2014.*	*Rs.66,44,490.80*
e)	*Interest of 52 days*	*Rs.4,79,908.00*
	Grand total a) to e)	*Rs.3,70,49,770.80"*

3. It is in this background that the present application has been preferred for claiming refund of the excess amount.

4. The application has been vehemently opposed by the Decree Holders by filing reply, wherein preliminary objections have been taken to the effect that the application is not maintainable, as the same seeks to raise issues, which stand already decided or are deemed to be decided and therefore, cannot again be permitted to be raised. It has been alleged that these orders have obtained finality and operate as resjudicata between the parties. In support of their allegations, the Decree Holders have made the following averments:-

> "(a) That the Judgment Debtor/applicant was served in the execution petition as well as in the application for attachment of his properties being OMP No. 262 of 2013. Both in the execution petition and OMP No. 262 of 2013, details of the amounts due from the Judgment Debtor to the Decree Holders were clearly spelt out item-wise alongwith the interest claimed separately. Therefore, the total amount due was also indicated. The Judgment Debtor appeared in the present proceedings on 10.7.2013. He specifically prayed for and was granted time to file objections to the execution petition as well as OMP No. 262 of 2013.
>
> (b) That on 2.8.2013 the judgment debtor was again granted time to file objections to execution petition and reply to OMP No. 262 of 2013 subject to costs of Rs.2000/-
>
> (c) On 27.8.2013, this Hon'ble Court closed the right of the Judgment Debtor to file objections to the execution petition. It also closed his right to file a reply to OMP No. 262 of 2013.
>
> (d) On 27.8.2013, the Court further proceeded to order the Decree Holder to take necessary steps for the attachment of the property, the means of which were detailed in the said order.
>
> (e) The aforesaid order is an order under Order 21 Rule 22 and is dated 27.8.2013, that is a decree unto itself. One stage of the execution proceedings culminated with the said order, which is to be treated as a decree. Thereafter, the Court proceeded to the next stage by passing an order under Order 21 Rule 23 CPC. Once the Judgment Debtor, with open eyes failed to file any objections having appeared pursuant to the notice issued to him, and the Court closed his right to do so, in law, it will be deemed that while ordering the attachment of his property, after closing his right to file objections, this Court had adjudicated and determined the amount to be recovered from the Judgment Debtor. J.D. had as such agreed with the calculations put forth by the Decree Holders, both in the execution petition as also in the application. The said order dated 27.8.2013, is a decree unto itself and if the Judgment Debtor was not satisfied with the same, the only course left open to him was to file an appeal against the same. Since no appeal was filed, and the said decree dated 27.8.2013 has attained finality. The Judgment Debtor is barred in law from filing the present application in order to question the amount that is claimed by the Decree Holders and which has not only been deposited by the Judgment

Debtor, but his no objection to the release of the amount in favour of the Decree Holder stands recorded in Order dated 24.2.2015 by this Court. The Decree Holders are supported by the law as laid down by the Hon'ble Apex Court, the Full Bench and Division Benches of various High Courts, which shall be furnished to this Hon'ble Court in the form of a compilation at the time of arguments.

(f) That the application is also not maintainable for the reason that after the property was attached for recovery of the amount claimed and detailed in the execution petition (to which no objections have been filed), this Hon'ble Court proceeded to pass an order dated 25.3.2014, thereby allowing OMP No. 69 of 2014 and ordering the sale of the attached property of the Judgment Debtor at Dharamshala to be sold by way of public auction to recover the amount detailed and indicated in the execution petition. The Judgment Debtor did not file any objections to the said application nor did he challenge the said order in appeal. The same has also attained finality.

(g) That thereafter the Judgment Debtor filed an OMP No. 196 of 2014, under Section 151 CPC for recalling the order. In the said application, the Judgment Debtor has admitted in para-4 thereof the amount claimed in the execution petition in the following words: "The learned Arbitrator has come to the conclusion that the non-applicants/judgment holders are entitled for an amount of Rs.3,82,06,988/- (this is amount detailed and claimed in the Execution Petition). At no stage, the Judgment Debtor questioned the correctness of this amount that had been claimed by the Decree Holders. The said application was also dismissed by this Hon'ble Court vide its order dated 9.7.2014. The appeal filed against the Order was dismissed as withdrawn.

(h) That thereafter, the proclamation for sale was ordered to be drawn up and was drawn up and, at that stage also, (although, in law he could not have raised any objection), the Judgment Debtor failed to raise any objections regarding the correctness of the amount for which the decree was being executed.

(i) That the Judgment Debtor then filed an application being OMP No. 457 of 2014. He raised several objections therein, but he did not question the amount claimed in the execution petition."

5. It is thereafter averred that this Court has become functus officio after passing of order dated 24.2.2015 and the application, therefore, deserves to be dismissed. It is also contended that the Arbitrator has specifically held that the Judgment Debtor had withdrawn an amount of Rs.67,44,947/- before the dissolution of the Firm and therefore, this amount had infact been awarded in favour of the Decree Holder.

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

6. The Decree Holder in the application under Order 21 Rule 1 C.P.C. has claimed the following amounts:-

"7.	Amount with interest due up to the decree or other relief granted thereby together with particulars of any cross decree.	(a) Original amount as awarded vide award dated 1.12.2012, i.e. amount due as on 26.05.2008 Rs.1,84,58,030/- and interest thereupon @12% from 26.11.2012 as awarded by the arbitrator i.e Rs.99,67,342/-	2,84,25,372.00
		(b) Interest @18% p.a. on Rs.1,84,58,030/- from 01.12.2012 till 30.04.2013.	
		(c) Amount awarded in favour of the Decree Holders after dissolution of the partnership firm as payable by the Judgment Debtor.	13,84,352.00
		(d) Interest @ 18% p.a. on Rs.63,11,334/- from 01.12.2012 till 30.04.2013	
		Total (a) to (d)	
			63,11,334.00
			4,73,350.00
			3,65,94,408.00
8.	Amount of costs, if any awarded.	**Cost awarded**	**Rs.15,00,000/-**
		Interest @18% p.a. on Rs.15,00,000/- from 01.12.2012 till 30.04.2013	**Rs.1,12,500/-**
		The Decree in total i.e. amounts mentioned in para 7(a) to (d) and para 8 (as on	

	30.04.2013).	Rs.3,82,06,908/-
	N.B. The Judgment Debtor is also liable to pay interest @18% p.a. on the aforesaid amount from 01/05/2013 till date of payment of the entire decreetal amount to the Decree Holders	

7. Therefore, the main question which arises for determination is as to whether the Decree Holder is entitled to the amount of Rs.63,11,334/- along with the interest thereon.

8. The relevant portion of the award passed by the learned Arbitrator reads thus:-

> "From the close scrutiny of this post-dissolution accounts maintained in different Banks, a casual chart of amounts transferred from SHR Account to and in the name of Shri Vijay Khann's personal account referred to below read with the record in the form of Compilation of Provisional Income and Expenditure Account of SHR, it is evident that the Respondent has grained huge profits by carrying on the business by using the partnership property for his personal gains since the date of dissolution till date. The Hotel business has monetarily gained grounds day by day and Respondent is having thriving business as is apparent from the Statement of amount(s) withdrawn by him (Respondent) from the account of SHR with ICICI Branch Office Dharamshala for his personal use after dissolution of partnership firm i.e. 26.5.2008 and other Banks. From the CHART prepared by this forum based on the entries of the accounts of different Bank read with Provisional Income and Expenditure Account of SHR and entries detailed therein CHART Annexure MARK "Y" Respondent has withdrawn an amount of Rs.67,44,947/- before dissolution and an amount of Rs.63,11,334 after dissolution. It is to be seen that the cash withdrawals by Respondent and by his family, ATM withdrawals, Car Loan payments when compared with the Provisional Income and Expenditure Account of M/s SHR as compiled by the above-said Chartered Accountants does not find mention therein as much as no such personal Ledger Account of Respondent Vijay Khanna has been opened under any Head as are detailed in any of the said Compilation of Provisional Income and Expenditure Account(s) of aforesaid SHR. As such it is not possible to conclude the financial status of the parties to the instant lis even for the purposes of settlement of accounts in the winding up process of the instant case from the above said Provisional Income and Expenditure Account of SHR as produced by Respondent without the concerned papers indicated for the purpose of withdrawal, payment or expenditure so incurred. Huge amount towards legal and professional charges have been indicated in

the said compiled accounts but other withdrawals through ATM etc do not find place therein. Therefore, it is not possible to seek help and rely upon the entries of the said Compilation of Provisional Income and Expenditure Account of M/s SHR aforesaid after dissolution of the partnership firm on 26.3.2008.

Even otherwise Respondent from the very inception of receipt of notice adopted a stubborn attitude to defy the claim of the Claimants. Rather the Respondent filed a Counter Claim on untenable, contradictory and inconsistent pleas which have been proved to be not only destructive of each other but on false grounds as well.

Admittedly this is a Commercial Industry/business. Thus this forum deems it just and proper to adopt the procedure of awarding interest from the date of dissolution in accordance with sub-section 7(a) and (b) of the Arbitration & Conciliation Act, 1996 on the whole of the amount found to be due as per the terms and conditions of the partnership deed @ 12% per annum. Thus the total payable amount (as of today) by the Respondent to the Claimants comes to

a) Amount due as on 26.5.2008	Rs.1,84,58,030/-
b) Interests from 26.5.2008 to 26.11.212 @12% p.a.	Rs. 99,67,342/-
Total	**Rs. 2,84,25,372/-**

In case the amount found due is not paid within one month from the date of receipt of the copy of the duly signed award, the Respondent shall be further bound to pay interest in accordance with Section 17(7) (b) of the Act 26 of 1996 i.e. @ 18% per annum on the amount of Rs.1,84,58,030/- till the date of its payment."

9. Now a bare perusal of the award would show that nowhere has the learned Arbitrator awarded a sum of Rs.63,11,334/- in favour of the Decree Holders.

10. However, the learned Counsel for the Decree Holder has vehemently argued that not only at any stage of proceeding did the Judgment Debtor ever file any objections against the decree, but he has also not objected at the time when notice of attachment of his property had been issued. He did not object even when his property was attached and thereafter when attached property was in fact ordered to be sold. He further argued that the Judgment Debtor while filing OMP No. 196 of 2014 for recalling of order, had clearly admitted in para 4 regarding the amount claimed in the execution in the following words:

> *"4. That after sometime partnership was dissolved and decree holder/non-applicant has filed a case and matter was referred to Ld. Single Arbitrator. The Ld. Arbitrator has come to the conclusion that the non applicants/judgment holders are entitled for an amount of Rs.3,82,06,988/-"*

11. Learned counsel for the Decree Holders has argued that if after receiving notice of the execution application under Rule 22 of Order 21 C.P.C., the Judgment Debtor does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court is bound to order that the decree be executed. Such an

order passed by the Court is not automatic, but involves an implied adjudication that the Decree Holder has a right to execute the decree and the Judgment Debtor is liable to satisfy the decree. He further contended that the principle of constructive resjudicata is applicable to the execution proceedings, where in response to the notice under Order 21 Rule 22 or Order 21 Rule 23 sub Rule 1 and 2 of the Civil Procedure Code, the Judgment Debtor either does not appear in the Court or having appeared does not object to the execution on any grounds and the Court thereupon orders that the execution to proceed then by application of explanation IV to Section 11 of the Civil Procedure Code, it would be deemed that the plea as sought to be raised now had been raised and rejected and consequently the judgment debtor would not be permitted at a later stage of the same execution proceedings to again raise the plea.

12. In support of his contention, the learned counsel for the Decree Holder has relied upon Full Bench decision of Orissa High Court in ***Rajkishore Mohanty and another Vs. Kangali Moharana and others*** *AIR (59) 1972 Orissa 119,* a Division Bench Judgment of Rajasthan High Court in ***Barkat Ali and others Vs. Badrinarain*** *AIR 2001 Rajasthan 51*, which in turn has been upheld by the Hon'ble Supreme Court in *(2008) 4 SCC 615.*

13. There can be no quarrel with the proposition of law as canvassed by learned counsel for the Decree Holder more particularly in teeth of the judgment passed by Hon'ble Supreme Court in Barkat Ali's case (supra). The relevant portion whereof reads as under:-

> ***"9. Order 21 Rule 22 CPC culminates in end of one stage before attachment of the property can take place in furtherance of execution of decree. The proceedings under Order 21 Rule 23 can only be taken if the executing court either finds that after issuing notice under Order 21 Rule 21 (sic Rule 22) the judgment-debtor has not raised any objection or if such objection has been raised, the same has been decided by the executing court. Sub-rule (1) as well as sub-rule (2) under Order 21 Rule 22, operate simultaneously in the same field. Sub-rule (1) operates when no objection is filed. Then the court proceeds and clears the way for going to the next stage of the proceedings, namely, attachment of the property and if the court finds objections on record then it decides the objections in the first instance and thereafter clears the way for taking up the matter for attachment of the property if the objections have been overruled."***

14. But question which still remains to be adjudicated is as to whether the Decree Holders are entitled to the amount of Rs.63,11,334 along with interest, despite the fact that, this amount has not been awarded in their favour by the learned Arbitrator.

15. It cannot be disputed that the provision of Order 21 makes reference to a 'decree'. Would 'decree' in this context mean the award passed by the learned Arbitrator or would it mean the amount claimed unilaterally by the Decree Holders in their application preferred under Order 21 Rule 1 C.P.C.

16. Indisputably it is the award of the Arbitrator, which is required to be enforced, as if it was a decree. It is borne in mind that the executing Court is duty bound to give effect to the decree in its substance and ought not to pass an order rendering in the judgment and decree as futile one. It is a trite that the executing Court must take the decree according to its tenor and it cannot go beyond the decree. The executing Court

cannot sit in appeal over the decree passed by the Court nor is it entitled to pass an order, which will virtually result in effecting the rights of the parties already settled under the decree. The executing Court can neither add nor subtract anything in the decree.

17. If that be so, then the excess amount deposited by the Judgment Debtor, at best can be termed to be a deposit made under a mistake.

Section 72 of the Contract Act provides:-

> "***72. Liberty of person to whom money is paid, or thing delivered, by mistake or under coercion.****---A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."*

18. The Hon'ble Supreme Court in ***The Sale Tax Officer, Banaras and others Vs. Kanhaiya Lal Makund Lal Saraf,*** *AIR 1959 SC 135,* while construing the provisions of Section 72 of Contract Act, has held that the term "mistake" used in Section 72, Contract Act has been used without any qualification or limitation whatever and comprises within its scope a mistake of law as well as a mistake of fact. It has further been held that there is no warrant for ascribing any limited meaning to the word "mistake" as has been used therein. Lastly, it has been held that the true principle is that if one party under a mistake, whether of fact or law, pays to another party money which is not due by contract or otherwise, that money must be repaid. The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitles the party paying the money to recover it back from the party receiving it.

19. Confronted with this position, the learned counsel for the Decree Holder would still argue that the principle of constructive resjudita would apply to both the factual and legal aspects of the matter and therefore, Judgment Debtor cannot raise this plea at this stage.

20. The learned counsel for the Decree Holder would probably have been right in his submission, in case there would have been some ambiguity in the award passed by the learned Arbitrator or alternatively if the Decree Holders would be in a position to convince the Court that the amount now claimed by the Judgment Debtor had in fact been awarded to the Decree Holders. That not being so, this Court cannot shut its eyes or else the same would amount to Decree Holder being unduly enriched.

21. The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the expense of another person. This was so held by the Hon'ble Supreme Court in ***Renusagar Power Co. Ltd. Vs. General Electric Co.*** *1994 Supp (1) SCC 644:-*

> *"98. The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the expense of another person. It provides the theoretical foundation for the law governing restitution. The principle has, however, its critics as well as its supporters. In the words of Lord Diplok: "…there is no general doctrine of unjust enrichment in English law. What it does is to provide specific remedies in particular cases of what might be classed as unjust enrichment in a legal system that is based upon civil*

law." (See: Orakpo V. Manson Investments Ltd. 1978 AC, 104). In The Law of Restitution by Goff and Jones, it has, however, been stated "that the case-law is now sufficiently mature for the courts to recognize a generalized right of restitution" (3rd Edn., P. 15). In Chitty on Contracts, 26th Edn., Vol. I, p. 1313, para 2037, it has been stated that "the principle of unjust enrichment is not yet clearly established in English law". The learned editors have, however, expressed the view:

> *"Even if the law has not yet developed to that extent, it does not follow from the absence of a general doctrine of unjust enrichment that the specific remedies provided are not justifiable by reference to the principle of unjust enrichment even if they were originally found without primary reference to it." (pp. 1313-1314, para 2037)."*

The issue regarding undue enrichment thereafter came up before the Hon'ble Supreme Court in ***Indian Council for Enviro-Legal Action Vs. Union of India and others*** *(2011) 8 SCC 161* and it was held as follows:-

*"**UNJUST ENRICHMENT***

***151**. Unjust enrichment has been defined as:*

> *"Unjust enrichment.---A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense."*

See Black's Law Dictionary, 8th Edition (Bryan A. Garner) at page 1573. A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."

***152**. "Unjust enrichment" has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.*

***153**. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." A defendant may be liable "even when the defendant retaining the benefit is not a wrongdoer" and "even though he may have received [it] honestly in the first instance." (Schock v. Nash, 732 A.2d 217, 232-33 (Delaware. 1999). USA)*

154. *Unjust enrichment occurs when the defendant wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain. In the leading case of Fibrosa v. Fairbairn, [1942] 2 All ER 122, Lord Wright stated the principle thus :*

> ***"... .Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."***

155. *Lord Denning also stated in Nelson v. Larholt, [1947] 2 All ER 751 as under:-*

> ***"..... It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular frame-work. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."***

156. *The above principle has been accepted in India. This Court in several cases has applied the doctrine of unjust enrichment.*

Restitution and compound interest

157. *American Jurisprudence 2d. Volume 66 Am Jur 2d defined Restitution as follows:*

> ***"The word `restitution' was used in the earlier common law to denote the return or restoration of a specific thing or condition. In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another. As a general principle, the obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation."***

158. *While Section (') 3 (unjust enrichment) reads as under:*

"The phrase "unjust enrichment" is used in law to characterize the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly."

159. *Unjust enrichment is basic to the subject of restitution, and is indeed approached as a fundamental principle thereof. They are usually linked together, and restitution is frequently based upon the theory of unjust enrichment. However, although unjust enrichment is often referred to or regarded as a ground for restitution, it is perhaps more accurate to regard it as a prerequisite, for usually there can be no restitution without unjust enrichment. It is defined as the unjust retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.*

160. *While the term `restitution' was considered by the Supreme Court in South-Eastern Coalfields 2003 (8) SCC 648 and other cases excerpted later, the term `unjust enrichment' came to be considered in Sahakari Khand Udyog Mandal Ltd vs Commissioner of Central Excise & Customs ((2005) 3 SCC 738). This Court said:*

> ***"31. ...'unjust enrichment' means retention of a benefit by a person that is unjust or inequitable. `Unjust enrichment' occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else."***

161. *The terms `unjust enrichment' and `restitution' are like the two shades of green - one leaning towards yellow and the other towards blue. With restitution, so long as the deprivation of the other has not been fully compensated for, injustice to that extent remains. Which label is appropriate under which circumstances would depend on the facts of the particular case before the court. The courts have wide powers to grant restitution, and more so where it relates to misuse or non-compliance with court orders.*

162. *We may add that restitution and unjust enrichment, along with an overlap, have to be viewed with reference to the two stages, i.e., pre-suit and post-suit. In the former case, it becomes a substantive law (or common law) right that the court will consider; but in the latter case, when the parties are before the court and any*

act/omission, or simply passage of time, results in deprivation of one, or unjust enrichment of the other, the jurisdiction of the court to levelise and do justice is independent and must be readily wielded, otherwise it will be allowing the Court's own process, along with time delay, to do injustice.

***163**. For this second stage (post-suit), the need for restitution in relation to court proceedings, gives full jurisdiction to the court, to pass appropriate orders that levelise. Only the court has to levelise and not go further into the realm of penalty which will be a separate area for consideration altogether.*

***164**. This view of law as propounded by the author Graham Virgo in his celebrated book on "The Principle of Law of Restitution" has been accepted by a later decision of the House of Lords (now the UK Supreme Court) reported as 136 Sempra Metals Ltd (formerly Metallgesellschaft Limited) v Her Majesty's Commissioners of Inland Revenue and Another [2007] UKHL 34 = [2007] 3 WLR 354 = [2008] 1 AC 561 = [2007] All ER (D) 294.*

***165**. In similar strain, across the Altantic Ocean, a nine judge Bench of the Supreme Court of Canada in Bank of America Canada vs Mutual Trust Co. [2002] 2 SCR 601 = 2002 SCC 43 (both Canadian Reports) took the view :*

> ***"There seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the plaintiff should have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also. By the same token the defendant will have had the benefit of compound interest. Although not historically available, compound interest is well suited to compensate a plaintiff for the interval between when damages initially arise and when they are finally paid."***

This view seems to be correct and in consonance with the principles of equity and justice.

***166**. Another way of looking at it is suppose the judgment- debtor had borrowed the money from the nationalised bank as a clean loan and paid the money into this court. What would be the bank's demand.*

***167**. In other words, if payment of an amount equivalent of what the ledger account in the nationalised bank on a clean load would have shown as a debit balance today is not paid and something less than that is paid, that differential or shortfall is what there has been : (1) failure to restitute; (2) unfair gain by the non-complier; and (3) provided the incentive to obstruct or delay payment. Unless this differential is paid, justice has not been done to the creditor. It only encourages non-compliance and litigation. Even if no benefit had been retained or availed even then, to do justice, the debtor must*

> *pay the money. In other words, it is this is not only disgorging all the benefits but making the creditor whole i.e. ordering restitution in full and not dependent on what he might have made or benefitted is what justice requires.*

22. In so far as the contention raised by the Decree Holder that this Court has become functus officio is concerned, it needs to be noticed that no final decision has been taken in the Execution Petition and the same is still pending. It is only when a Court decides a question brought before it finally that it becomes functus officio and cannot review its own decision. In observing so, this Court draws support from the following observations of the Hon'ble Supreme Court in ***State Bank of India and others Vs. S.N. Goyal*** *(2008) 8 SCC 92*:-

> *"**25**. The learned counsel for respondent contended that the Appointing Authority became functus officio once he passed the order dated 18.1.1995 agreeing with the penalty proposed by the Disciplinary Authority and cannot thereafter revise/review/modify the said order. Reliance was placed on the English decision VGM Holdings Ltd, Re (1941) 3 All. ER 417 wherein it was held that once a Judge has made an order which has been passed and entered, he becomes functus officio and cannot thereafter vary the terms of his order and only a higher court, tribunal can vary it. What is significant is that decision does not say that the Judge becomes functus officio when he passes the order, but only when the order passed is 'entered'. The term 'entering judgment' in English Law refers to the procedure in civil courts in which a judgment is formally recorded by court after it has been given.*
>
> ***26**. It is true that once an Authority exercising quasi judicial power, takes a final decision, it cannot review its decision unless the relevant statute or rules permit such review. But the question is as to at what stage, an Authority becomes functus officio in regard to an order made by him. P. Ramanatha Aiyar's Advance Law Lexicon (3rd Edition, Vol. 2 pp. 1946-47) gives the following illustrative definition of the term 'functus officio' :*
>
> *"Thus a Judge, when he has decided a question brought before him, is functus officio, and cannot review his own decision."*
>
> ***27**. Black's Law Dictionary (Sixth Edition Page 673) gives its meaning as follows:*
>
> *"Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore, of no further force or authority".*
>
> ***28**. We may first refer to the position with reference to civil courts. Order XX of Code of Civil Procedure deals with judgment and decree. Rule 1 explains when a judgment is pronounced. Sub-rule (1) provides that the Court, after the case has been heard, shall pronounce judgment in an open court either at once, or as soon thereafter as may be practicable, and when the judgment is to be pronounced on some future day, the court shall fix a day for that purpose of which due*

notice shall be given to the parties or their pleaders. Sub-rule (3) provides that the judgment may be pronounced by dictation in an open court to a shorthand writer (if the Judge is specially empowered in this behalf). The proviso thereto provides that where the judgment is pronounced by dictation in open court, the transcript of the judgment so pronounced shall, after making such corrections as may be necessary, be signed by the Judge, bear the date on which it was pronounced and form a part of the record. Rule 3 provides that the judgment shall be dated and signed by the Judge in open court at the time of pronouncing it and when once signed, shall not afterwards be altered or added to save as provided by section 152 or on review. Thus where a judgment is reserved, mere dictation does not amount to pronouncement, but where the judgment is dictated in open court, that itself amounts to pronouncement. But even after such pronouncement by open court dictation, the Judge can make corrections before signing and dating the judgment. Therefore, a Judge becomes functus officio when he pronounces, signs and dates the judgment (subject to section 152 and power of review). The position is different with reference to quasi judicial authorities. While some quasi judicial tribunals fix a day for pronouncement and pronounce their orders on the day fixed, many quasi judicial authorities do not pronounce their orders. Some publish or notify their orders. Some prepare and sign the orders and communicate the same to the party concerned. A quasi judicial authority will become functus officio only when its order is pronounced, or published/notified or communicated (put in the course of transmission) to the party concerned. When an order is made in an office noting in a file but is not pronounced, published or communicated, nothing prevents the Authority from correcting it or altering it for valid reasons. But once the order is pronounced or published or notified or communicated, the Authority will become functus officio. The order dated 18.1.1995 made on an office note, was neither pronounced, nor published/notified nor communicated. Therefore, it cannot be said that the Appointing Authority became functus officio when he signed the note on dated 18.1.1995."

23. In view of the aforesaid discussion, it can safely be concluded that the Decree Holders are only entitled to what has been awarded to them in terms of the award of the learned Arbitrator and this Court while executing the award cannot go behind the award by adding or subtracting anything from it. The Judgment Debtor having deposited the excess amount under mistake is entitled to refund of the same or else the same would amount to undue enrichment of the Decree Holder. Therefore, the Decree Holder is held entitled only to an amount of Rs.3,70,49770.80 and the remaining amount is required to be refunded to the Judgment Debtor and accordingly the order dated 24.2.2015 directing release of the amount in favour of the Decree Holders is modified to that extent.

In view of the aforesaid discussion, the present application is allowed and the Judgment Debtor is held entitled to excess amount deposited by him.

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

Uma Akash Agro Pvt. Ltd. and others ... Petitioners.
Versus
State of H.P. and others ... Respondents.

Cr.MMO No.4127 of 2013.
Reserved on : 21.04.2015.
Date of decision: 02.05.2015

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition seeking quashing of FIR as well as order passed by JMIC, Kasauli and Sessions Judge, Solan- it was alleged that respondent No. 2 had sold 11,170 apple boxes to respondent No. 3- respondent No. 3 had paid amount of Rs. 20 lacs and remaining amount was not paid- 11,170 apple boxes were stored in the cold store owned by petitioner No. 1- held, that respondent No. 3, purchaser of the goods, had acquired title from respondent No. 2- mere non-payment of part of sale consideration cannot constitute an entrustment- thus, no offence punishable under Section 406 of IPC was made out against the respondent No. 3 or respondent No. 1- further, petitioner was not liable to pay the sale consideration and it cannot be held liable for the non- payment of the sale consideration- accordingly, FIR ordered to be quashed- however, the order regarding the sale of the apples cannot be challenged on behalf of petitioner No. 1 who is merely a bailee. (Para-3)

For the petitioners: Mr. Vinay Kuthiala, Sr. Advocate with Mr. Gaurav Sharma, Advocate.

For the respondents: Mr. Vivek Singh Attri, Dy. A.G. for respondent No.1.
Mr. Sudheer Thakur and Mr. Anirudh Sharma, Advocate, for respondents No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The petitioners herein through this petition filed under Section 482 Cr.P.C. seek the indulgence of this Court for quashing of F.I.R. No. 94 of 2013 registered at Police Station Parwanoo, District Solan under Sections 406 and 420 IPC and also seek quashing of orders of 13.11.2013 rendered by the learned Judicial Magistrate 1st Class, Kasauli, District Solan besides orders of 16.12.2013 rendered by the learned Sessions Judge, Solan.

2. The petitioner No.1 is a private limited company and owns a cold storage for storing farm/horticultural produce. Respondent No. 2 is the owner of an apple orchard. The factum of respondent No.2 having sold apple boxes to respondent No.3 is perse evident from a perusal of the averments contained in paragraph 3 of Cr.MP No. 708 of 2014 in Cr.MMO No. 4127 of 2013. Besides, the factum of respondent No. 2 having sold his apple boxes carrying a value of Rs.1.32 crore to Rakesh @ Rajender Prasad @ Rajan Sharma is forthcoming from a perusal of a detailed report submitted by the Investigating Officer, SHO Police Station, Parwanoo. Therefore, the factum of passing of title in the apple boxes numbering 11,117 by respondent No.2 in favour of respondent No. 3 stands clinched. However, it is also evident from an incisive reading of the comprehensive report submitted

by the SHO, Police Station, Parwanoo, that the buyer of goods inasmuch, as, respondent No.3 had paid to the seller who is respondent No. 2 only a sum of Rs. 20 lacs and the remaining price of apple boxes aforesaid remains unpaid to respondent No. 2 by respondent No. 3. On respondent No. 3 purchasing the goods from respondent No.2 he came to as portrayed by Annexure P-8 deposit them in the cold storage owned by the petitioner No.1. Since the entire sale consideration for 11,117 apple boxes purchased by respondent No.3 from respondent No.2 stood not paid and theirs having come to be stored in the cold storage owned by petitioner No.1, the respondent No.2 took to institute a complaint against the petitioners herein averring therein that the latter in connivance with the respondent No.3 had deprived him of the entire sale consideration qua apple boxes numbering 11,117 owned by respondent No.2, as such, they had committed offences constituted under Section 420 and 406 IPC.

3. The uncontroverted factum as is evident from the aforesaid discussion is of title qua 11,117 of apple boxes having passed in favour of respondent No. 3 from respondent No.2, its hitherto owner. Consequently, the aforesaid factum cannot obviously constitute the factum of the goods purchased by respondent No.3 from respondent No.2 to be hence entrusted to respondent No.2 nor also when title in the goods was transferred or alienated by respondent No.2 in favour of respondent No.3, the recipient of the goods, who is the petitioner No.1, besides petitioners No. 2 and 3 its employees, cannot also be in any manner concluded to have connived or colluded with respondent No.3, in the latter having purportedly committed the offence of criminal breach of trust. The respondent No.3 who is the purchaser of the goods from respondent No.2, constituted by the act of his uncontrovertedly receiving goods from respondent No.3, had acquired title qua them from respondent No.2. It is obvious that when respondent No.3 became the owner of the contentious goods, he cannot be construed to have been entrusted their custody by respondent No.2. Besides, the mere fact that the entire sale consideration qua contentious goods had not come to be passed by respondent No.3 in favour of respondent No.2 even the said fact cannot imbue the fact of their possession gained by respondent No.3 on payment of part of sale consideration to be an entrustment thereof to him. In aftermath, for reiteration the owner of goods cannot be construed to have when they stood purchased by him from its owner received them by way of entrustment from the seller. Consequently, when the respondent No.2 lost control or title over the goods, he cannot claim to have, when he possesses no title qua them as owner, that hence he had entrusted them to the buyer. Obviously, when there is no element of entrustment of goods by respondent No.2 to respondent No.3 especially in the event of respondent No.3 having purchased or acquired title over 11,117 number of apple boxes from its seller, who is respondent No.2, then prima facie no offence of criminal breach of trust is constituted against respondent No.3. The petitioners, who are the recipient of goods from respondent No.2 cannot, also be by the act of theirs receiving goods from a lawful buyer, by the mere fact of theirs receiving them from the latter, be construed to have also in continuity committed the offence of criminal breach of trust enshrined in Section 406 of the Indian Penal Code. An incisive reading of the detailed report furnished by the SHO, as also of the record of the case unfolds that respondent No.2 hitherto owner of 11,117 apple of boxes was aggrieved by the act of respondent No.3, constituted by the latter not paying the entire sale consideration to him qua 11,117 apple boxes sold by him to respondent No.3. The complainant alleges that the petitioners and the respondent No.3 colluded and connived with each other. The said fact is attempted or concerted to be ingrained in the act of the petitioners, who when sought to be conversed over landline and mobile phone by respondent No.2 having transferred calls to the mobile number of respondent No.3. The aforesaid fact does not perse constitute nor convey

the fact that there was collusion or connivance interse the petitioners and respondent No.3 especially in the act of respondent No.3 having not paid the entire sale consideration to respondent No.2 qua the 11,117 of apple boxes purchased by him from respondent No.2. The collusion or connivance interse the petitioners and respondent No.3 was cullable only from the evident fact comprised in payments qua the goods purchased by respondent No.3 from respondent No.2 having emanated from the petitioners. However, no such forthright evidence exists on record portraying that the petitioner No.1 was a buyer or a hidden buyer and that the respondent No. 3 was merely a benamidar and that hence the liability for defraying the entire sale consideration to respondent No.2 was fastenable, upon the petitioners and theirs having omitted to part with the entire sale consideration for goods purchased by respondent No. 3 from respondent No.2, they are rendered amenable for penal liability envisaged in Section 420 of the IPC. However, when the above fact is not forthcoming, on a deep and incisive scanning of the file, consequently no inference other than the one that the respondent No.3 was the actual and not an obscure buyer of the petitioner company hence he alone was liable to defray to the respondent No. 2, the entire sale consideration for goods purchased by him from the latter. The aforesaid discussion constrains this Court to conclude that the complaint with the allegations against the petitioners is misconceived, it constitutes abuse of process of law and tantamounts to harassing the petitioners and as such it deserves to be quashed and set-aside. Moreso, when the liability, if any of the respondent No.3 to the respondent No.2 arising from his purported act of not defraying to the latter the entire sale consideration for 11,117 apple boxes, is a civil liability. Besides, when it stands mitigated by the orders rendered by the Judicial Magistrate 1st Class, Kasauli, District Solan, wherein the said Court ordered for the release of apple boxes in favour of respondent No.2 as also of appropriation by him of their sales turn over, it looses tinge if any of criminality. Accordingly, the petition is allowed to the extent that the F.I.R. is quashed and set-aside. However, since the orders rendered by the Judicial Magistrate have attained finality and are rendered qua perishable goods and appear to have been rendered to recompense the respondent No.2 the owner of goods for his having come to be not defrayed by the respondent No.3 the entire sale consideration, as such, when respondent No.3, the person who may have been aggrieved by the said orders, may then proceed to impeach the said orders before the competent Court. Consequently, the assailing of the orders of the Judicial Magistrate 1st Class, Kasauli, comprising in Annexure P-5 at the instance of the petitioner No.1 is wholly unwarranted, who is merely a bailee of goods who rather may be entitled to claim rent from respondent No.2 or respondent No.3 for the period the apple boxes stood stored in its premises and which stands tendered before the Sessions Court, Solan and is comprised in FDR in the sum of Rs.21 lacs, as is evident from the reading of the impugned orders rendered by the learned Sessions Judge, Solan comprised in Annexure P-7. Consequently, it is not deemed fit to interfere with the orders of the learned Sessions Judge. It rather is deemed fit, just and appropriate that the petitioners herein approach the learned Sessions Judge, Solan for laying or staking a claim for the release of rent amount for storing apple boxes in its premises comprised in the FDR amounting to Rs.21 lacs, which application if and when stands instituted shall be decided in accordance with law.

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

Ateek Ahmed son of Shaeed Ahmed ….Applicant
Versus
State of H.P. ….Non-applicant

Cr.MP(M) No. 357 of 2015
Order Reserved on 23rd April, 2015
Date of Order 4th May, 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Section 11(D) of Prevention of Cruelty to Animals Act and Section 8 of Prohibition of H.P. Cow Slaughter Act- co-accused are yet to be arrested- cruelty to animal is a heinous offence- Courts are under legal obligation to protect the lives of animals because animals cannot protect themselves- investigation is at initial stage and it would not be expedient to release the petitioner on anticipatory bail- application dismissed. (Para-6 to 8)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

For the Applicant: Mr. Deepak Kaushal, Advocate
For the Non-applicant: Mr. J.S. Rena, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with FIR No. 307 of 2014 dated 31.8.2014 registered under Section 11(D) of Prevention of Cruelty to Animals Act and Section 8 of Prohibition of H.P. Cow Slaughter Act P.S. Paonta Sahib District Sirmaur (H.P.)

2. It is pleaded that applicant is only bread earner of his family and is a labourer and is agriculturist. It is further pleaded that applicant is innocent and he does not have any connection in the case. It is pleaded that bail application was filed before learned Additional Sessions Judge Nahan District Sirmaur vide bail application No. 122 of 2015 which was rejected on dated 4.4.2015. It is pleaded that applicant has been falsely implicated in present case. It is pleaded that owner of vehicle and main accused Irshad already stood released by the Court of learned JMIC Paonta Sahib. It is further pleaded that applicant is not owner of the cattle nor is the owner of vehicle. It is also pleaded that applicant will not tamper with prosecution evidence and will abide by terms and conditions imposed by Court. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. There is recital in police report that on dated 31.8.2014 ASI Mohar Singh along with HC Jagir Singh, C. Ayub Khan, C. Jaagar Singh were posted in check post Bahral and HHC Sewa Singh and C. Ishwar Singh were on patrolling

duty at about 6 AM. There is recital in police report that vehicle having registration No. HR-55F-3717 came and same was stopped for checking purpose. There is recital in police report that driver of vehicle told that ice-cream was loaded in the vehicle. There is further recital in police report that some voices came from inside the vehicle and on suspicion driver was directed to produce the documents of vehicle. There is recital in police report that two persons were travelling in the vehicle and one person boarded down from the vehicle and ran towards the forest. There is recital in police report that driver of vehicle disclosed his name as Mohammad Hussain @ Mausim Khan son of Raiees Khan resident of Akbarabad, P.O. Dariyal Tehsil Swar P.S. Tanda District Rampur U.P. There is recital in police report that driver of vehicle disclosed the name of another person who fled away at the time of checking as Raoop son of Poona Chaudhary resident of VPO Dariyal Tehsil Swar P.S. Tanda District Rampur U.P. There is further recital in police report that vehicle was checked in presence of Ranbir Singh and Kedar Singh. There is also recital in police report that nine ox were kept in the vehicle. There is recital in police report that seizure memo was prepared. There is further recital in police report that site plan was prepared and statements of witnesses recorded. There is recital in police report that owner of animals and another person who was travelling in the vehicle have concealed themselves. There is further recital in police report that Ateek Ahmad filed the anticipatory bail application but he did not appear before the Court and thereafter his anticipatory bail application was dismissed. There is further recital in police report that co-accused Ateek Ahmad is to be arrested and other co-accused Naushad and Raoop are also to be arrested. There is recital in police report that co-accused Ateek Ahmad, Naushad and Raoop are resident of another State and they were carrying the animals for slaughter purpose in vehicle No. HR-55F-3717. There is recital in police report that religious sentiments of Hindus have been damaged and there is resentment in the Hindu community. Prayer for rejection of anticipatory bail application sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the State and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether anticipatory bail application filed under Section 438 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

<u>Findings on Point No.1</u>

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that any condition imposed by Court will be binding upon applicant and on this ground anticipatory bail application be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. In present case as per police report co-accused Naushad and Raoop are still to be arrested. Court is of the opinion that cruelty to animal is a heinous offence. Courts are under legal obligation to protect the life of animals because animals cannot

protect themselves. There are serious allegations against the applicant that applicant along with other co-accused was carrying nine ox in the vehicle which was closed from all sides. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In present case Court is of the opinion that for proper investigation custodial interrogation of applicant is essential. Court is of the opinion that if applicant is released on anticipatory bail at this stage then investigation of case will be adversely affected. In view of the fact that investigation is at the initial stage of case it is not expedient in the ends of justice to release the applicant on anticipatory bail at this stage.

8. Submission of learned Additional Advocate General appearing on behalf of non-applicant that if applicant is released on anticipatory bail at this stage then applicant will induce and threat the prosecution witnesses is accepted for the reasons mentioned hereinafter. There is apprehension in the mind of Court that if applicant is released on bail at this stage then applicant will threat and induce the prosecution witnesses which would adversely effect the case. In view of above stated facts, point No.1 is answered in negative.

Point No.2 (Final order)

9. In view of my findings on point No.1 anticipatory bail application filed by applicant under Section 438 Cr.P.C. is rejected. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 438 of Code of Criminal Procedure 1973. Pending application(s) if any also disposed of. Application filed under Section 438 of Code of Criminal Procedure is disposed of.

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

Cr. Appeal Nos. 392, 206, 211 & 393 of 2011.
Reserved on: May 01, 2015.
Decided on: May 04, 2015.

1. **Cr. Appeal No. 392 of 2011**.

Deep Bahadur ……Appellant.

Versus

State of H.P. …….Respondent.

2. **Cr. Appeal No. 206 of 2011**.

Bal Bahadur ……Appellant.

Versus

State of H.P. …….Respondent.

3. **Cr. Appeal No. 211 of 2011**.

Deep Bhadur & anr. ……Appellant.

Versus

State of H.P. …….Respondent.

4. **Cr. Appeal No. 393 of 2011**.

Asha Devi ……Appellant.

Versus

State of H.P. …….Respondent.

N.D.P.S. Act, 1985- Section 20- Accused 'P' was carrying a boru on his shoulder- accused 'P' and 'A' were holding a pithu bag from each side- they tried to run away on seeing the police but were apprehended- their search was conducted- boru contained 24 kg. of charas and pithu contained 8 kg. of charas- prosecution witnesses admitted that police officials prepared the documents together by sitting in the police station- no entry was made in the malkhana register regarding taking out of the property for sending it to FSL for analysis- further, there is no entry regarding the re-deposit or taking the case property to the Court or deposit in malkhana after it was brought from the Court- no independent witness was associated- held, that in these circumstances, case of the prosecution was not proved- accused acquitted. (Para-19 to 25)

For the appellant(s): Mr. Anup Chitkara, Advocate, for appellant(s) in Cr. Appeals No. 392 & 393 of 2011.
Mr. M.L.Sharma, Advocate, for appellant in Cr. Appeal No. 206 of 2011.

For the respondent(s): Mr. M.A.Khan, Addl. AG, with Mr. P.M.Negi, Dy. AG and Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since common questions of law and facts are involved in these appeals, all these appeals were taken up together for hearing, except Cr. Appeal No. 211 of 2011, titled as Deep Bhadur & anr. Vrs. State of H.P. It is made clear that accused Deep Bahadur has infact filed two Cr. Appeals bearing No. 392 of 2011 through Sh. Anoop Chitkara, Advocate and Cr. Appeal No. 211 of 2011 as Jail Appeal.

2. These appeals are directed against the common judgment dated 4/5.1.2011, rendered by the learned P.O. Fast Track Court, Mandi, H.P., in Sessions Trial No. 16 of 2009, whereby the appellants-accused (hereinafter referred to as the "accused"), who were charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act) have been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years each and to pay fine of Rs. 1,00,000/- each and in default of payment of fine, they were further ordered to undergo rigorous imprisonment for six months each under Section 20(ii)(C) of the ND & PS Act.

3. The case of the prosecution, in a nut shell, is that on 2.9.2008, police party headed by Insp. Hemant Kumar Thakur, I.O. Police Station, SV & ACB, Mandi, H.P., set up a naka at Pansara bridge, a secluded place. At about 9:30 PM, the accused persons were seen coming from the area of Bhadoli-Kullu side. Accused Bal Bahadur was carrying a "Boru" on his shoulder. Accused Deep Bahadur and Asha Devi were carrying a "Pithu bag". Accused Deep Bahddur was holding that Pithu bag from one side while accused Asha Devi

was holding that bag from the other side. The accused tried to turn back. The accused persons were nabbed. The Insp. Hemant Kumar Thakur, I.O. and other police officials gave their personal search to the accused vide memo Ext. PW-1/B. The accused persons were informed of their legal right to be searched by a Magistrate or a Gazetted Officer vide memo Ext. PW-1/A. The accused persons consented to be searched by the Police party. The boru carried by the accused Bal Bahadur was searched. It was found to be containing charas in the shape of chapattis, wrapped in polythene. The bag carried by accused Deep Bahadur and Asha Devi was found to be containing charas in the shape of sticks. The recovered stuff on smelling was found to be charas. The charas, so recovered from boru was weighed. It weighed 24 kgs whereas the charas, so recovered from Deep Bahadur and Asha Devi weighed 8 kgs. Out of the charas recovered from boru, two samples of 50 gms. each were drawn which were separately parceled and sealed with three seals of seal-S each. The bulk charas was put in that very boru which was parceled and sealed with six seals of seal-S. The sample parcels were marked as mark A-1 and mark A-II. The parcel containing balance charas was marked as mark P-1. Two samples of 50 gms. each were drawn from the charas recovered from the pithu bag carried by accused Deep Bahadur and Asha Devi. These were separately parceled and sealed with three seals of seal-S each. The bulk charas was put in that very pithu bag, which was parceled and sealed with six seals of seal-S. The sample parcels were marked as mark A-III and mark A-IV. The parcel containing balance bulk charas was marked as mark P-II. NCB form in triplicate was filled in on the spot. The recovered charas was taken into possession by the police vide memo Ext PW-1/C. Rukka Ext. PW-3/A was scribed and sent to the Police Station through Const. Pankaj Kumar, on the basis of which FIR No. 9/2008 Ext. PW-4/A was registered at PS SV & ACB, Mandi, H.P. The case property was brought before the SI Om Verma for resealing, who resealed each parcel with three seals of "C" and prepared the reseal memo Ext. PW-4/E. Thereafter, he deposited the case property alongwith sample seals and other related documents with MHC. The sample parcels Mark A-I and A-III were sent for chemical analysis. The report of FSL is Ext. PW-4/D. During the pendency of the trial, the prosecution sent the parcels containing balance charas to the Laboratory for chemical examination and the report is Ext. PX. The investigation was completed and the challan was put up after completing all the codal formalities.

4. The prosecution, in order to prove its case, has examined as many as 14 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution case. According to them, they were falsely implicated. The learned trial Court convicted and sentenced the accused persons, as noticed hereinabove. Hence, these appeals on behalf of the accused.

5. M/S. Anup Chitkara and M.L.Sharma, Advocates, appearing on behalf of the respective accused, have vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, Addl. AG, for the State has supported the judgment of the learned trial Court dated 4/5.1.2011.

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

7. PW-1 LC Chandra Thakur deposed that on 22.9.2008, she was associated by Insp. Hemant Kumar, in the raiding party. They all went in the official vehicle to Pansara bridge of Aut area of District Mandi. The police laid naka at Pansara bridge at 9:30 PM. In the meantime, two male persons and one lady came from Bhadyoli Kullu side. They were coming towards Pansara bridge. One male person was carrying jute bag on his left

shoulder. The other male and lady were holding pithunuma bag of black and blue colour, in which the word "Alpine" was written. The lady was holding that bag from one side and the male was holding it from the other side. The accused disclosed their identity. The place where the accused were intercepted, was lonely place. The I.O. informed the accused persons of their legal right vide written option memo Ext. PW-1/A as to whether they intend to give personal search and of the articles in their possession, to a Gazetted Officer or to the police. The accused persons opted to give their personal search to the police. In this regard, memo Ext. PW-1/A was prepared. Hemant Kumar I.O. gave his personal search and that of the raiding party. Thereafter, Insp. Hemant got checked the jute bag (boru) after calling the accused Bal Bahadur to bring down the jute bag from his shoulder. The said bag was opened. It was found containing charas in the shape of chapatinuma and aitakar which was wrapped with polythene. It weighed 24 kgs. Thereafter, the bag which was carried by accused Deep Bahadur and Asha Devi was checked. It found containing charas. It weighed 8 kgs. The samples were drawn. The same were put in polythene bags. Thereafter, they were packed and sealed in separate cloth parcels. The charas was also put in the same jute bag i.e. 23.900 kgs and thereafter, it was packed and sealed in a cloth parcel. The sample parcels were marked as A-1 and A-2 and sealed with three seals of "S" on each parcel and the enclosure of the parcels were also signed by her, Rajender, Const. Lal Singh as well as by the accused. The parcel of Boru was marked as P-1 and six seal impressions were affixed on it on different places. Thereafter, the cloth parcels of sample were marked as A-3 and A-4 and sealed with the seal impression of "S" and three seals were affixed on the parcel and thereafter the parcel of Pithu bag was marked as P-2 and six seal impressions of seal "S" were affixed thereon. The I.O. has also taken the impression of seal on NCB form in triplicate. The sealed articles were taken into possession vide recovery memo Ext. PW-1/D. In her cross-examination, she admitted that Pansara is a big village.

8. PW-2 Const. Rajinder Singh also deposed the manner in which the accused were apprehended, searched, recoveries were made and the codal formalities were completed on the spot. In his cross-examination, he admitted that it was the duty of the I.O. to associate some independent witnesses from Pansara and none of the member of the raiding party including the senior officer had tried to join any independent witness nor they reminded the I.O. to do so. The National Highway was just half a kilometer away from the Pansara bridge. On the National Highway, hundreds of vehicles, motor cycles, car and three wheelers used to ply day and night. No hukamnama was issued to any of the member of the raiding party to bring independent witnesses from the nearby locality. In his further cross-examination, he admitted that there were houses between NH 21 which leads to Kullu-Manali and the Pansara bridge.

9. PW-3 Const. Pankaj Kumar, also deposed the manner in which the accused were apprehended, searched, recoveries were made and the codal formalities were completed on the spot. In his cross-examination, he admitted that there were residential houses within a span of 300 meters of village Badyawali and 700 meter at village Dalashani, where people do reside. He also admitted that village Dalshani is a big Panchayat where Panchayat Pradhan and other members were available. He further admitted that village Pansara is also a big village on National Highway 21, where Panchayat Pradhan and other members of the Panchayat were available. He did not remember that any member of the raiding party was instructed by the I.O. to bring local respectable members from nearby vicinity of villages Dalshani, Badayawali and Pansara.

10. PW-4 Om Parkash, deposed that Const. Pankaj Kumar produced rukka at about 2:15 AM in the PS, ACB, Mandi, on the basis of which, FIR Ext. PW-4/A was registered and its endorsement bears his signature. On 23.9.2008, at about 7:15 AM, Insp. Hemant Thakur produced the contraband before him. The resealing process was completed. He also filled in column No. 11 of the NCB form vide Ext. PW-4/D. He also prepared the certificate of resealing vide Ext. PW-4/E.

11. PW-5 HC Kuldeep Singh deposed that SI Om Prakash has deposited the case property with him. He made the entries in the malkhana register vide Ext. PW-5/A. He sent Const. Rajinder Singh vide RC No. 24/08 to deposit the samples at FSL Junga for chemical analysis. The copy of RC is Ext. PW-5/B. On 17.11.2008, Const. Brijesh Kumar took the report the chemical analysis alongwith the sample A-1 and A-3 from FSL Junga which were sealed with seals of FSL and deposited with him. He kept the aforesaid case property in the malkhana intact. In his cross-examination, he admitted that the malkhana register Ext. PW-5/A does not find mention regarding deposit of NCB forms. He also admitted that the sample was sent to FSL Junga after a delay of 72 hours. He categorically admitted that all the police officials prepared the documents together by sitting in the Police Station. He also admitted that in the report of FSL, Junga, it does not find mention of RC number through which samples were allegedly sent to the laboratory. Column No. 12 in the NCB-1 form was filled up by him. He admitted that the said column does not find mention of the name of the laboratory where the sample was allegedly sent by him. He also admitted that column No. 12 was not stamped by him.

12. PW-7 Const. Som Dev, also deposed the manner in which the accused were apprehended, searched, recoveries were made and the codal formalities were completed on the spot.

13. PW-9 HC Brajesh Kumar, deposed that on 16.6.2008, he was deputed to collect the report from FSL, Junga. He went to FSL Junga on 16.11.2008 and collected the report and handed over the same to the MHC.

14. PW-11 HC Vinod Kumar, MHC deposed that on 17.6.2010, he received order from the Court that two parcels of this case were allowed to be sent to the laboratory for chemical examination. On 19.6.2010, both the parcels of this case sealed with the court seal were sent to the laboratory through HC Yog Raj vide R/C No. 40/10. According to him, so long as the case property remained in his custody, he did not do any tampering nor did he allow anybody to tamper with it. The FSL report was received on 6.7.2010. When the parcels were sent to the laboratory an entry was made to this effect in the malkhana register at Sr. No. 45/19.

15. PW-12 HC Yog Raj, deposed that on 19.6.2010, MHC handed over to him two parcels of this case sealed with the court seal vide R/C No. 40/10 for being taken to FSL Junga. He deposited the same after obtaining the receipt and returned the R/C and receipt to the MHC on his return.

16. PW-13 Const. Som Dev, deposed that on 6.7.2010, he went to FSL Junga to collect the case property of this case. He brought two parcels of this case vide Ext. PW-10/A and PW-10/B alongwith the FSL report Ext. PX. He handed over the same to MHC PS SV and ACB Mandi on 6.7.2010.

17. PW-14 Insp. Hemant Kumar deposed the manner in which the accused were apprehended, searched, recoveries were made and the codal formalities were completed on

the spot. He filled up the NCB form. He sent the rukka to the Police Station. In his cross-examination, he admitted that village Bashing was at a distance of 4 kms. from Kullu towards Manali. He did not send any police official to call any independent person. He could not assign any special reason for not sending any police official to call any independent person. He also admitted that Pansara is a big village but not thickly populated. He also admitted that he did not associate any independent witness in the raiding party. Voluntarily deposed that there were various reasons for it like witnesses turn hostile and witnesses do not come forward to join the raiding party. He also admitted that he did not make any efforts to associate any independent witnesses.

18. The case of the prosecution, precisely, is that the accused were nabbed on 22.9.2008 carrying charas in boru and pithu. The samples were drawn and these were sealed. The bulk was also sealed. NCB forms were filled up in triplicate. Rukka was sent to the Police Station, on the basis of which, FIR was registered.

19. According to PW-5 Kuldeep Singh, the samples were sent for analysis to FSL Junga through Constable Rajinder Singh to be deposited in the FSL vide RC No. 24/08. The copy of RC is Ext. PW-5/B. On 17.11.2008, Const. Brijesh Kumar took the report of the chemical analysis alongwith the sample A-1 and A-3 from FSL Junga which were sealed with seals of FSL and deposited with him. He kept the aforesaid case property in the malkhana intact. In his cross-examination, he has categorically admitted that all the police officials prepared the documents together by sitting in the Police Station, though the documents are required to be completed, including filling up of NCB forms, on the spot. Initially, two parcel samples Ext. A-1 and A-3 were sent for chemical analysis to FSL Junga. Thereafter, the Court sent the bulk charas for chemical analysis as per the trial Court order dated 16.6.2010. The samples were sent by PW-11 HC Vinod Kumar to laboratory through HC Yog Raj, PW-12 vide RC No. 40/10. The FSL report was received on 6.7.2010. When the parcels were sent to the laboratory, the entry to this effect was made in the malkhana register at Sr. No. 45/19. Parcels Ext. PW-10/A and PW-10/B were taken by HC PW-12 Yog Raj through RC No. 40/10 to FSL Junga. The samples were brought back with the report Ext. PX by Const. Som Dev (PW-13).

20. The case property was produced before the Court while recording the statement of PW-14 Insp. Hemant Kumar. He identified the case property. We have gone through Ext. PW-5/A malkhana register, carefully. The entry at Sr. No. 45/19 has been made to the effect that the case property was deposited by PW-4 Om Prakash on 23.9.2008. The samples A-1 and A-3 were sent for chemical analysis vide RC No. 24/08 through Const. Rajender Singh to Junga. These were received back through Brijesh Kumar on 17.11.2008 carrying seal of the FSL.

21. PW-11 MHC Vinod Kumar, as noticed by us hereinabove, stated that on 19.6.2010, both the parcels of this case sealed with the court seal were sent to the laboratory through HC Yog Raj vide R/C No. 40/10. Surprisingly, RC No. 40/10 has not been proved. According to him, when the parcels were sent to the laboratory an entry was made to this effect in the malkhana register at Sr. No. 45/19. There is no corresponding entry of the bulk charas being taken out from the malkhana on 19.6.2010. The malkhana register is not on the prescribed proforma and the case property when deposited, entry is required to be made and when the same is taken out corresponding entry is also required to be made. PW-12 HC Yog Raj, deposed that he was handed over two parcels of this case, PW-10/A and PW-10/B, sealed with the court seal vide R/C No. 40/10 for being taken to FSL Junga. He deposited the same after obtaining the receipt and returned the R/C and receipt

to the MHC on his return. These samples were brought from FSL Junga by PW-13 Const. Som Dev alongwith the report of the FSL Ext. PX. He handed over the same to MHC PS SV and ACB Mandi on 6.7.2010. There is no corresponding entry of re-deposit of Ext. PW-10/A and PW-10/B in the malkhana register Ext. PW-5/A. Thus, there is no entry in the malkhana register when the bulk was taken out for analysis and when it was re-deposited by PW-13 Const. Som Dev. The case property was produced in the Court but there is no entry in the malkhana register when it was taken out. The necessary entry was to be made in the malkhana register when Ext. PW-10/A and PW-10/B were taken out from the malkhana to be produced in the Court alongwith the DDR report. Similarly, when the case property after its production in the Court was to be brought back in the malkhana, the entry was required to be made alongwith the DDR. The case property when taken out from the malkhana is entrusted to police official/officer, for its safe custody from malkhana to the Court and to be brought back. Since the case property, as per the procedure duly established, has neither been deposited nor taken out from the malkhana as per law, it casts serious doubt whether it was the same contraband/case property, which was seized from the accused and sent for chemical analysis at FSL, Junga. It has caused serious prejudice to the accused persons.

22. The accused were nabbed on 22.9.2008 at about 9:30 PM, when the police had laid down naka at Pansara bridge. PW-2 Rajinder Singh, in his cross-examination has admitted specifically that it was the duty of the I.O. to associate some independent witnesses from Pansara and none of the member of the raiding party including the senior officers have tried to join any independent witnesses nor they reminded the I.O. about the same. The National Highway was just half a kilometer away from the Pansara bridge. According to him, on the National Highway, hundreds of vehicles, motor cycles, car and three wheelers used to ply day and night. No hukamnama was issued to any of the member of the raiding party to bring independent witnesses from the nearby locality. In his further cross-examination, he admitted that there were houses between NH 21 which leads to Kullu-Manali and the Pansara bridge. PW-3 Const. Pankaj Kumar has admitted that there were residential houses within a span of 300 meters of village Badyawali and 700 meter at village Dalashani, where people do reside. He further admitted in his cross-examination that village Dalshani is a big Panchayat where Panchayat Pradhan and other members were available. He further admitted that village Pansara is also a big village on National Highway 21 where Panchayat Pradhan and other members of the Panchayat were available. He did not remember that any member of the raiding party was instructed by the I.O. to bring local respectable members from nearby vicinity of villages Dalshani, Badayawali and Pansara. PW-7 Const. Som Dev also admitted that Pansara is a big Panchayat having Panchayat Pradhan and its members. It is a thickly populated village.

23. PW-14 Insp. Hemant Kumar, in his cross-examination, has admitted that village Bashing was at a distance of 4 kms. from Kullu towards Manali. He did not send any police official to call any independent person. He could not assign any special reason for not sending any police official to call any independent person. He also admitted that Pansara is a big village but not thickly populated. He also admitted that Pansara Panchayat was headed by Pradhan. He did not send any police official to associate any independent person. However, he stated that there were various reasons, when cross-examined by the learned Advocate appearing on behalf of accused Bal Bahadur and Deep Bahadur, that at times, witnesses turn hostile and witnesses do not come forward to join the raiding party. He further admitted that he did not make any efforts to associate any independent witnesses. It is proved on the basis of the statements, as discussed, hereinabove, that the independent

witnesses, though available from villages Dalshani, Badayawali and Pansara, were not associated. PW-14 Insp. Hemant Kumar has not even made any efforts to associate independent witnesses. No hukamnama was issued to the police party to bring the independent witnesses.

24. The accused were nabbed at village Pansara at about 9:30 PM. The National Highway was nearby, where hundreds of vehicles ply day and night. Thus, it cannot be presumed that it was a secluded place, where independent witnesses were not available. The purpose of joining independent witnesses at the time of arrest, search and sealing process is to inspire confidence that all the codal formalities were completed on the spot at the time of arrest, search and sealing process.

25. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 20 of the N.D & P.S., Act, since the mandatory provisions have not been complied with and the manner in which the case property was taken out and re-deposited, coupled with the fact that no independent witnesses, though available were associated.

26. Accordingly, in view of the analysis and discussion made hereinabove, the appeals are allowed. Judgment of conviction and sentence dated 4/5.1.2011, rendered by the learned P.O. Fast Track Court, Mandi, H.P., in Sessions Trial No. 16 of 2009, is set aside. Accused are acquitted of the charges framed against them by giving them benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case.

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

Cr. Appeal No. 211 of 2011.

28. In view of the judgment rendered in Cr. Appeal No. 392 of 2011, no orders are required to be passed in this appeal.

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

General Manager, Northern Railway, ...Appellant.
Versus
Ramesh Chand and others. ....Respondents.

CMP(M) No. 1295 & 1296 of 2014 in
RFA No. 4104 of 2013.
Decided on: 4th May, 2015

Land Acquisition Act, 1894- Section 18- One of the petitioners had died during the Reference Petition before the trial Court- this fact was not brought to the notice of trial Court- held, that when the award was passed in ignorance of death of the sole petitioner, award has to be set aside - in case of more than one petitioner, death of one of the

petitioners does not make the award a nullity and the legal representatives can be brought on record in appeal. (Para-2 and 3)

Case referred:
Collector Land Acquisition NHPC versus Khewa Ram and others, Latest HLJ 2007 (HP) 270

For the appellant:	Mr. Prince Chauhan, Advocate vice Mr. Rahul Mahajan, Advocate.
For the respondents:	Mr. Dheeraj K. Vashisth, Advocate for respondents No. 1, 3 to 5 and for proposed LRs No. 2(a) and 2(b).
	Mr.D.S.Nainta, Addl. A.G with Mr. Pushpinder Jaswal, Dy. A.G for respondents No. 6 and 7.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Respondent No. 2, Shri Raj Kumar (one of the petitioner in the trial Court) in the main appeal has expired on 02.10.2010 i.e. during the pendency of the reference petition in the trial Court. The factum of his death was neither brought to the notice of the trial Court either by the surviving petitioners or legal representatives of the said respondent nor any steps for his substitution taken. To the contrary, the reference petition filed by said Sh. Raj Kumar and his brothers S/Sh. Ramesh Chand, Pawan Kumar, Arun Kumar and Pardeep Kumar came to be decided along with batch of petitions vide award dated 30.04.2012, under challenge in the present appeal, without taking notice of his death and substitution of his legal representatives.

2. The question for adjudication as arisen in these applications is as to what is the impact of death of deceased respondent Raj Kumar and non-substitution of his legal representatives in these proceedings. The law in this regard is no more *res-integra* as this Court in **Collector Land Acquisition NHPC** versus **Khewa Ram and others, Latest HLJ 2007 (HP) 270**, after taking into consideration the provisions contained under the Land Acquisition Act and also under Order 22 of the Code of Civil Procedure, has held that a reference petition under Section 18 has to be answered by the Court and in case the claimant does not appear despite notice, he do so at his own risk. In the event of the sole claimant died during the course of proceedings and the Court unaware of his death answered the reference on the basis of the material available on record, in an appeal either filed by his legal representatives or the acquiring authority, the award has to be set aside and the proceedings deem to have been abated, of course subject to the consideration of the question of setting aside the abatement on condonation of delay, however, only by the reference Court and not by the appellate Court. In a case where there are more claimants or where more than one petition (a batch of petitions) decided by a common award, death of one of the claimants during the course of proceedings do not render the award passed on common evidence led by all the parties a nullity and the legal representatives can even be brought on record during the pendency of the appeal also. The relevant portion of the judgment supra reads as follows:

> "13. The question that next arises is as to what happens if the claimant has died during the proceedings. This can also happen

under various circumstances, some of which are being dealt with hereunder:

a. In case there is only one claimant in an isolated case of land acquisition and the claimant dies, then obviously if the court is unaware about the death of the claimant, it will proceed to decide the reference on the material placed on record before it. In such a case, if either the legal representatives of the claimant or the acquiring authority files an appeal, then the award of the District Judge will have to be set aside and the reference proceedings deemed to have been abated. The questions whether abatement should be set aside and whether the delay, if any, should be condoned are questions to be decided by the District Judge alone and not by the appellate court.

b. However even in the aforesaid situation, the award cannot be said to be nullity since the reference court is bound by law to answer the reference. In case none of the parties is aggrieved, the legal representatives can execute the award in accordance with law.

c. In cases where there are more than one claimants and each is owner of a separate share, then the death of one of the claimants can never render the award to be a nullity. The award is answered in favour of all the claimants. Therefore, in an appeal filed either by the claimants or by the acquiring authority, the legal representatives of the deceased claimant can be brought on record even during the course of the appeal and it is not necessary to refer the matter back to the reference court.

d. Where there are more than one petitions and they are decided by a common award and the sole claimant in one of the petitions has died during the pendency of the reference proceedings, the entire award cannot be termed a nullity. Since the award is a common award based on common evidence led by all the parties, the legal representatives of the deceased can be brought on record during the pendency of the appeal also.

e. In cases(c) and (d) above, the abatement, if any, will be qua the deceased and the entire proceedings will not abate. In both these cases the legal representatives can be brought on record even during the pendency of the appeal.

3. The present is a case which is covered by (b) and (c) of para 13 of the judgment supra, as Raj Kumar was not the only petitioner in the reference petition but his brother S/Sh. Ramesh Chand, Pawan Kumar, Arun Kumar and Pardeep Kumar being co-

owners of the acquired land were also the petitioners with him. Above all, the reference petition, they preferred has been decided by a common award passed in a batch of petitions on the basis of common evidence available on record. Therefore, irrespective of the death of deceased respondent Raj Kumar during the course of the proceedings in the reference petition in the trial Court, the question of abatement of the appeal and substitution of his legal representative can be gone into by this Court in the present appeal. Since his brothers, petitioners No. 1, 3, 4 and 5 were their on record to represent the estate of the deceased petitioner-respondent and to pursue the petition, therefore, the question of abatement does not arise. The proposed legal representatives of deceased respondent Raj Kumar named in para 3 of the application [CMP(M) No. 1295 of 2014] are otherwise also required to be brought on record being entitled to receive the compensation in respect of the acquired land to the extent of their share and also to straighten the record.

4. The application, no doubt, has been filed beyond the period of limitation. The delay, however, stands explained from the contents of another application [CMP(M) No. 1296 of 2014] filed under Section 5 of the Limitation Act.

5. I, therefore, allow both the applications and on setting aside the abatement of the proceedings, order to substitute the proposed legal representatives named in para 3 of the application,[CMP(M) No. 1295 of 2014] as respondents No. 2(a) and 2(b) in the main appeal. Necessary corrections be made in the records accordingly. Amended memo, in terms of this order be also filed within two weeks. Both the applications stand disposed of.

An authenticated copy of this order be sent to learned trial Court for making necessary corrections in the records in terms of this order.

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

Kameshwar son of late Sh. Parma Ram ….Applicant
Versus
State of H.P. ….Non-applicant

Cr.MP(M) No. 359 of 2015
Order Reserved on 23rd April,2015
Date of Order 4th May, 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 430, 504 and 506 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- Courts are under an obligation to maintain balance between human rights and a criminal cases- considering that investigation is complete and no recovery is to be effected from the accused, bail granted to the accused. (Para-7 and 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179

The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702

For the Applicant: Mr. G.C.Gupta, Sr. Advocate with Ms. Meera Devi, Advocate
For the Non-applicant: Mr. J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 20 of 2015 dated 21.3.2015 registered under Sections 430, 504 and 506 Part-B of IPC at P.S. New Shimla.

2. It is pleaded that applicant has not committed any offence as alleged and further pleaded that applicant will abide by terms and conditions imposed by Court. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. There is recital in police report that applicant intentionally uprooted public water tap from sehan of complainant and placed the public water tap in his house and stopped the water supply to the house of complainant. There is recital in police report that accused did not allow the complainant and his children to use the public water tap since six months and when complainant went to take the water from water tap accused abused the complainant and told the complainant that if he would again come to take the water from public water tap then he would kill him. There is further recital in police report that site plan was prepared and statements of witnesses recorded under Section 161 Cr.P.C. There is also recital in police report that no further investigation is to be conducted from applicant and no recovery is to be effected from the applicant. There is recital in police report that accused is quarrelsome person and another FIR No. 46 of 2014 dated 1.10.2014 registered under sections 336, 504 and 427 IPC against the applicant. There is further recital in police report that applicant would induce and threat the prosecution witnesses in case applicant is released on bail and prayer for rejection of anticipatory bail application sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the non-applicant and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether the anticipatory bail application filed under Section 438 Cr.P.C. by applicable is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is completed and no recovery is to be effected from applicant and on this ground anticipatory bail application filed by applicant be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period. In view of the fact that investigation is complete and in view of the fact that no recovery is to be effected from applicant Court is of the opinion that it would be in the interest of justice if applicant is released on bail because trial will be concluded in due course of time.

8. Submission of learned Additional Advocate General appearing on behalf of non-applicant that if bail is granted to applicant then applicant will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional bail will be granted to applicant and condition will be imposed in the bail order to the effect that applicant will not induce and threat the prosecution witnesses. Court is of the opinion that if applicant will flout the terms and conditions of bail order then non-applicant will be at liberty to file application for cancellation of bail strictly in accordance with law. It is well settled law that Courts are under legal obligation to keep equal balance between criminal case and human rights of individual. In view of the fact that investigation is complete and in view of the fact that no recovery is to be effected from applicant it is expedient in the ends of justice to allow the application. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final Order)

9. In view of my findings on point No.1 bail application filed by applicant under Section 438 Cr.P.C. is allowed and interim order dated 9.4.2015 is made absolute. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 438 of Code of Criminal Procedure stands disposed of.

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

Nishant Sharma son of Sh. Desh Raj Sharma ....Applicant

Versus

State of H.P. ....Non-applicant

Cr.MP(M) No. 360 of 2015
Order Reserved on 23rd April,2015
Date of Order 4th May, 2015

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commissions of offences punishable under Sections 341, 323, 395, 367, 147, 148, 149, 120-B IPC- petitioner pleaded that he is a student and his career would be spoiled in case he is not permitted to appear in the last semester of final examination- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- release of the petitioner will not affect the investigation adversely- bail granted.

(Para-6 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702

For the Applicant: Mr. Jitender P. Ranote, Advocate.
For the Non-applicant: Mr. J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 28 of 2015 dated 5.3.2015 registered under Sections 341, 323, 395, 367, 147, 148, 149, 120-B IPC at P.S. Nadaun, District Hamirpur (H.P.)

2. It is pleaded that applicant is not directly connected with criminal offence and applicant has been implicated in false case. It is pleaded that age of applicant is 20 years and applicant is studying in the last semester at Government Industrial Training Institution Rail District Hamirpur and his final examination scheduled to be held in the month of July 2015. It is pleaded that if applicant is not released on bail then applicant will not be in position to appear in examination and career of applicant would be ruined. It is pleaded that learned Sessions Judge Hamirpur has rejected the bail application of applicant. It is further pleaded that investigation is complete and no recovery is to be effected from applicant and applicant would not tamper with prosecution witnesses in any manner and would abide by terms and conditions imposed by Court. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report, FIR No. 28 of 2015 dated 5.3.2015 registered under Sections 341, 323, 395, 367, 147, 148, 149 and 120-B of Indian Penal Code at Nadaun District Hamirpur (H.P.) against the applicant. There is recital in police report that on dated 4.3.2015 at about 10.10 PM information received that one person was brought for his medical treatment in CHC Sujanpur. There is recital in police report that Deep Sharma is taxi driver by profession and owner of vehicle No. HP-01-H-1316. There is recital in police report that on dated 4.3.2015 when Deep Sharma reached outside his house then two boys aged 20-25 years told him that they would go to Chabutra. There is recital in police report that Deep Sharma took those two boys to Chabutra in his vehicle and thereafter accused persons told Deep Sharma to take them to Karot in his vehicle. There is

further recital in police report that thereafter Deep Sharma brought the accused persons to Karot and thereafter accused persons told Deep Sharma to take them to Jihan in his vehicle. There is recital in police report that thereafter when Deep Sharma and accused persons reached at Bhou road accused persons directed Deep Sharma to stop his vehicle. There is further recital in police report that thereafter Deep Sharma was dragged outside from vehicle and was beaten with sticks and fist blows. There is also recital in police report that Rs. 10,000/- (Rupees ten thousand only) of Deep Sharma could not be traced out. There is recital in police report that matter was investigated and Deep Sharma was medically examined and as per report Deep Sharma had sustained fifteen injuries on his body. As per further police report the site plan was prepared and statements of prosecution witnesses recorded under Section 161 Cr.P.C. There is further recital in police report that two sticks were also recovered as per Section 27 of Indian Evidence Act and Rs.1000/- (Rupees one thousand only) were also recovered as per disclosure statement given by accused. There is recital in police report that Gurdev Singh raised alarm and thereafter when Gurdev Singh raised alarm accused persons fled away. There is further recital in police report that as per MLC report Deep Sharma had sustained simple injuries. There is recital in police report that in case applicant is released on bail then applicant would threat the prosecution witnesses. Prayer for dismissal of bail application sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the non-applicant and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether bail application filed under Section 439 Cr.P.C. by applicable is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

<u>Findings on Point No.1</u>

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that any condition imposed by Court will be binding upon the applicant and applicant is student and his career would be spoiled in case he would not be in position to appear in last semester of final examination and on this ground bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held

that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period. It is well settled law that accused is presumed to be innocent till convicted by competent Court of law. In view of the fact that applicant is student and in view of the fact that applicant would appear in examination of last semester Court is of the opinion that it is expedient in the ends of justice to allow the bail application filed by applicant. It is held that if applicant is released on bail then investigation of case will not be adversely effected.

8. Submission of learned Additional Advocate General appearing on behalf of non-applicant that if bail is granted to applicant then applicant will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional bail will be granted to applicant and condition will be imposed in the bail order to the effect that applicant will not induce and threat the prosecution witnesses. Court is of the opinion that if applicant will flout the terms and conditions of bail order then non-applicant will be at liberty to file application for cancellation of bail in accordance with law under Section 439(2) of Code of Criminal Procedure 1973. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order)

9. In view of my findings on point No.1 bail application filed by applicant under Section 439 Cr.P.C. is allowed subject to furnishing personal bond to the tune of Rs. 1 lac (Rupees one lac only) with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That the applicant will join the investigation of case whenever and wherever directed by Investigating Officer in accordance with law. (ii) That applicant will attend the proceedings of learned trial Court regularly till conclusion of trial of case. (iii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iv) That the applicant will not leave India without the prior permission of the Court. (v) That applicant will give his residential address in written manner to the Investigating Officer and Court so that applicant can be located in short notice. (vi) That applicant will not commit similar offence qua which he is accused. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 439 of Code of Criminal Procedure stands disposed of.

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

Partap Singh ……Petitioner.
Versus
Kanwar Singh …….Respondent.

CMPMO No. 25 of 2015.
Reserved on: 28.4.2015.
Decided on: 04.5.2015.

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff filed an application for seeking amendment in the plaint- application was filed after the issues were framed and it was

belated - the amendment would change the nature of the suit- it was not pleaded in the application that in spite of due diligence, amendment could not have been made earlier, therefore, application is liable to be dismissed. (Para-4 to 6)

Cases referred:
State of Madhya Pradesh vrs. Union of India and another, (2011) 12 SCC 268
J.Samuel and others vrs. Gattu Mahesh and others, (2012) 2 SCC 300

For the petitioner: Mr. Raman Prashar, Advocate.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The respondent was served but there is no representation on his behalf.

2. This petition is instituted against the order dated 14.10.2014, rendered by the learned Civil Judge (Jr. Divn.), Arki, Distt. Solan, H.P. in CMA No. 200/6 of 2012.

3. Key facts, necessary for the adjudication of this petition are that the respondent-plaintiff (hereinafter referred to as the plaintiff) has instituted a civil suit for permanent prohibitory injunction under Section 38 of the Specific Relief Act, for restraining the petitioner-defendant (hereinafter referred to as the defendant) from carrying out digging, construction activities and from interfering into the land shown in the plaint. The written statement was filed by the defendant on 15.1.2010. The plaintiff did not file any replication, despite numerous opportunities granted to him. The issues were framed by the learned trial Court on 10.8.2010. The plaintiff also led his evidence on 2.1.2012. The plaintiff moved an application under Order 6 Rule 17 CPC, seeking amendment of the plaint. The application was resisted by the defendant by filing detailed reply. The learned trial Court allowed the application on 14.10.2014. Hence, this petition.

3. I have heard Mr. Raman Prashar, Advocate, for the petitioner and gone through the impugned order dated 14.10.2014, carefully.

4. In the present case, the written statement was filed on 15.1.2010 and issues have already been framed by the learned trial Court on 10.8.2010. The application has been filed belatedly and it is an afterthought. The description of the suit land was already within the knowledge of the plaintiff at the time of instituting the suit. The amendment of the plaint would definitely change the basic nature of the suit causing serious prejudice to the defendant. The amendment sought for was not necessary for the final adjudication of the suit. The plaintiff has not specifically stated in the application filed under Order 6 Rule 17 CPC that inspite of due diligence, such amendment could not have been sought earlier.

5. Their lordships of the Hon'ble Supreme Court in the case of ***State of Madhya Pradesh vrs. Union of India and another,*** reported in ***(2011) 12 SCC 268***, have held that when application is filed after the commencement of the trial, it must be shown that inspite of due diligence, such amendment could not have been sought earlier. Their lordships have held as under:

"7). The above provision deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it must be shown that in spite of due diligence, such amendment could not have been sought earlier.

8). The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

9) Inasmuch as the plaintiff-State of Madhya Pradesh has approached this Court invoking the original jurisdiction under Article 131 of the Constitution of India, the Rules framed by this Court, i.e., The Supreme Court Rules, 1966 (in short `the Rules) have to be applied to the case on hand. Order XXVI speaks about "Pleadings Generally". Among various rules, we are concerned about Rule 8 which reads as under:

> "8. The Court may, at any stage of the proceedings, allow either party to amend his pleading in such manner and on such terms as may be just, but only such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

The above provision, which is similar to Order VI Rule 17 of the Code prescribes that at any stage of the proceedings, the Court may allow either party to amend his pleadings. However, it must be established that the proposed amendment is necessary for the purpose of determining the real question in controversy between the parties.

10) This Court, while considering Order VI Rule 17 of the Code, in several judgments has laid down the principles to be applicable in the case of amendment of plaint which are as follows:

(i) Surender Kumar Sharma v. Makhan Singh, (2009) 10 SCC 626, at para 5:

> "5. As noted hereinearlier, the prayer for amendment was refused by the High Court on two grounds. So far as the first ground is concerned i.e. the prayer for amendment was a belated one, we are of the view that even if it was belated, then also, the question that needs to be decided is to see whether by allowing the amendment, the real controversy between the parties may be resolved. It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure,

> wide powers and unfettered discretion have been conferred on the court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. Therefore, in our view, mere delay and laches in making the application for amendment cannot be a ground to refuse the amendment."

(ii) North Eastern Railway Administration, Gorakhpur v.

Bhagwan Das (dead) by LRS, (2008) 8 SCC 511, at para16:

> "16. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings. In Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs."

(iii) Usha Devi v. Rijwan Ahamd and Others, (2008) 3 SCC 717, at para 13:

> "13. Mr Bharuka, on the other hand, invited our attention to another decision of this Court in Baldev Singh v. Manohar Singh. In para 17 of the decision, it was held and observed as follows: (SCC pp. 504-05) "17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion on the court to allow an amendment of the written statement at any stage of the proceedings."

(iv) Rajesh Kumar Aggarwal and Others v. K.K. Modi and Others, (2006) 4 SCC 385, at paras 15 & 16:

> "15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.
>
> 16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties."

(v) Revajeetu Builders and Developers v. Narayanaswamy and Sons and Others, (2009) 10 SCC 84, at para 63:

"63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

> (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
>
> (2) whether the application for amendment is bona fide or mala fide;
>
> (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
>
> (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
>
> (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case;
>
> and (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

The above principles make it clear that Courts have ample power to allow the application for amendment of the plaint. However, it must be satisfied that the same is required in the interest of justice and for the purpose of determination of real question in controversy between the parties."

6. Their lordships in the case of ***J. Samuel and others vrs. Gattu Mahesh and others,*** reported in ***(2012) 2 SCC 300,*** have held that omission of specific plea mandatorily amounts to negligence and lack of due diligence. Their lordships have explained the term "due diligence". It has been held as under:

> "15) In this legal background, we have to once again recapitulate the factual details. In the case on hand, Suit O.S. No. 9 of 2004 after prolonged trial came to an end in September, 2010. The application for amendment under Order VI Rule 17 CPC was filed on 24.09.2010 that is after the arguments were concluded on 22.09.2010 and the matter was posted for judgment on 04.10.2010. We have already mentioned that Section 16(c) of the Specific Relief Act contemplates that specific averments have to be made in the plaint that he has performed and has always been willing to perform the essential terms of the Act which have to be performed by him. This is an essential ingredient of Section 16(c) and the form prescribes for the due performance. The proviso inserted in Rule 17 clearly states that no amendment shall be allowed after the trial has commenced except when the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial.
>
> 18) The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The Court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that:
>
>> "... no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."
>
> 19) Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term `Due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.
>
> 20) A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit."

7. Accordingly, the petition is allowed. Impugned order dated 14.10.2014, rendered by the learned Civil Judge (Jr. Divn.), Arki, Distt. Solan, H.P. in CMA No. 200/6 of 2012, is quashed and set aside.

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

Cr. Appeal No. 452/2012
with Cr. Appeal no. 39/2013
Reserved on: 1.5.2015
Decided on: 4.5.2015

1. Cr. Appeal No. 452/2012

Sashi Kumar and another …Appellants

Versus

State of Himachal Pradesh …Respondent

2. Cr. Appeal No. 39/2013

State of Himachal Pradesh …Appellant

Versus

Shashi Kumar and another …Respondents

N.D.P.S Act, 1985- Section 20- Search of the vehicle was conducted during which 500 grams of charas was recovered – when parcel Ex. P1 was opened in the Court, it was containing another parcel Ex. P2 sealed with seal impression 'P'- seal impression 'P' was put on the parcel when the contraband was seized- parcel was opened for analysis at FSL, Junga and the seals were bound to be removed at FSL- no entry was made in the Malkhana register regarding taking out of the property for production before the Court- case property was to be taken out after making entry in the Malkhana register and after recording the same in the daily dairy – case property was to be re-deposited in malkhana register and entry in the daily dairy was to be recorded- held, that these circumstances make it doubtful that case property remained intact- hence, accused acquitted. (Para-13 to 16)

For the Appellant(s) : Mr. Lakshay Thakur and Mr. Abhi Raj Guleria, Advocates, in Cr. Appeal No. 452/2012.
Mr. M.A. Khan, Additional Advocate General, in Cr. Appeal No. 39/2013.

For the Respondent(s): Mr. Lakshay Thakur and Mr. Abhi Raj Guleria, Advocates, in Cr. Appeal No. 39/2013.
Mr. M.A. Khan, Additional Advocate General, in Cr. Appeal No. 452/2012.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Since both the appeals have arisen out of the same judgment, the same were taken together and are being disposed of vide this common judgment.

2. These appeals are instituted against Judgment dated 8.10.2012 rendered by learned Special Judge, Kullu, Himachal Pradesh in Sessions Trial No. 29 of 2012, whereby appellants in Criminal Appeal No. 452/2012 (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for

convenience sake), were convicted and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.20,000/-, in default of payment of fine, to further undergo simple imprisonment for three months. The State has come in appeal bearing No. 39/2013, for enhancement of the sentence dated 8.10.2012.

3. Case of the prosecution in a nutshell is that on 4.5.2011, PW-7 SHO Tenzin (IO) alongwith HC Bala Ram was on patrolling duty near Larji. At about 4.00 am, a vehicle bearing No. HP01H-6009 came from Larji side. It was signalled to stop. Driver of the vehicle and other occupants disclosed their identification. Search of the vehicle was taken. One packet kept in the dashboard was recovered. On checking Charas was recovered and it weighed 500 gms. It was wrapped in the same manner in the packet and sealed with six seals of impression 'P'. Samples of seals were prepared on separate piece of cloth. IO filled NCB form at the spot. Possession memo was prepared. Rukka was prepared at the spot and sent to the police station, Bharari through HHC Bala Ram alongwith case property alongwith NCB form. NCB form in triplicate, sample seal 'P' and copy of seizure memo were handed over to SHO Balbir Singh. He lodged FIR. SHO Balbir Singh resealed case property with 5 impressions of seal 'W'. He also filled up column Nos. 9 to 11 of the NCB form and deposited case property with PW-5 Parkash Chand. Case property was entered in the Malkhana register at Sr. No. 46. He sent the sealed parcels vide RC Ext. PW-1/B to FSL Junga through PW-1 Bala Ram. He deposited the same in laboratory and obtained receipt. Thereafter, codal formalities were completed and challan was put up in the Court.

4. Prosecution, in all, examined 7 witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. According to them, they were innocent and were falsely implicated. Accused were convicted and sentenced as noticed above. Hence, these two appeals, one by the accused against their conviction bearing Cr. Appeal No. 452/2012, and another by the State bearing Cr. Appeal No. 39/2013, for enhancement of sentence.

5. Mr. Lakshay Thakur, Advocate has vehemently argued that the Prosecution has failed to prove its case against the accused.

6. Mr. M.A. Khan, Additional Advocate General has also argued that accused should have been given maximum punishment of 10 years being in possession of Charas.

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

8. PW-1 Bala Ram has deposed that on 4.5.2011, he alongwith SHO Tenzin and team was on patrolling and excise duty. They reached near Larji. At about 4.00 am, one vehicle came from Larji side which was stopped by the police and checked. Identities of the occupants of the vehicle were established. Search of the vehicle was conducted. During search, one pack kept on dashboard was recovered. It contained 500 gms charas. IO prepared Rukka and handed over to him for registration of case vide Ext. PW-1/A. On 5.5.2011, MHC handed over to him case property alongwith record of the case vide RC No. 30/11 Ext. PW-1/B. He deposited the same with FSL Junga and handed over receipt to MHC.

9. PW-2 and PW-3 are formal witnesses.

10. PW-4 deposed that he lodged FIR Ext. PW-4/B on the same day. Bala Ram produced/ handed over case property alongwith documents. He resealed the parcel with 'W'

and affixed 5 seals over parcel vide Ext. PW-4/D. Sample of seal is Ext. PW-4/E. He filled up columns No. 9 to 11, which is Ext. PW-4/F and affixed three impressions of seal 'W'. MHC thereafter handed over case property to MHC Parkash Chand.

11. PW-5 Parkash Chand deposed that on 4.5.2011 SI Balbir Singh handed over case property i.e. one parcel resealed with five seals of 'W', which he entered in the Malkhana register at Sr. No. 46. He proved abstract of Malkhana register Ext. PW-5/A. On 5.5.2011, sealed parcel alongwith other record was sent to FSL Junga through PW-1 HC Bala Ram.

12. PW-6 ASI Rajesh Kumar deposed the manner in which accused were apprehended, search and sealing process was completed at the spot. Case property was produced in the Court. While recording statement of PW-6 Rajesh Kumar, the trial Court has observed as under:

> **"On opening the parcel Ex. P1, it contains another sealed parcel Ex. P2 sealed with seal P six in numbers. Seals are intact. On opening Ex. P2, it contains charas Ex. P3, cello tape and polythene wrappers Ex. P4 are the same which were taken in possession from the vehicle of the accused."**

13. PW-7 SHO Tenzin was leading the patrol party. He also deposed the manner in which vehicle was stopped, accused were apprehended and vehicle was searched. He prepared NCB form. He also prepared Rukka Ext. PW-1/A. He sent the same through HHC Bala Ram alongwith case property, NCB form, sample seal 'P', copy of seizure memo to Police Station Bharari. He also prepared rough spot map.

14. Mr. Lakshay Thakur has drawn the attention of the court to Ext. PW-5/A i.e. Malkhana Register. According to PW-5, he entered in the Malkhana Register at Sr. No. 46 property deposited on 4.5.2011. He sent the same to FSL Junga through PW-1 HC Bala Ram. Bala Ram carried case property to FSL Junga vide RC Ext. PW1/B. According to Ext. PX, the report was signed by Assistant Director on 11.5.2011. After examination of the extract, original cloth parcel containing remnants of the exhibit were resealed. Case property was produced before the Court. While recording statement of PW-6, on opening of parcel Ext. P1, it contained another sealed parcel Ext. P2, sealed with seal impression 'P' six in number. Seals were intact. Seal 'P' six in number were put when the contraband was seized and thereafter 5 seals of 'W' were put by the PW-4 Balbir Singh. Parcel was supposed to be reopened for the purpose of analysis by FSL Junga. Five seals of 'W' and six seals of 'P' were bound to be removed in order to take the contraband out for the purpose of analysis from the pocket. Analysis was carried and thereafter property was put in the same parcel and sealed with FSL seals. However, when the property has been produced before the Court all the 6 seals of 'P' were found intact. The trial Court has not noticed whether seals of FSL were on the packet when produced before the Court. There is no entry also in the malkhana register Ext. PW-5/A when the property was taken out from Malkhana for production before the Court. Case property was to be taken out after making entry in Malkhana and after recording same in daily diary report. Case property was to be re-deposited in the Malkhana register and daily diary was to be prepared. Thus, it casts doubt whether the case property, which was sent to FSL Junga and the property produced before the Court, was the same which was seized from the accused coupled with the fact that six impression of 'P' were found intact as per the observations made by the Court, while recording statement of PW-6 when the case property was produced before the Court and opened. These seals were bound to be removed when the sample was examined as alleged. It creates doubt in the version of

the prosecution and, thus, prosecution has failed to prove case against accused beyond reasonable doubt. There is no reference of FSL seals. Statement of PW-6 was recorded on 21.8.2012 and as noticed by us, Ext. PX is dated 11.5.2011.

15. In Punjab Police Rules, applicable to the State of Himachal Pradesh, Malkhana registered is assigned serial number-19. It is in a tabular form. There are different columns like who has deposited the case property and when it was taken out and deposited back. These details are very material and every deposit made in the Malkhana /Store Room is to be recorded and also at the time when it is re-deposited.

16. In this case, there is no evidence who has brought the case property from Malkhana at the time of production before the Court and who has taken it back to the Malkhana. Generally, case property is taken from the Malkhana after recording entry. It is sent by MHC through some Constable and handed over to Naib Court and returned in the same manner to be deposited back in the Malkhana/Store Room.

17. Accordingly, Cr. Appeal No. 452/2012 preferred by the accused is allowed. Judgment dated 8.10.2012 rendered by learned Special Judge, Kullu, Himachal Pradesh in Sessions Trial No. 29 of 2012 is set aside. Accused be released forthwith, if not required in any other case by the Police. Fine amount, if already deposited, be also refunded to them. Registry is directed to prepare the release warrant of the accused and send them to the Superintendent of Jail concerned immediately.

18. In view of above, Cr. Appeal No. 39/2013 preferred by the State is dismissed being without any merits. Pending applications, if any, in both the appeals are disposed of.

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

Tulsi Ram. ....Petitioner.

Versus

HPSEB & another. ....Respondents.

CWP No. 5074 of 2011
Decided on: 4.5.2015

Code of Civil Procedure, 1908- Order 23 Rule 1- Learned Counsel for the petitioner submitted that he did not want to continue with the present petition and same be dismissed as withdrawn- In view of statement of the Learned Counsel, petition is dismissed as withdrawn.

For the petitioner : Mr. R.D. Kaundal, Advocate, vice counsel.
For the respondents : Mr. Raj Pal Thakur, Advocate.

The following judgment of the Court was delivered:

P.S. Rana Judge (Oral)

Learned Advocate appearing on behalf of the petitioner submitted that petitioner does not want to continue the present petition and the same be dismissed as

withdrawn. In view of the submission of learned Advocate appearing on behalf of the petitioner petition is dismissed as withdrawn. No order as to costs. For fresh cause of action petitioner would be at liberty to file fresh petition. Petition is disposed of. Pending applications if any also disposed of.

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

Gopal Chauhan. .....Applicant.
Versus
State of Himachal Pradesh. ....Non- applicant.

Cr.MP(M) No. 367 of 2015.
Order reserved on: 1.5.2015.
Date of Order: May 5, 2015.

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 465 and 471 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- police had not claimed that custodial interrogation is necessary in the present case- interests of the State or general public will not be affected by keeping the accused inside the jail- therefore, bail granted. (Para-6 to 8)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh AIR 1962 SC 253
Sanjay Chandra Vs. Central Bureau of Investigation 2012 Cri.L.J 702

For the applicant: Mr. Ravinder Singh Jaswal, Advocate.
For non-applicant . Mr. M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 26 of 2014 dated 10.7.2014 registered under Sections 420, 465 and 471 of the Indian Penal Code at Police Station Jubbal District Shimla Himachal Pradesh.

2. It is pleaded that applicant is an agriculturist and apple merchant. It is further pleaded that service of complainant namely Bhupinder Singh son of Late Sh Roop Chand resident of Mandhol Tehsil Jubbal District Shimla HP was hired for transportation of 130 boxes of apples from Matasa (Jubbal) to Solan in the month of July and August, 2014. It is further pleaded that apple boxes transported in the vehicle were found lying on the road

between Kharapathar and Kaina Kenchi road due to loosing of rope of the truck. It is further pleaded that boxes were further re-loaded in the same vehicle. It is further pleaded that as the apple boxes were got damaged the parties arrived into a compromise that complainant would compensate applicant to the extent of damage caused to the applicant. It is further pleaded that complainant just to avoid the liability towards applicant filed a false criminal complaint against applicant. It is further pleaded that allegations leveled by the complainant against the applicant are without any basis. It is further pleaded that applicant is innocent. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. There is recital in police report that applicant Gopal Chauhan has also filed counter FIR No.61 of 2012 dated 5.10.2012 under Section 407 IPC against complainant. There is further recital in police report that applicant Gopal Chauhan has also submitted carbon copy of G.R builty during investigation of FIR No.61 of 2012 and thereafter cancellation report was submitted before learned Judicial Magistrate Ist Class Jubbal which was accepted by learned Judicial Magistrate Ist Class Jubbal. There is recital in police report that carbon copy of G.R.builty was sent to FSL Junga for comparison of signatures and it was found that complainant Bhupinder Thakur had not signed in the carbon copy of G.R. builty and his signatures were obtained through some other persons. There is further recital in police report that applicant had joined investigation in the present case. There is further recital in police report that applicant will threaten the prosecution witness. Prayer for rejection of anticipatory bail application sought.

4. Following points arise for determination in the present bail application:

(1) Whether bail application filed under Section 438 of the Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of bail application.

(2) Final Order.

5. Court heard learned Advocate appearing on behalf of applicant and Court also heard learned Additional Advocate General appearing on behalf of State.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that custodial investigation of the applicant is not essential in the present case and on this ground anticipatory bail application filed by applicant be allowed is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered such as (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri.L.J 702 titled Sanjay Chandra Vs. Central Bureau of Investigation*** that object of

bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. In the present case there is no recital in police report that custodial investigation of the applicant is essential in the present case. It is well settled law that accused is presumed to be innocent till proven guilty by the competent Court of law. Court is of the opinion that if applicant is released on bail at this stage then interests of the general public or the State will not be adversely effected because there is no recital in police report that custody of the applicant is necessary for investigation in present case.

8. Submission of learned Additional Advocate General that if the applicant is released on bail then applicant will induce and threat prosecution witness and on this ground bail application be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that conditions will be imposed in the bail order that applicant will not induce or threat prosecution witnesses. If applicant will flout terms and conditions of bail order then prosecution agency or investigating agency will be at liberty to file application for cancellation of bail in accordance with law. Point No.1 is decided in affirmative.

Point No.2 (Final order).

9. In view of my above findings on point No.1 anticipatory bail application filed by applicant is allowed and interim order dated 10.4.2015 is made absolute with all terms and conditions mentioned in interim order dated 10.4.2015. Observation made hereinabove is strictly for the purpose of deciding the present anticipatory bail application and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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

Jatinder Singh ……Applicant.
Versus
State of Himachal Pradesh. …….Non-applicant.

Cr.MP(M) No. 370 of 2015.
Order reserved on: 1.5.2015.
Date of Order: May 5, 2015.

Code of Criminal Procedure, 1973- Section 439 - Petitioner was arrested for the commission of offences punishable under Sections 457 and 380 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete and challan has been filed in the Court- criminal cases would be disposed of in course of the time – interests of the general public or State would not be affected by releasing the petitioner on bail, therefore, petitioner ordered to be release on bail.
(Para-6 to 8)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh AIR 1962 SC 253
Sanjay Chandra Vs. Central Bureau of Investigation 2012 Cri.L.J 702

For the applicant: Mr. Naresh Verma, Advocate.
For non-applicant . Mr. M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No.180 of 2014 dated 27.9.2014 registered under Sections 457 and 380 of the Indian Penal Code at Police Station Jawalamukhi District Kangra Himachal Pradesh.

2. It is pleaded that investigation of the present case is completed and recovery has been effected. It is further pleaded that there is no direct evidence against the applicant and he is innocent. It is further pleaded that applicant will not induce or threat prosecution witness in any manner and will abide by the terms and conditions imposed by the Court. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report FIR No. 180 of 2014 dated 27.9.2014 registered under Sections 457 and 380 IPC at Police Station Jawalamukhi District Kangra HP. There is recital in police report that statement of co-accused Jitender Singh was recorded under Section 27 of the Indian Evidence Act and as per disclosure statement of co-accused Jitender Singh site plan of location was prepared where cash chest of ATM machine was kept. There is further recital in police report that broken locks of shutter which were thrown in the bushes by accused persons were also recovered as per disclosure statement given by co-accused Jitender Singh. There is further recital in police report that one CD and bank statement dated 26.9.2014 and statement of cash kept in the ATM machine also took into possession vide seizure memo. There is further recital in police report that on dated 26.9.2014 the ATM machine kept by PNB Bank Kaloh Tehsil Rukker District Kangra HP was broken and Rs.6,24,200/-(Six lac twenty four thousand two hundred) was stolen from cash chest of ATM machine by accused persons. There is further recital in police report that one spray bottle, cash chest of ATM machine and cash to the tune of Rs.5,97,700/- (Five lac ninety seven thousand seven hundred) and car having registration No. HR-51E-6011 were also took into possession vide seizure memo. There is further recital in police report that investigation is complete and challan is filed in the competent Court of law on dated 2.12.2014.

4. Following points arise for determination in the present bail application:

(1) Whether bail application filed under Section 439 of the Code of Criminal Procedure 1973 is liable to be accepted after completion of investigation and after filing of challan in competent Court of law as alleged?.

(2) Final Order.

5. Court heard learned Advocate appearing on behalf of applicant and Court also heard learned Additional Advocate General appearing on behalf of State.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is complete and challan already stood filed in competent court of law and criminal case will be disposed of in due course of time and on this ground bail application be allowed is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered.(i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri.L.J 702 titled Sanjay Chandra Vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. As per police report investigation is complete and challan already stood filed in Court in the present case and criminal case will be disposed of in due course of time. It is well settled law that accused is presumed to be innocent till proven guilty by the competent of Court of law. Court is of the opinion that if applicant is released on bail at this stage then interests of the general public or the State will not be adversely effected.

8. Submission of learned Additional Advocate General that if the applicant is released on bail then applicant will induce and threat prosecution witness and on this ground bail application be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that conditions will be imposed in the bail order that applicant will not induce or threaten prosecution witness and if applicant will induce or threaten prosecution witness after grant of bail then prosecution will be at liberty to file application for cancellation of bail in accordance with law. It is not expedient in the ends of justice to keep applicant in jail because investigation is complete and challan stood filed in competent Court of law. Point No.1 is answered in affirmative.

Point No.2 (Final order).

9. In view of my findings on point No.1 bail application filed by applicant is allowed. It is ordered that applicant will be released on bail on following terms and conditions on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of learned trial Court (i) That applicant will join investigation as and when called for by the Investigating Officer in accordance with law.

(ii) That applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That applicant will not leave India without prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address to the Investigating Officer in written manner so that applicant can be located after giving short notice. (vi) That applicant will attend the proceedings of learned trial Court regularly. Observation made hereinabove is strictly for the purpose of deciding the present bail application and it shall not effect merits of case in any manner. Bail application disposed of. All pending application(s) if any also disposed of.

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

Malkiyat Singh son of Chiman Singh .....Applicant.
Versus
State of Himachal Pradesh. ....Non- applicant.

Cr.MP(M) No. 371 of 2015.
Order reserved on: 1.5.2015.
Date of Order: May 5, 2015.

Code of Criminal Procedure, 1973- Section 439- Petitioner was arrested for the commission of offences punishable under Sections 457 and 380 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete and challan has been filed in the Court- criminal cases would be disposed of in course of the time – interests of the general public or State would not be affected by releasing the petitioner on bail, therefore, petitioner ordered to be release on bail.
(Para-6 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh AIR 1962 SC 253
Sanjay Chandra Vs. Central Bureau of Investigation 2012 Cri.L.J 702

For the applicant: Mr. Naresh Verma, Advocate.
For non-applicant . Mr. M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No.180 of 2014 dated 27.9.2014 registered under Sections 457 and 380 of the Indian Penal Code at Police Station Jawalamukhi District Kangra Himachal Pradesh.

2. It is pleaded that investigation of the present case is completed and recovery has been effected. It is further pleaded that there is no direct evidence against the applicant and he is innocent. It is further pleaded that applicant will not induce or threat prosecution witness in any manner and will abide by the terms and conditions imposed by the Court. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report FIR No. 180 of 2014 dated 27.9.2014 registered under Sections 457 and 380 IPC at Police Station Jawalamukhi District Kangra HP. There is recital in police report that statement of co-accused Jitender Singh was recorded under Section 27 of the Indian Evidence Act and as per disclosure statement of co-accused Jitender Singh site plan of location was prepared where cash chest of ATM machine was kept. There is further recital in police report that broken locks of shutter which were thrown in the bushes by accused persons were also recovered as per disclosure statement given by co-accused Jitender Singh. There is further recital in police report that one CD and bank statement dated 26.9.2014 and statement of cash kept in the ATM machine also took into possession vide seizure memo. There is further recital in police report that on dated 26.9.2014 the ATM machine kept by PNB Bank Kaloh Tehsil Rukker District Kangra HP was broken and Rs.6,24,200/-(Six lac twenty four thousand two hundred) was stolen from cash chest of ATM machine by accused persons. There is further recital in police report that one spray bottle, cash chest of ATM machine and cash to the tune of Rs.5,97,700/- (Five lac ninety seven thousand seven hundred) and car having registration No. HR-51E-6011 were also took into possession vide seizure memo. There is further recital in police report that investigation is complete and challan is filed in the competent Court of law on dated 2.12.2014.

4. Following points arise for determination in the present bail application:

(1) Whether bail application filed under Section 439 of the Code of Criminal Procedure 1973 is liable to be accepted after completion of investigation and after filing of challan in competent Court of law as alleged?.

(2) Final Order.

5. Court heard learned Advocate appearing on behalf of applicant and Court also heard learned Additional Advocate General appearing on behalf of State.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is complete and challan already stood filed in competent court of law and criminal case will be disposed of in due course of time and on this ground bail application be allowed is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit***

Singh. It was held in case reported in ***2012 Cri.L.J 702 titled Sanjay Chandra Vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. As per police report investigation is complete and challan already stood filed in Court in the present case and criminal case will be disposed of in due course of time. It is well settled law that accused is presumed to be innocent till proven guilty by the competent of Court of law. Court is of the opinion that if applicant is released on bail at this stage then interests of the general public or the State will not be adversely effected.

8. Submission of learned Additional Advocate General that if the applicant is released on bail then applicant will induce and threat prosecution witness and on this ground bail application be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that conditions will be imposed in the bail order that applicant will not commit similar offence in future. If applicant commits similar offence in future then prosecution will be at liberty to file application for cancellation of bail in accordance with law. It is not expedient in the ends of justice to keep applicant in jail because investigation is complete and challan stood filed in competent Court of law. Point No.1 is answered in affirmative.

Point No.2 Final order.

9. In view of my findings on point No.1 bail application filed by applicant is allowed. It is ordered that applicant will be released on bail on following terms and conditions on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of learned trial Court (i) That applicant will join investigation as and when called for by the Investigating Officer in accordance with law. (ii) That applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That applicant will not leave India without prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address to the Investigating Officer in written manner so that applicant can be located after giving short notice. (vi) That applicant will attend the proceedings of learned trial Court regularly. Observation made hereinabove is strictly for the purpose of deciding the present bail application and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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

Criminal Appeals No.331 & 453 of 2009
Reserved on : 8.4.2015
Date of Decision : May 5, 2015

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1. Cr. Appeal No.331 of 2009

Nand Lal and others ...Appellants.

Versus

State of H.P. ...Respondent.

2. Cr. Appeal No. 453 of 2009

State of HP ...Appellant.

Versus

Nand Lal and others ...Respondents

Indian Penal Code, 1860- Sections 304-II and 506-I read with Section 34- Complainant party wanted the accused to remove the obstruction caused on the passage commonly used by the villagers - accused failed to remove such obstruction - when she tried to remove the obstruction, accused pelted the stones- one stone hit 'V' who sustained injuries- he was taken to PGI where he succumbed to the injuries- Medical Officer opined that there was fracture of skull and death was caused on account of shock caused due to extra dural haemorrhage - presence of the deceased was duly proved by the complainant party- testimonies of the witnesses corroborated each other- it was duly proved that accused had hurled abuses and had proclaimed to settle the matter – they caused injuries to the complainant party- all the accused were together and shared their common intention- held that conviction of the accused was justified. (Para-12 to 30)

Cases referred:

K. Ravi Kumar v. State of Karnataka, (2015) 2 SCC 638

Murllidhar Shivram Patekar and another v. State of Maharashtra, (2015) 1 SCC 694

Balu s/o Onkar Pund and others v. State of Maharashtra, (2015) 3 SCC 409

Virsa Singh v. State of Punjab, AIR 1958 SC 465

For the Appellant(s) : Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj Vashist, Advocate, in Cr.A No.331/2009; and Mr. Ashok Chaudhary & Mr. V.S. Chauhan, Additional Advocates General and Mr. J.S. Guleria, Assistant Advocate General in Cr.A No.453/2009.

For the Respondent(s) : Mr. Ashok Chaudhary & Mr. V.S. Chauhan, Additional Advocates General and Mr. J.S. Guleria, Assistant Advocate General in Cr.A No.331/2009, and Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj Vashist, Advocate, in Cr.A No.453/2009.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Since both these appeals arise out of the same judgment of the trial Court; hence, they are being decided by a common judgment.

2. Appellants-convicts Nand Lal, Dayala Ram, Smt. Neelam Kumari and Smt. Geeta Devi, hereinafter referred to as the accused, have filed Criminal Appeal No.331 of 2009, assailing the judgment dated 30.7.2009/ 31.7.2009, passed by Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P., in Sessions Trial No.20/7 of 2006, titled as *State of H.P. Vs. Nand Lal and others*, whereby accused Nand Lal stands convicted for having committed offences, punishable under the provisions of Sections 304-II and 506-I/34 of the Indian Penal Code, and accused Dayala Ram, Neelam Kumari and Geeta Devi stand convicted for

having committed offence, punishable under the provisions of Section 506-I/34 of the Indian Penal Code, and sentenced as under:

Name of accused	Sections	Sentence
Nand Lal	304-II IPC	Simple Imprisonment for a period of three years and eight months and to pay a fine of Rs.5000/-, and in default of payment thereof to further undergo simple imprisonment for a period of six months.
	506-I IPC	Simple Imprisonment for a period of 20 days and pay fine of Rs.500/- and in default of payment thereof to further undergo simple imprisonment for a period of seven days.
Dayala Ram, Neelam Kumari and Geeta Devi	506-I IPC	Each of the convicts to undergo simple imprisonment for a period of 20 days and pay fine of Rs.500/- each and in default of payment thereof to further undergo simple imprisonment for a period of seven days.

3. Cr. Appeal No.453 of 2009 stands filed by the State.

4. The issue which arises for consideration in the present appeals is as to whether findings returned by the Court below, holding accused Nand Lal to have committed an offence, punishable under the provisions of Section 304-II and Section 506-I read with Section 34 of the Indian Penal Code and co-accused Dayala Ram, Neelam Kumari and Geeta Devi, having committed an offence, punishable under the provisions of Section 506-I read with Section 34 of the Indian Penal Code, are based on correct appreciation of evidence on record or not? Primarily what needs to be considered is as to whether the prosecution has been able to prove that Nand Lal committed an offence of murder or not? Correctness, legality and perversity of all findings are to be adjudged.

5. In relation to FIR No. 196 of 2005 dated 1.12.2005 (Ex.PW13-/A), registered under the provisions of Sections 307, 336, 504, 506, 34 of the Indian Penal Code, prosecution filed challan against all the accused persons, namely Dayala Ram, his wife Geeta Devi, son Nand Lal and daughter-in-law Neelam Kumari, for having committed offences, punishable under the provisions of Sections 302 and 504, both read with Section 34 IPC. Finding no evidence, all the accused persons were discharged in relation to an offence, punishable under the provisions of Section 504 read with Section 34 IPC. Also, accused Dayala, Neelam Kumari and Geeta Devi stand discharged for having committed an offence, punishable under the provisions of Section 302 and 504, both read with Section 34 IPC. However, accused Nand Lal was charged for having committed an offence, punishable under Section 302 of the IPC as also section 506 read with Section 34 of IPC, and accused persons, namely Dayala Ram, Neelam Kumari and Geeta Devi, were charged for having committed an offence, punishable under Section 506 read with Section 34 of IPC.

6. As per prosecution story, the incident took place in village Kularu (District Bilaspur), between accused Dayala Ram and his family on one side, and the complainant party, including Chaman Lal on the other side. Complainant party wanted the accused to remove the obstruction so caused on the passage commonly used by the villagers. Houses

of the complainant party and the accused are just adjoining to each other. Despite intervention of the Panchayat, accused failed to remove such obstruction. The accused were insistent of not doing so, for the reason that the alleged obstruction, in the form of stairs-case was not on public passage, but on their own land. On 1.12.2005, at 7.30 am, after convening meeting of the villagers, when Chaman Lal tried to remove the obstruction, accused threw stones at the villagers. One such stone, so pelted by accused Nand Lal hit Vijay Ram, as a result of which, he sustained injuries and was taken to the Civil Hospital, Ghumarwin, where he was attended to by Dr. Rakesh Dhiman (PW-10). Prakash Chand (PW-1) telephonically informed the police of the incident and entry (Ex.PW-12/A) was recorded by HC Rakesh Kumar (PW-16) in this regard. Shiv Chaudhary (PW-14) and Gian Chand (PW-17) conducted investigation, which revealed that the accused persons, with a guilty intent, pelted stones, with an object of committing murder, and also criminally intimidated Prakash Chand (PW-1) and other villagers present on the spot (witnesses examined in the court).

7. Finding condition of Vijay Ram to be serious, he was referred for further treatment to PGI, Chandigarh, where unfortunately he succumbed to the injuries. Since he remained unconscious, police could not record his statement. Postmortem of the dead body was conducted by Dr. Savita Mehta (PW-11), who issued report (Ex.PW-11/B). Upon receipt of report of the Chemical Examiner (Ex.PW-13/C) from the Forensic Science Laboratory, Junga, final opinion of the doctor was obtained, who issued report (Ex. PW-11/B). With the completion of investigation, which *prima facie* revealed complicity of the accused in the alleged crime, *Challan* was presented in the Court for trial.

8. Accused persons, who were charged, as aforesaid, did not plead guilty and claimed trial. Significantly, State did not assail the order of discharge of some of the accused persons in relation to certain offences.

9. In order to establish its case, prosecution examined as many as seventeen witnesses. Statements of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, were also recorded, in which accused Nand Lal took the following defence:-

> "We had dismantled out house 12 years back. Thereafter, we started constructing a new house after three years. When the land was vacant, Chaman Lal, used to cross there from. Thereafter, we constructed pillars of the house slowly and put a lintel there over and constructed walls. Thereafter, followed the work of second storey. We had kept space between two pillars to facilitate transportation of articles of construction of the upper storey of the house. The wall in such gape had been constructed 4-5 days before the incident., again started that I am not aware when the wall was constructed as I had come to the house a day before the incident and was working in connection with 'Bee Keeping at Haryana. However, on the wall being given Chaman Lal gave an application to the Panchayat, at which we were asked to open the wall for the way but we refused. On the panchayat being convened, we refused to open the way. On 1.12.2005, while we were involved in daily routine, some people started coming in the house of Chaman Lal with Dandas etc. and started proclaiming that they shall eliminate use that day. At this, I went inside my house. When such persons started stoning our house, when I have a ring to the police at about 7.15-7.30AM. Thereafter, I took snaps of such persons with my camera from the

roof of my house. While I was taking photographs, one stone hit me on the forehead at which I fell down. Thereafter, I do not know as to what happened and I regained consciousness in the hospital and at that time I saw my father Dayala Ram lying near me on the bed with bandage on his head. Thereafter, I was taken to police station at about 2.30-3.00 PM and was put behind the bars. My mother and wife were also put behind the bar at 9.00-9.30 PM by the police. I did not throw any stone. I do not know now as to what has happened to the wall. Had we been inside the wall we would have been killed by those present outside at the spot on that day."

10. While taking similar defence, remaining accused further elaborated that the villagers, who were armed with hammers and Darat, had criminally intimidated them. In order to probablize their defence, accused examined three witnesses.

11. Appreciating the testimony of the witnesses and the material placed on record, trial court found all the accused persons guilty and sentenced them, as aforesaid.

12. We have heard Mr. Ajay Kumar, Sr. Advocate, assisted by Mr. Dheeraj Vashisht, Advocate, learned counsel, on behalf of the appellants-accused, as also Mr. Ashok Chaudhary and Mr. V.S. Chauhan, learned Additional Advocates Geneal, and J.S. Guleria, learned Assistant Advocate General, on behalf of the State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find the findings returned by the trial Court to be based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice. Prosecution has been able to prove its case to the extent so held by the trial Court, beyond reasonable doubt. The sentences imposed cannot be said to be disproportionately less.

13. Correctness of the decision is subject matter of these appeals, so filed by the convicts and the State.

14. Can it be said that defence of the accused stands probablized through the testimonies of their witnesses and cross-examination of the prosecution witnesses? Having minutely examined the same, we are of the opinion it to be not so.

15. The fact that dispute in relation to the obstruction caused on the passage was going on between the parties is not only admitted by the accused, but also established on record through the testimony of Prakash Chand (PW-1) and Chaman Lal (PW-3). The matter was also taken to the Panchayat. Accused Nand Lal admits that his brother, at the relevant time, was posted at the Police Station, Sadar. It be observed that in relation to the complaint so filed by this accused, none from the village came forward to support him and, as such, cancellation report was filed by the police. What happened thereafter is not evident from the record. Defence of this accused that he was hit with a stone, as a result of which, he fell down and became unconscious, does not inspire confidence. There is no material on record to substantiate such fact. One cannot lose sight of the fact that Nand Lal himself appeared as a defence witness. Medical record pertaining to treatment, which he undertook, was in his possession. Assuming that the police, despite his brother being in the police force and posted in the very same district, was not extending help, he could have himself produced such material in support of his case. But, then it was not so done. The

photographs, so taken by him on the spot, cannot be said to have been proved in accordance with law. Krishan Lal (DW-1), who claims to be a Photographer, has categorically deposed that the photographs (Ex.P-1 to Ex.P-5) were not developed by him. Also, no date/time is reflected in these photographs. Similarly, factum of telephonic conversation between the accused party and the police cannot be said to have been established on record, despite the testimony of Ramesh Kumar (DW-2), who admits not to have produced the original record pertaining to the person in whose name the said telephone was installed. Thus, the defence cannot be said to have been probablized.

16. From the conjoint reading of testimonies of Parkash Chand, Banti Devi, Chaman Lal and Ram Kumar, it is apparent that the incident took place on 1.12.2005, sometime between 7-7.30 am. It appears that Vijay Ram was immediately rushed to Civil Health Centre, Ghumarwin, where he was attended to at 8.45 am by Dr. Rakesh Dhiman (PW-10), who found the patient to be unconscious. On physical examination, the doctor found the patient to have sustained the following injuries:-

1. There was swelling and abrasion on scalp extending from forehead to occipital region vertically placed and was 3.5 cm. wide.

2. A small abrasion on right hand. Dorsal portion with fresh blood present on the wound."

17. Despite application moved by the police, his statement could not be recorded as he was found not fit to do so. This doctor also admits to have examined Dayala Ram, who was also brought by the police for having suffered a lacerated would on the left side of the parietal region.

18. Dr. Savita Mehta, who conducted the postmortem of the deceased, has categorically opined that there was fracture of scull just above the right eye from frontal point going back to parietal bone linear (there in extra dural haemorrhage). According to the doctor, death took place on account of shock caused due to extra dural haemorrhage due to head injury. These experts as is so deposed by them in the court are of the considered view that injury, which was fatal, could be as a result of blow received with a stone (Ex.P-8).

19. Presence of the accused, the deceased and the complainant party (prosecution witnesses) at the time of occurrence of the incident cannot be disputed. This fact not only stands established on record, but also admitted by the accused.

20. We shall now deal with the testimonies of spot witnesses. Chaman Lal states that in relation to obstruction so caused by the accused party, he had moved an application with the Panchayat and other authorities. A compromise was arrived at and the accused agreed to dismantle the stairs so constructed by them. In fact, some portion of the stairs was removed, which was re-erected by the accused party. This was so done on 30.11.2005. On 01.12.2005, he called a meeting of the villagers, in relation to the same. He, Vijay Ram, Rakesh Chand, Sarwan Kumar, Bhrami Devi and 2-3 other villagers went to the house of accused, where he found all the accused persons standing on the lintel of the house, which was on the higher side. Vijay Ram asked the accused to come down for talks, which was opposed by them as they had wanted to decide the matter only from the place where they were standing. Thereafter, the accused started abusing and pelting stones on all the persons who were standing below. One stone thrown by accused Nand Lal hit Vijay Ram, as a result of which, he fell down. He was taken to the hospital. From the cross-examination, we find

that the dispute, *inter se* the parties, was pending for more than 2- 2½ years. This witness, however, does not probablize the defence, so taken by the accused that either or the other villagers had assembled with hammers/sickles for the purpose of removing the obstruction.

21. We find testimony of this witness to have been corroborated by Ram Kumar (PW-4), who has also deposed that Nand Lal refused to come down for talks, but "proclaimed that the decision shall be made from the upper side".

22. Prakash Chand (PW-1) further corroborates the version of these two witnesses by stating that hearing noise coming from the courtyard of Chaman Lal, he went and saw the accused throwing stones at Chaman Lal and Vijay Ram from the second storey of their house. He also saw the stone so thrown by accused Nand Lal hit Vijay Ram. Also accused extended threats of killing the persons present on the spot. The witness does state that he had seen Chaman Lal with a hammer in his hand, but then he does not state that the hammer belonged to Chaman Lal. This witness does not state that Chaman Lal had started breaking the wall for removing the obstruction and Vijay Ram was hit by the debris.

23. We find that on the complaint so lodged by Prakash Chand (PW-1), Rakesh Kumar (PW-16) made entry in the police record and went to the Community Health Centre, Ghumarwin, where he moved an application (PW-10/B) for recording statement of Vijay Ram. Since the patient was certified not fit, needful could not be done. Thereafter, he recorded the statement of Prakash Chand under the provisions of Section 154 of Code of Criminal Procedure (Ex.PW-1/A), which was sent to the Police Station for registration of FIR. Shiv Chaudhary (PW-14), SHO of the Police Station reached on the spot and conducted the investigation. He collected some of the stones (Ex.P-8 to Ex.P-15) lying on the spot vide a memo (Ex.PW-1/B). The spot map (Ex.PE-5/A) was prepared and necessary investigation conducted.

24. "Criminal intimidation" is defined in Section 503 of the Indian Penal Code. To constitute an offence of Criminal intimidation, prosecution is to prove the following essential ingredients:-

1. Threatening a person with any injury.
   (i) to his person, reputation or property; or
   (ii) to the person or reputation of any one in whom that person is interested.
2. The threat must be with intent
   (i) to cause alarm to that person, or
   (ii) to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat; or
   (iii) to cause that person to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat.

25. It is a settled principle of law that the threat must be to the person with an intent to cause harm. Threat has to be real and not artificial. It must have an effect on the complainant party. It has to be specific and not vague.

26. Now in the instant case, Parkash Chand (PW-1), Banti Devi (PW-2), Chaman Lal (PW-3) and Ram Kumar (PW-4) are clear and consistent in their version with regard to not only presence of the accused on the spot, but also having hurled abuses and proclaimed of settling the matter, causing injury to the complainant party. Their intent being their

preparedness of pelting stones. All the accused persons were together and shared common intention of having intimidated the complainant and the other persons present on the spot. In this view of the matter, it cannot be said that the Court below erred in convicting the accused for having committed an offence, punishable under the provisions of Section 506 read with Section 34 of the Indian Penal Code.

27. It has come on record that despite Chaman Lal having taken the matter before the Panchayat, there was no animosity or hostility inter se the parties and more specifically between Nand Lal and deceased Vijay Ram. In fact, Banti Devi widow of deceased Vijay Ram admits that relations between her family and that of the accused are cordial.

28. That deceased was hit with the stone, so pelted by Nand Lal, stands evidently established and proved through the testimony of Prakash Chand, Banti Devi, Chaman Lal and Ram Kumar. Stone (Ex.P-8), so recovered by the police, was shown to the doctors, who were of the view that injury No.1, found on the body of the deceased, could have been caused with the same. Intent of Nand Lal, in killing the deceased, cannot be inferred from the testimony of the prosecution witnesses. After all, all the accused persons were throwing stones on the persons, who had gathered on the spot. Nand Lal did not, however, has any animosity against Vijay Ram, who happened to be there only on the asking of Chaman Lal, who, in fact, had filed a complaint with the Panchayat. The main dispute appears to be with Chaman Lal and not Vijay Ram. None of the prosecution witnesses has deposed that Nand Lal, with an intent of committing murder, threw the stone at Chaman Lal. Intent, if at all, could have been for causing bodily injury to Chaman Lal and not Vijay Ram. But then this is not the prosecution case. As such, the stone, with which Vijay Ram was hit, cannot be said to have been thrown with an intent of murdering Vijay Ram. However, the fact that stone weighing 1 Kg., which is so deposed by the doctor, would have caused injury is only reflective of the knowledge that in all probability and likelihood, death of the recipient could have been caused. The Court is aware of the fact that stone was pelted from a height with Nand Lal being in an advantageous position, as he was standing on the lintel of his house, which is two storeys above the courtyard of Chaman Lal.

29. From the record, it cannot be said that there was premeditation of mind in the commission of crime. Also, motive or animosity to commit the same is absent. Provocation, if at all, on the part of the accused, was one day prior to the occurrence of the incident. It stands established, through the testimonies of the prosecution witnesses that it was Chaman Lal, who had taken the villagers to the spot for talks. It is not the other way round. To us, it appears to be a case of sudden quarrel and in the heat of moment, the accused started pelting stones. The assailants cannot be said to have taken undue advantage or acted in a premeditated manner.

30. It is a settled principle of law that the cause of quarrel or the wounds caused is not a factor, on the basis of which accused can be held guilty or let off for having committed an offence, punishable under Section 302 of the Indian Penal Code. (*K. Ravi Kumar v. State of Karnataka,* (2015) 2 SCC 638; and *Murllidhar Shivram Patekar and another v. State of Maharashtra,* (2015) 1 SCC 694).

31. In *Balu s/o Onkar Pund and others v. State of Maharashtra,* (2015) 3 SCC 409, the Hon'ble Supreme Court of India, has reiterated the principles of law laid down by it in *Virsa Singh v. State of Punjab,* AIR 1958 SC 465 and other decisions, as under:

“16 The learned Judge Vivian Bose in his distinctive style of writing and speaking for the Court succinctly stated as under: (*Virsa Singh v. State of Punjab,* AIR 1958 SC 465)

"11. In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for, if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad-based and simple and based on commonsense: the kind of enquiry that "twelve good men and true" could readily appreciate and understand.

12. To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 "thirdly":

First, it must establish, quite objectively, that a bodily injury is present.

Secondly, the nature of the injury must be proved. These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further, and

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

13. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under Section 300 "thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two).

It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or

reasonably deduced, that the injury was accidental or otherwise unintentional."

17 Relying on the aforesaid principle of law, recently this Court in Pulicherla Nagaraju @ Nagaraja Reddy Vs. State of Andhra Pradesh, 2006 11 SCC 444, again examined the issue as to what relevant factors should be kept in consideration while deciding the question as to whether case in hand falls under Section 302 or 304 Part-I or Part-II. Justice Raveendran speaking for the Court held in para 29 as under:

> "29. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not [pic] converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may."”

32. Thus, in our considered view, prosecution has been able to establish guilt of the accused, beyond reasonable doubt, to the extent so held by the trial Court, by leading clear, cogent, convincing and reliable piece of evidence, not only ocular but also corroborative in the shape of recovery of weapon of offence.

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

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

35. Thus, Criminal Appeal No.331 of 2009, so filed by the accused-convicts is dismissed.

36. Findings of conviction can also not be assailed on the ground so urged by the State. Noticeably, State never challenged the initial order of discharge of some of the convicts.

37. Now coming to the appeal filed by the State for enhancement of sentence, we are of the considered view that, in the facts and circumstances of the present case, sentences imposed by the trial Court are adequate and no enhancement is required. Hence, Criminal Appeal No.453 of 2009 is also dismissed. Both the appeals stand disposed of, so also pending application, if any.

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

Roop Chand …Petitioner.
Versus
Union of India & others …Respondents.

CWP No. 278 of 2010-A
Reserved on: 28.04.2015
Decided on: 05.05.2015

Gramin Dak Sevak (Conduct and Employment) Rules, 2001- Rule 10- Petitioner was involved in indiscipline and forgery- Inquiry was conducted against him- Inquiry Officer found that all the charges were proved – Disciplinary Authority imposed the penalty of the removal – record established that petitioner had forged the signatures of the Head of Village on many occasions- he was involved in indiscipline and had undermined the authorities and

had disgraced them - a person who indulges in illegal activities and commits fraudulent or frivolous acts by deceitful means, is to be dealt with iron hands – Writ Court cannot re-appreciate the evidence- considering the gravity of the accusations, the punishment cannot be said to be disproportionate or shocking - Writ petition dismissed. (Para-11 to 38)

Cases referred:
R. Vishwanatha Pillai versus State of Kerala and others, AIR 2004 Supreme Court 1469
U.P. State Road Transport Corporation versus Suresh Chand Sharma *with* Suresh Chand Sharma versus State of U.P. and Anr., 2010 AIR SCW 3859
U.P. State Road Transport Corporation, Dehradun versus Suresh Pal, 2006 AIR SCW 4903
S.R. Tewari versus Union of India & Anr., with S.R. Tewari versus R.K. Singh & Anr., reported in 2013 AIR SCW 3338
G.M. (Operation) S.B.I. & Anr. versus R. Periyasamy, 2015 AIR SCW 455
State Bank of India & Ors. versus Ramesh Dinkar Punde, 2006 AIR SCW 5457
Nirmala J. Jhala versus State of Gujarat and another, 2013 AIR SCW 1800
Union of India and others versus P. Gunasekaran, 2014 AIR SCW 6657
State of Punjab and others versus Ram Singh Ex-Constable, (1992) 4 SCC 54
The Management of Tournamulla Estate versus Workmen, (1973) 2 SCC 502
Lalla Ram versus D.C.M. Chemical Works Ltd. and another, (1978) 3 SCC 1
Union of India and others versus Narain Singh, (2002) 5 Supreme Court Cases 11
M.P. Electricity Board versus Jagdish Chandra Sharma, (2005) 3 Supreme Court Cases 401

For the petitioner: Mr. B.M. Chauhan, Advocate.
For the respondents: Mr. Ashok Sharma, Assistant Solicitor General of India.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Challenge in this writ petition is to the judgment and order, dated 13.08.2009, made by the Central Administrative Tribunal, Chandigarh Bench (Circuit at Shimla) (for short "the CAT"), whereby O.A. No. 682/HP/2007, titled as Shri Roop Chand versus Union of India and others, filed by the writ petitioner came to be dismissed (for short "the impugned judgment").

2. Writ petitioner was employee of respondents-department, was found involved in indiscipline and forgery, thus, has committed a misconduct. The respondents, after noticing the conduct, actions and the fact of forgery, decided to conduct departmental inquiry against him. Preliminary inquiry was conducted by the appointing authority and memorandum of charge sheet containing three article of charges was issued to him on 14.10.2005 (Annexure P-1), details of which have been given in the opening para of the impugned judgment.

3. Writ petitioner denied the charges, Inquiry Officer & Presenting Officer were appointed on 25.10.2005, and inquiry under Rule 10 of the Gramin Dak Sevak (Conduct and Employment) Rules, 2001 (for short "the Rules") was conducted. The Inquiry Officer submitted his report on 30.10.2006, who, after concluding the inquiry, came to the conclusion that all the charges were proved against the writ petitioner. Writ petitioner was

asked to file representation vide letter, dated 24.11.2006, who filed representation on 04.12.2006. Thereafter, the disciplinary authority, vide order, dated 03.01.2007 (Annexure P-3) awarded the penalty of removal from service upon the writ petitioner.

4. Writ petitioner, feeling dissatisfied with the said order of the disciplinary authority, i.e. order of removal from service, filed an appeal before the Appellate Authority, i.e. Superintendent of Post Offices, Rampur Bushahr Division, Rampur, on 22.01.2007 (Annexure P-4), was dismissed by the said authority vide order, dated 13.03.2007 (Annexure P-5).

5. Writ petitioner also invoked the jurisdiction of the revisional authority by filing revision petition before the Director Postal Services, HP Circle, Shimla on 16.05.2007 (Annexure P-6), which too was dismissed vide order, dated 10.09.2007 (Annexure P-7). All the said orders are the subject matter of the writ petition.

6. Writ petitioner has assailed all the said orders on the grounds taken in the writ petition, particularly, in paras 7 (a) to 7 (m) of the writ petition.

7. The respondents have filed reply and resisted the writ petition on the grounds taken in the memo of objections.

8. Learned counsel for the writ petitioner argued that the Inquiry Officer came to the conclusion that the charges are partly brought home to the writ petitioner, which is not correct as per the findings recorded by the Inquiry Officer. He has also questioned the proportionality of the punishment.

9. Learned Assistant Solicitor General of India argued that the writ petitioner has committed a grave misconduct, i.e. forgery, indiscipline, arrogance and was also giving names to his superiors as *'Shakuni, Duryodhan and Dhritrashtra',* thus, was disrespectful towards his superiors.

10. Learned counsel for the writ petitioner was asked to show as to how the writ petitioner was not involved in forgery as it is established on record that on so many occasions, he had forged the signatures of the Head of Village, was not able to demolish the said evidence and the findings recorded by the Inquiry Officer, Disciplinary Authority, Appellate Authority and the Revisional Authority. Virtually, the learned counsel for the writ petitioner was not able to satisfy the Court that the writ petitioner was not involved in forgery.

11. Learned counsel for the writ petitioner was also asked to show as to whether the Writ Court can appreciate the evidence and whether the writ petitioner has carved out a case for appreciating the evidence, which already stands appreciated by the authorities supra. He tried to argue, but was not able to, *prima facie,* carve out a case.

12. It is not a case of perversity or a case of mis-appreciation or misreading of the evidence.

13. While going through the record, it appears that the writ petitioner was involved in indiscipline and has acted in such a way, which amounts to undermining the authorities and disgrace them, to whom he was subordinate. If an employee is found committing forgery, to us, only on this count, the employee can be dismissed from service, as it is a grave misconduct.

14. The Apex Court in a case titled as **R. Vishwanatha Pillai versus State of Kerala and others,** reported in **AIR 2004 Supreme Court 1469,** held that if an employee has acted unfairly and has managed the documents, which are fictitious, by fraud or has committed forgery, is not entitled to any relief and cannot be even heard.

15. It is beaten law of land that a person, who claims equity, must do equity. A person, who is not fair, cannot claim equity. It is apt to reproduce para 19 of the judgment in **R. Vishwanatha Pillai's case (supra)** herein:

> *"19. .... A person who seeks equity must come with clean hands. He, who comes to the Court with false claims, cannot plead equity nor the Court would be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner. Equity jurisdiction cannot be exercised in the case of a person who got the appointment on the basis of false caste certificate by playing a fraud. No sympathy and equitable consideration can come to his rescue. We are of the view that equity or compassion cannot be allowed to bend the arms of law in a case where an individual acquired a status by practising fraud.*
>
> *(Emphasis added)"*

16. In another case titled as **U.P. State Road Transport Corporation versus Suresh Chand Sharma** with **Suresh Chand Sharma versus State of U.P. and Anr.,** reported in **2010 AIR SCW 3859,** fare was recovered from the passengers but they were not issued tickets by the bus conductor, charge was proved, he was dismissed from service. The Apex Court, while upholding the punishment of dismissal from service, held that misappropriating the public money is a grave misconduct. It is apt to reproduce para 20 of the judgment herein:

> *"20. We do not find any force in the submissions made by Dr. J.N. Dubey, learned Senior counsel for the employee that for embezzlement of such a petty amount, punishment of dismissal could not be justified for the reason that it is not the amount embezzled by a delinquent employee but the mens rea to mis-appropriate the public money."*

17. It is a duty of the State/Government/Department to weed out the dead wood. A person who indulges in illegal activities and commits fraudulent or frivolous acts by deceitful means, is to be dealt with iron hands and is to be weeded out.

18. The Apex Court in a case titled as **U.P. State Road Transport Corporation, Dehradun versus Suresh Pal,** reported in **2006 AIR SCW 4903,** held that misconduct should be dealt with iron hands and not leniently. It is apt to reproduce paras 7 to 9 of the judgment herein:

> *"7. Short question for our consideration in the present case is whether the punishment which has been modified by the learned Single Judge is justified or not? The learned Single Judge found that the punishment awarded in the present case is disproportionate to the guilt of the delinquent. So far as, the guilt of the petitioner is concerned, in the domestic enquiry it has been found that the*

petitioner is guilty of not issuing tickets to the twenty passengers and the same finding of the domestic enquiry has been upheld by the Labour Court & High Court. The petitioner was a conductor and holding the position of trust. If incumbent like the petitioner starts misappropriating the money by not issuing a ticket and pocketing the money thereby causing loss to the Corporation then this is a serious misconduct. It is unfortunate that the petitioner was appointed in 1988 and in the first year of service he started indulging in mal practice then what can be expected from him in the future. If this is the state of affair in the first year of service and if such persons are allowed to let off to the light punishment then this will be a wrong signal to the other persons similarly situated. Therefore, in such cases the incumbent should be weeded out as fast as possible and same has been upheld by the Labour Court. We are firmly of the view that such instances should not be dealt with lightly so as to pollute the atmosphere in the Corporation and other co-workers.

8. Normally, courts do not substitute the punishment unless they are shockingly disproportionate and if the punishment is interfered or substituted lightly in the punishment in exercise of their extra-ordinary jurisdiction then it will amount to abuse of the process of court. If such kind of misconduct is dealt with lightly and courts start substituting the lighter punishment in exercising the jurisdiction under Art. 226 of the Constitution then it will give a wrong signal in the Society. All the State Road Transport Corporations in the country have gone in red because of the misconduct of such kind of incumbents, therefore, it is the time that misconduct should be dealt with iron hands and not leniently.

9. Learned counsel for the appellant invited our attention to a decision of this Court in the case of Regional Manager, U.P. SRTC, Etawah & Ors. V/s. Hoti Lal & Anr., reported in [2003 (3) SCC 605] wherein, this Court has very categorically held that a mere statement that it is disproportionate would not suffice to substitute a lighter punishment. This Court held as under :

> *"The court or tribunal while dealing with the quantum of punishment has to record reasons as to why it is felt that the punishment was not commensurate with the proved charges. The scope for interference is very limited and restricted to exceptional cases. In the impugned order of the High Court no reasons whatsoever have been indicated as to why the punishment was considered disproportionate. Failure to give reasons amounts to denial of justice. A mere statement that it is disproportionate would not suffice. It is not only the amount involved but the mental setup, the type of duty performed and similar relevant circumstances which go into the decision-making process while considering whether the punishment is proportionate or disproportionate. If the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of*

functioning, it would not be proper to deal with the matter leniently. Misconduct in such cases has to be dealt with iron hands. Where the person deals with public money or is engaged in financial transactions or acts in a fiduciary capacity, the highest degree of integrity and trustworthiness is a must and unexceptionable. Judged in that background, conclusions of the Division Bench of the High Court are not proper."

19. In **S.R. Tewari versus Union of India & Anr.,** with **S.R. Tewari versus R.K. Singh & Anr.,** reported in **2013 AIR SCW 3338,** the Apex Court held that judicial review in the cases of disciplinary proceedings is very limited and the Courts cannot substitute its findings for the findings recorded by the disciplinary authority. It is apt to reproduce para 22 of the judgment herein:

"22. The role of the court in the matter of departmental proceedings is very limited and the court cannot substitute its own views or findings by replacing the findings arrived at by the authority on detailed appreciation of the evidence on record. In the matter of imposition of sentence, the scope for interference by the court is very limited and restricted to exceptional cases. The punishment imposed by the disciplinary authority or the appellate authority unless shocking to the conscience of the court, cannot be subjected to judicial review. The court has to record reasons as to why the punishment is disproportionate. Failure to give reasons amounts to denial of justice. The mere statement that it is disproportionate would not suffice. (Vide: Union of India & Ors. v. Bodupalli Gopalaswami, (2011) 13 SCC 553 : (2011 AIR SCW 5331) and Sanjay Kumar Singh v. Union of India & Ors., AIR 2012 SC 1783 : (2012 AIR SCW 2361)."

20. It is also apt to reproduce para 9 of the judgment rendered by the Apex Court in the case titled as **G.M. (Operation) S.B.I. & Anr. versus R. Periyasamy,** reported in **2015 AIR SCW 455,** herein:

"9. It is not really necessary to deal with the judgment of the learned Single Judge since that has merged with the judgment of the Division Bench. However, some observations are necessary. The learned Single Judge committed an error in approaching the issue by asking whether the findings have been arrived on acceptable evidence or not and coming to the conclusion that there was no acceptable evidence, and that in any case the evidence was not sufficient. In doing so, the learned Single Judge lost sight of the fact that the permissible enquiry was whether there is no evidence on which the enquiry officer could have arrived at the findings or whether there was any perversity in the findings. Whether the evidence was acceptable or not, was a wrong question, unless it raised a question of admissibility. Also, the learned Single Judge was not entitled to go into the question of the adequacy of evidence and come to the conclusion that the evidence was not sufficient to hold the respondent guilty."

21. The Apex Court in a case titled as **State Bank of India & Ors. versus Ramesh Dinkar Punde,** reported in **2006 AIR SCW 5457,** after discussing the facts in

paras 10 to 13, which are similar to the case in hand, has taken note of the principles and the ratio laid down in a series of judgments, reproduced in paras 14 to 19. It is apt to reproduce para 21 of the judgment herein:

> *"21. Confronted with the facts and the position of law, learned counsel for the respondent submitted that leniency may be shown to the respondent having regard to long years of service rendered by the respondent to the Bank. We are unable to countenance with such submission. As already said, the respondent being a bank officer holds a position of trust where honesty and integrity are inbuilt requirements of functioning and it would not be proper to deal with the matter leniently. The respondent was a Manager of the Bank and it needs to be emphasised that in the banking business absolute devotion, diligence, integrity and honesty needs to be preserved by every bank employee and in particular the bank officer so that the confidence of the public/depositors is not impaired. It is for this reason that when a bank officer commits misconduct, as in the present case, for his personal ends and against the interest of the bank and the depositors, he must be dealt with iron hands and he does not deserve to be dealt with leniently."*

22. It is established principle of law that High Courts or other Courts cannot act as Appellate Court while dealing with the writ petitions or appeals, outcome of disciplinary proceedings, and cannot substitute their own views unless the view expressed by the disciplinary authority shocks the conscience or is not supported by record.

23. It is apt to reproduce para 6 (III) of the judgment rendered by the Apex Court in a case titled as **Nirmala J. Jhala versus State of Gujarat and another,** reported in **2013 AIR SCW 1800,** herein:

> *"6. ....*
>
> *III. Scope of Judicial Review :*
>
> *(i) It is settled legal proposition that judicial review is not akin to adjudication on merit by re-appreciating the evidence as an Appellate Authority. The only consideration the Court/Tribunal has in its judicial review, is to consider whether the conclusion is based on evidence on record and supports the finding or whether the conclusion is based on no evidence. The adequacy or reliability of the evidence is not a matter which can be permitted to be canvassed before the Court in writ proceedings. (Vide: State of T.N. & Anr v. S. Subramaniam, AIR 1996 SC 1232; R.S. Saini v. State of Punjab, (1999) 8 SCC 90; and Government of Andhra Pradesh & Ors. v. Mohd. Nasrullah Khan, AIR 2006 SC 1214).*
>
> *(ii) In Zora Singh v. J.M. Tandon & Ors., AIR 1971 SC 1537, this Court while dealing with the issue of scope of judicial review, held as under:*
>
> *"The principle that if some of the reasons relied on by a Tribunal for its conclusion turn out to be extraneous or otherwise unsustainable,*

its decision would be vitiated, applies to cases in which the conclusion is arrived at not on assessment of objective facts or evidence, but on subjective satisfaction. The reason is that whereas in cases where the decision is based on subjective satisfaction if some of the reasons turn out to be irrelevant or invalid, it would be impossible for a superior Court to find out which of the reasons, relevant or irrelevant, valid or invalid, had brought about such satisfaction. But in a case where the conclusion is based on objective facts and evidence, such a difficulty would not arise. If it is found that there was legal evidence before the Tribunal, even if some of it was irrelevant, a superior Court would not interfere if the finding can be sustained on the rest of the evidence. The reason is that in a writ petition for certiorari the superior Court does not sit in appeal, but exercises only supervisory jurisdiction, and therefore, does not enter into the question of sufficiency of evidence." (Emphasis added)

(iii) The decisions referred to hereinabove highlights clearly, the parameter of the Court's power of judicial review of administrative action or decision. An order can be set-aside if it is based on extraneous grounds, or when there are no grounds at all for passing it or when the grounds are such that, no one can reasonably arrive at the opinion. The Court does not sit as a Court of Appeal but, it merely reviews the manner in which the decision was made. The Court will not normally exercise its power of judicial review unless it is found that formation of belief by the statutory authority suffers from malafides, dishonest/corrupt practice. In other words, the authority must act in good faith. Neither the question as to whether there was sufficient evidence before the authority can be raised/examined, nor the question of re-appreciating the evidence to examine the correctness of the order under challenge. If there are sufficient grounds for passing an order, then even if one of them is found to be correct, and on its basis the order impugned can be passed, there is no occasion for the Court to interfere. The jurisdiction is circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. This apart, even when some defect is found in the decision-making process, the Court must exercise its discretionary power with great caution keeping in mind the larger public interest and only when it comes to the conclusion that overwhelming public interest requires interference, the Court should intervene."

24. The Apex Court in a recent judgment in the case titled as **Union of India and others versus P. Gunasekaran,** reported in **2014 AIR SCW 6657,** has held that in disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal, the High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into re- appreciation of the evidence and laid down certain tests as to when findings of the disciplinary authority can be interfered by the High Court and what is the scope of the High Court. It is apt to reproduce para 13 of the judgment herein:

"13. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the

disciplinary proceedings, re-appreciating even the evidence before the enquiry officer. The finding on Charge no. I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into re- appreciation of the evidence. The High Court can only see whether:

a. the enquiry is held by a competent authority;

b. the enquiry is held according to the procedure prescribed in that behalf;

c. there is violation of the principles of natural justice in conducting the proceedings;

d. the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;

e. the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;

f. the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;

g. the disciplinary authority had erroneously failed to admit the admissible and material evidence;

h. the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;

i. the finding of fact is based on no evidence.

Under Article 226/227 of the Constitution of India, the High Court shall not:

(i). re-appreciate the evidence;

(ii). interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;

(iii). go into the adequacy of the evidence;

(iv). go into the reliability of the evidence;

(v). interfere, if there be some legal evidence on which findings can be based.

(vi). correct the error of fact however grave it may appear to be;

(vii). go into the proportionality of punishment unless it shocks its conscience."

25. The Apex Court in para 24 of the judgment rendered in **S.R. Tweari's case (supra)** held that if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. It is apt to reproduce para 24 of the judgment herein:

> *"24. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide: Rajinder Kumar Kindra v. Delhi Administration, AIR 1984 SC 1805; Kuldeep Singh v. Commissioner of Police & Ors., AIR 1999 SC 677: (1999 AIR SCW 129); Gamini Bala Koteswara Rao & Ors. v. State of Andhra Pradesh thr. Secretary, AIR 2010 SC 589 : (2009 AIR SCW 7158) and Babu v. State of Kerala, (2010) 9 SCC 189 : (2010 AIR SCW 5105).*
>
> *Hence, where there is evidence of malpractice, gross irregularity or illegality, interference is permissible."*

26. In order to claim perversity, writ petitioner has to establish how it is perverse, which the writ petitioner, has miserably failed to do so, thus, cannot raise question of perversity.

27. The standard of proof in disciplinary inquiry and in criminal proceedings is on different footing. In disciplinary inquiry, the charge is to be proved by preponderance of probabilities and not proved beyond reasonable doubt, which is *sine qua non* in a criminal trial.

28. It is apt to reproduce para 10 of the judgment rendered by the Apex Court in **R. Periyasamy's case (supra)** herein:

> *"10. It is interesting to note that the learned Single Judge went to the extent of observing that the concept of preponderance of probabilities is alien to domestic enquiries. On the contrary, it is well known that the standard of proof that must be employed in domestic enquiries is in fact that of the preponderance of probabilities. In Union of India Vs. Sardar Bahadur, 1972 4 SCC 618], this Court held that a disciplinary proceeding is not a criminal trial and thus, the standard of proof required is that of preponderance of probabilities and not proof beyond reasonable doubt. This view was upheld by this Court in State Bank of India & ors. Vs. Ramesh Dinkar Punde, 2006 7 SCC 212]. More recently, in State Bank of India Vs. Narendra Kumar Pandey, 2013 2 SCC 740], this Court observed that a disciplinary authority is expected to prove the charges leveled against a bank-officer on the preponderance of probabilities and not on proof beyond reasonable doubt. Further, in Union Bank of India Vs. Vishwa Mohan, 1998 4 SCC 310], this Court was confronted with a case which was similar to the present one. The respondent therein was also a bank employee, who was unable to demonstrate to the Court*

as to how prejudice had been caused to him due to non-supply of the inquiry authorities report/findings in his case. This Court held that in the banking business absolute devotion, diligence, integrity and honesty needs to be preserved by every bank employee and in particular the bank officer. If this were not to be observed, the Court held that the confidence of the public/depositors would be impaired. Thus in that case the Court set-aside the order of the High Court and upheld the dismissal of the bank employee, rejecting the ground that any prejudice had been caused to him on account of non-furnishing of the inquiry report/findings to him."

29. Learned counsel for the writ petitioner seriously argued that the punishment is not proportionate. We are of the considered view that in the given circumstances of the case, the punishment cannot be said to be disproportionate because the department has to come down heavily and also to show door to an employee, who is involved in indiscipline, mudslinging and forgery, which is a grave misconduct.

30. The punishment can be questioned on proportionality if it shocks the conscience of the Court, as held by the Apex Court in its judgment rendered in **S.R. Tewari's case (supra)**, which is lacking in the present case.

31. It would also be profitable to reproduce paras 20 and 24 of the judgment rendered by the Apex Court in **P. Gunasekaran's case (supra)** herein:

"20. The impugned conduct of the respondent working as Deputy Office Superintendent in a sensitive department of Central Excise, according to the disciplinary authority, reflected lack of integrity warranting discontinuance in service. That view has been endorsed by the Central Administrative Tribunal also. Thereafter, it is not open to the High Court to go into the proportionality of punishment or substitute the same with a lesser or different punishment. These aspects have been discussed at quite length by this Court in several decisions including B.C. Chaturvedi v. Union of India and others, 1995 6 SCC 749, Union of India and another v. G. Ganayutham, (1997) 7 SCC 463, Om Kumar and others v. Union of India, (2001) 2 SCC 386, Coimbatore District Central Cooperative Bank v. Coimbatore District Central Cooperative Bank Employees Association and another, (2007) 4 SCC 669, Chairman-cum- Managing Director, Coal India Limited and another v. Mukul Kumar Choudhuri and others, (2009) 15 SCC 620 and the recent one in Chennai Metropolitan Water Supply (AIR 2014 SC 1141) (supra).

21. ....

22. ....

23. ....

24. The Central Administrative Tribunal, in the order dated 01.02.2001 in O.A. No. 521 of 2000, after elaborately discussing the factual as well as the legal position, has come to the conclusion that the punishment of compulsory retirement is not outrageous or shocking to its conscience, it was not open to the High Court to

interfere with the disciplinary proceedings from stage one and direct reinstatement of the respondent with backwages."

32. One of the charges against the writ petitioner is that he was calling the officers by nick names and was also involved in mudslinging, is indiscipline and that stands proved during the departmental inquiry, is itself a misconduct.

33. The Apex Court in a case titled as **State of Punjab and others versus Ram Singh Ex-Constable,** reported in **(1992) 4 Supreme Court Cases 54,** defined the word 'misconduct' in para 5 of the judgment. It is apt to reproduce para 6 of the judgment herein:

"6. Thus it could be seen that the word 'misconduct' though not capable of precise definition, its reflection receive its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order."

34. The Apex Court in the cases titled as **The Management of Tournamulla Estate versus Workmen,** reported in **(1973) 2 Supreme Court Cases 502,** and **Lalla Ram versus D.C.M. Chemical Works Ltd. and another,** reported in **(1978) 3 Supreme Court Cases 1,** held that misbehave towards superiors is misconduct, which justifies dismissal. It is apt to reproduce relevant portion of para 9 of the judgment reported in **Lalla Ram's case (supra)** herein:

"9. Though it is true that private quarrel between an employee and a stranger with which the employer is not concerned as in Agnani's case (supra) (1963-1 Lab LJ 684) (SC) falls outside the categories of misconduct, it cannot be reasonably disputed that acts which are subversive of discipline amongst employees or misconduct or misbehaviour by an employee which is directed against another employee of the concern may in certain circumstances constitute misconduct so as to form the basis of an order of dismissal or discharge. It cannot also be disputed that the extent of jurisdiction exercisable by an approving authority under S. 33 (2) (b) of the Act is very limited as has been clearly and succinctly pointed out by this Court in a number of decisions........."

35. The Apex Court in the case titled as **Union of India and others versus Narain Singh,** reported in **(2002) 5 Supreme Court Cases 11,** held that disobeying the lawful commands, directions or orders of the superior officer is misconduct.

36. The Apex Court in a case titled as **M.P. Electricity Board versus Jagdish Chandra Sharma,** reported in **(2005) 3 Supreme Court Cases 401,** held that social order for the promotion of welfare of the State and role of discipline in general and especially at the workplace is *sine qua non* and its cardinality for the prosperity of the organization as well as of the employees is must and if an employee commits breach, is a misconduct and is to be dismissed from service.

37. Applying the test to the instant case, order of removal from service is reasoned one and cannot be said to be harsh or disproportionate.

38. While going through the findings recorded by the Inquiry Officer, Disciplinary Authority, Appellate Authority and the Revisional Authority read with the impugned judgment, it is crystal clear that the writ petitioner has not made out a case for any interference and has failed on all counts.

39. Having said so, the impugned judgment is upheld and the writ petition is dismissed alongwith all pending applications.

****

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

Sandeep Singh son of Jagdish Singh. .....Applicant.
Versus:
State of Himachal Pradesh. ....Non- applicant.

Cr.MP(M) No. 373 of 2015.
Order reserved on: 1.5.2015.
Date of Order: May 5,2015.

Code of Criminal Procedure, 1973- Section 439- Petitioner was arrested for the commission of offences punishable under Sections 457 and 380 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete and challan has been filed in the Court- criminal cases would be disposed of in course of the time – interests of the general public or State would not be affected by releasing the petitioner on bail, therefore, petitioner ordered to be release on bail. (Para-6 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh AIR 1962 SC 253
Sanjay Chandra Vs. Central Bureau of Investigation 2012 Cri.L.J 702

For the applicant: Mr. Naresh Verma, Advocate.
For non-applicant . Mr. M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No.180 of 2014 dated 27.9.2014 registered under Sections 457 and 380 of the Indian Penal Code at Police Station Jawalamukhi District Kangra Himachal Pradesh.

2. It is pleaded that investigation of the present case is completed and recovery has been effected. It is further pleaded that there is no direct evidence against the applicant and he is innocent. It is further pleaded that applicant will not induce or threat prosecution witness in any manner and will abide by the terms and conditions imposed by the Court. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report FIR No. 180 of 2014 dated 27.9.2014 registered under Sections 457 and 380 IPC at Police Station Jawalamukhi District Kangra HP. There is recital in police report that statement of co-accused Jitender Singh was recorded under Section 27 of the Indian Evidence Act and as per disclosure statement of co-accused Jitender Singh site plan of location was prepared where cash chest of ATM machine was kept. There is further recital in police report that broken locks of shutter which were thrown in the bushes by accused persons were also recovered as per disclosure statement given by co-accused Jitender Singh. There is further recital in police report that one CD and bank statement dated 26.9.2014 and statement of cash kept in the ATM machine also took into possession vide seizure memo. There is further recital in police report that on dated 26.9.2014 the ATM machine kept by PNB Bank Kaloh Tehsil Rukker District Kangra HP was broken and Rs.6,24,200/-(Six lac twenty four thousand two hundred) was stolen from cash chest of ATM machine by accused persons. There is further recital in police report that one spray bottle, cash chest of ATM machine and cash to the tune of Rs.5,97,700/- (Five lac ninety seven thousand seven hundred) and car having registration No. HR-51E-6011 were also took into possession vide seizure memo. There is further recital in police report that investigation is complete and challan is filed in the competent Court of law on dated 2.12.2014.

4. Following points arise for determination in the present bail application:

(1) Whether bail application filed under Section 439 of the Code of Criminal Procedure 1973 is liable to be accepted after completion of investigation and after filing of challan in competent Court of law as alleged?.

(2) Final Order.

5. Court heard learned Advocate appearing on behalf of applicant and Court also heard learned Additional Advocate General appearing on behalf of State.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is complete and challan already stood filed in competent court of law and criminal case will be disposed of in due course of time and on this ground bail application be allowed is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri.L.J 702 titled Sanjay Chandra Vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. As per police report investigation is complete and challan already stood filed in Court in the present case and criminal case will be disposed of in due course of time. It is well settled law that accused is presumed to be innocent till proven guilty by the competent of Court of law. Court is of the opinion that if applicant is released on bail at this stage then interests of the general public or the State will not be adversely effected.

8. Submission of learned Additional Advocate General that if the applicant is released on bail then applicant will induce and threat prosecution witness and on this ground bail application be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that conditions will be imposed in the bail order that applicant will not commit similar offence in future. If applicant commits similar offence in future then prosecution will be at liberty to file application for cancellation of bail in accordance with law. It is not expedient in the ends of justice to keep applicant in jail because investigation is complete and challan stood filed in competent Court of law. Point No.1 is answered in affirmative.

Point No.1 (Final order).

9. In view of my findings on point No.1 bail application filed by applicant is allowed. It is ordered that applicant will be released on bail on following terms and conditions on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of learned trial Court (i) That applicant will join investigation as and when called for by the Investigating Officer in accordance with law. (ii) That applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That applicant will not leave India without prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address to the Investigating Officer in written manner so that applicant can be located after giving short notice. (vi) That applicant will attend the proceedings of learned trial Court regularly. Observation made hereinabove is strictly for the purpose of deciding the present bail application and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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

State of Himachal Pradesh ...Appellant.

Versus

Durgu Ram and another ...Respondents.

Criminal Appeal No.495 of 2007
Reserved on : 7.4.2015
Date of Decision: May 5, 2015

Indian Penal Code, 1860- Section 302 read with Section 34- Deceased left his house to bring some articles but had not returned - his dead body was found by his wife-it was revealed during the investigations that accused had consumed alcohol with the deceased and they had killed the deceased due to animosity- accused 'D' confessed to commission of crime before 'Y'- wife of the deceased and PW-2 admitted that there was no enmity between the deceased and the accused- there was no evidence that deceased was last seen with the accused- extra judicial confession made by the accused that they had sent the deceased 'Upar' (Abode of God) cannot be construed to be an admission of guilt- statement of witness to recovery was not inspiring confidence- deceased was under heavy influence of liquor- Doctor had not ruled out the possibility of sustaining injury by way of fall- held, that in these circumstances, acquittal of the accused was justified. (Para-16 to 30)

Cases referred:

Prandas v. The State, AIR 1954 SC 36
Pudhu Raja and another Versus State Represented by Inspector of Police, (2012) 11 SCC 196
Madhu Versus State of Kerala, (2012) 2 SCC 399
Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622
Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43
Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Padala Veera Reddy v. State of Andhra Pradesh and others, 1989 Supp (2) SCC 706
Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172
Balwinder Singh v. State of Punjab, 1995 Supp (4) SCC 259
Harishchandra Ladaku Thange v. State of Maharashtra, (2007) 11 SCC 436
State of U.P. v. Ashok Kumar Srivastava, (1992) 2 SCC 286
Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

For the Appellant : Mr. Ashok Chaudhary, Additional Advocate General and Mr. J.S. Guleria, Assistant Advocate General.
For the Respondents : Mr. Javed Khan and Ms Kanta Thakur, Advocates.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

State has appealed against the judgment dated 6.9.2007 of the Presiding Officer, Fast Track Court, Mandi, Himachal Pradesh, passed in Sessions Trial No.4/2007,

titled as *State of Himachal Pradesh v. Durgu Ram & another,* challenging the acquittal of respondents Durgu Ram and Mukti Ram (hereinafter referred to as the accused), who stand charged for having committed an offence punishable under the provisions of Section 302 read with Section 34 of the Indian Penal Code.

2. It is the case of prosecution that on 8.9.2006, Puran Chand (deceased) left his wife Geeta Devi (PW-1) for buying certain articles from the shop of Kaltu Ram (PW.4). Since he did not return home, following day she asked her *Devar* Raj Kumar to search for him. She also went to the shop of Kaltu Ram and made inquiries. On way, she found dead body of her husband lying alongside the path near the Temple of Sehali Dev. Information was given by her to Smt. Bimla Devi, Pradhan of the Panchayat, who, in turn, informed the police. SHO Kapoor Chand (PW-18), upon receiving telephonic information, rushed to the spot, where he prepared inquest report (Ex. PW-18/C), after taking photographs (Ex. PW-8/A1 to PW-8/A4). He sent the dead body for postmortem. Statement of Geeta Devi (Ex. PW-1/A), under the provisions of Section 154 of the Code of Criminal Procedure, was also recorded, on the basis of which FIR No.219/06, dated 9.9.2006 (Ex. PW-14/B), under the provisions of Section 302 of the Indian Penal Code, was registered at Police Station, Joginder Nagar, District Mandi, Himachal Pradesh. Postmortem was conducted by Dr. Vishwajeet (PW-8), who opined the cause of death to be injury to the vital organ of brain.

3. Investigation revealed that on 8.9.2006, deceased Puran Chand had consumed chicken and liquor in the company of Prem Lal (PW-2), Bhupinder and Raj Kumar. This was at about 8 p.m. After some time, accused Mukti Ram joined them, who in the company of the deceased left to the house of Dharam Chand (PW-3), from whom they purchased illicit liquor and after consuming the same left together. Investigation further revealed that the accused persons harboured animosity, as a result of which they killed Puran Chand with an axe. Thereafter, accused Yadav Singh (juvenile) and Durgu Ram confessed of having committed the crime with Kaltu Ram. During the course of investigation, accused Durgu Ram and Yadav Singh made disclosure statements, on the basis of which they got recovered weapon of offence (Ex. P-3), in the presence of Mahinder Singh (PW-7) and Tej Singh (not examined). Reports of the Forensic Science Laboratory, Junga (Ex. PW-18/N and PW-18/O) were obtained and taken on record. With the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

4. Both the accused persons were charged for having committed an offence punishable under the provisions of Section 302/34 of the Indian Penal Code, to which they did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 18 witnesses and statements of the accused persons, under the provisions of Section 313 of the Code of Criminal Procedure, were also recorded, in which they pleaded innocence and false implication.

6. Based on the testimonies of witnesses and the material on record, trial Court acquitted both the accused of the charged offence. Hence, the present appeal by the State.

7. We have heard Mr. Ashok Chaudhary, learned Additional Advocate General, on behalf of the State as also Mr. Javed Khan and Ms Kanta Thakur, Advocates, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the

considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

8. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish the essential ingredients so required to constitute the charged offence.

9. In *Prandas v. The State*, AIR 1954 SC 36, Constitution Bench of the apex Court, has held as under:

> "(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.C., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:
>
> > "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

10. Undisputedly, there is no eye-witness to the occurrence of the incident. Hence, the present case is based on circumstantial evidence.

11. Law with regard to circumstantial evidence is now well settled. It is a settled proposition of law that when there is no direct evidence of crime, the guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which the conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with the crime. All the links in the chain

of circumstances must be established beyond reasonable doubt, and the proved circumstances should be consistent, only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, the Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence. [See: *Pudhu Raja and another Versus State Represented by Inspector of Police*, (2012) 11 SCC 196; *Madhu Versus State of Kerala*, (2012) 2 SCC 399; *Dilip Singh Moti Singh versus State of Gujarat*, (2010) 15 SCC 622, *Mulakh Raj and others Versus Satish Kumar and others*, (1992) 3 SCC 43; and *Sharad Birdhichand Sarda Versus State of Maharashtra*, (1984) 4 SCC 116.].

12. Also, apex Court in *Padala Veera Reddy v. State of Andhra Pradesh and others,* 1989 Supp (2) SCC 706, Court held that when a case rests upon circumstantial evidence, following tests must be satisfied:

> "(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."
>
> (Also see: *Ramreddy Rajesh Khanna Reddy v. State of A.P.,* (2006) 10 SCC 172; *Balwinder Singh v. State of Punjab,* 1995 Supp (4) SCC 259; and *Harishchandra Ladaku Thange v. State of Maharashtra,* (2007) 11 SCC 436).

13. Each case has to be considered on its own merit. Court cannot presume suspicion to be a legal proof. In the absence of an important link in the chain, or the chain of circumstances getting snapped, guilt of the accused cannot be assumed, based on mere conjectures.

14. The apex Court in *State of U.P. v. Ashok Kumar Srivastava*, (1992) 2 SCC 286, while cautioning the Courts in evaluating circumstantial evidence, held that if the evidence adduced by the prosecution is reasonable, capable of two inferences, the one in favour of the accused must be accepted. This of course must precede the factum of prosecution having proved its case, leading to the guilty of the accused.

15. Prosecution case primarily rests upon five circumstances: (i) animosity between the accused and the deceased, (ii) accused lastly seen in the company of the deceased, (iii) confessional statement, (iv) disclosure statement leading to discovery of weapon of offence, (v) link evidence corroborating substantive evidence.

16. Genesis of the prosecution story of animosity inter se the parties, stands belied by prosecution witnesses themselves. Geeta Devi (PW-1), wife of the deceased, as also Prem Lal (PW-2), uncontrovertedly admit that there was no animosity between the deceased and the accused persons and more specifically accused Mukti. Apart from the testimony of

these two witnesses, there is nothing on record to even remotely suggest that the accused was harbouring any animosity against the deceased. Motive of crime is missing in this case.

17. Even with regard to the circumstance of the deceased lastly seen in the company of accused Mukti, we do not find the prosecution witnesses to have supported the prosecution.

18. To begin with, Geeta Devi admits that after meeting her husband, accused Mukti went to his house. Prem Lal, simply states that on 8.9.2006, he, Puran Chand, Prem Lal (another person by the same name), Bhupinder and Raj Kumar had consumed chicken (which they had cooked along the road side) and liquor. After some time, accused Mukti Ram came from the side of Tinu Nalla. Puran Chand left with Mukti Ram for fetching *Khaini* and *Beedi* from the shop of Kaltu Ram. This is all, that the witness states.

19. Postmortem report as also testimony of Dr. Vishwajeet (PW-8) suggest that death took place much prior to the time of meeting of these persons. Be that as it may, Prem Lal admits that the deceased went with accused Mukti Ram of his own. It is not a case where the accused persons, after hatching conspiracy, enticed deceased Puran Chand to leave with Prem Lal or Mukti**.**

20. We find that even on the last seen circumstance, both Dharam Chand (PW-3) and Kaltu Ram (PW-4) have not supported the prosecution. They were declared hostile and despite extensive cross-examination by the Public Prosecutor, nothing fruitful could be elicited from their testimony. All that Prem Chand states is that at about 8 p.m., Mukti Ram came alongwith Puran Chand and purchased bottles of liquor. It appears that this witness himself was a suspect. In his uncontroverted testimony, he categorically states that the police had kept him in the Police Station for three hours and had also severely beaten him. That apart, the witness also states that house of Mukti Ram is just at a distance of 30 metres from his house whereas house of Puran Chand is at a distance of 300 metres and that too in an opposite direction. He is categorical that from his shop both Mukti Ram and Puran Chand went to their respective houses. That apart, there is not even a whisper in the testimony of this witness with regard to presence of accused Yadav Singh and Durgu. Witness also states that Mukti Ram left his house first, implying that Puran Chand was still in the company of this witness. It is perhaps for this reason that the police suspected him. Prosecution has not been able to establish that after deceased Puran Chand and accused Mukti left the house of witness Dharam Singh, they were seen together in the night.

21. Thus, the witness clearly belies the prosecution story of the deceased being seen last in the company of accused Mukti Ram. If the accused and the deceased had left the house of Dharam Chand for their respective houses, which were in opposite directions, it cannot be said that the accused was lastly seen in the company of the deceased.

22. Kaltu Ram states that on 9.9.2006, accused Durgu Ram and Yadav Singh came to his shop and told him that “they have sent Puran Chand “Upper”(Abode of God)”. After their visit, he learnt that dead body of Puran Chand was found near the temple of Sehali Dev. We find the witness to have been cross-examined by the Public Prosecutor, yet despite the same, there is nothing in his testimony, which would support the prosecution. He is categorical of not having understood the meaning of the words “Upper Bhej Diya”. Crucially, witness admits not to have signed any statement or memo so recorded by the police. Now, “Upper Bhej Diya” cannot be construed to be an admission of guilt.

23. Prosecution wants the Court to believe that blood soiled clothes of the deceased as also the weapon of offence (Ex. P-3) were recovered from the house of Yadav Singh, in the presence of Mahinder Singh (PW-7).

24. It is not the case of prosecution that the accused persons had first killed the deceased in the jungle and then after carrying the dead body kept it on the road near the temple. Significantly, as has come in the testimony of the prosecution witnesses, dead body was found in the village itself. Now, had the deceased been killed by the accused with an axe, surely, someone would have heard the cries, which in fact is not the case of the prosecution. Also, Kaltu Ram is not able to remember as to whether such words were spoken by Durgu Ram or Yadav Singh. Significantly, these accused persons do not state that accused Mukti Ram was also involved in the crime. From the testimony of the witness, we also notice that the factum of confessional statement was so disclosed to the police, only after three-four days of the occurrence of the incident. It was not voluntary or prompt in nature. As such, it would be absolutely unsafe to give credence or weightage to such extra judicial confession.

25. On the circumstance of recovery of incriminating articles, i.e. axe (P-3), we find the testimony of Mahinder Singh (PW-7) and the Investigating Officer Kapoor Chand (PW-18) not to be inspiring in confidence at all. Even otherwise, they have contradicted each other. Mahinder Singh states that the incriminating articles, i.e. axe (Ex. P-3), shirt (Ex. P-4), pant (Ex.P-5) were recovered from the house of Yadav Singh. Significantly, witness states that he did not enter the house at the time when recovery was effected. He tries to explain the reason of the same being a caste factor. But then this is no recovery in the eyes of law. Recovery from the house of the accused had to be in presence of an independent witness. What is crucial is his admission that police was already present in the house of accused Yadav Singh, when he was called, alongwith other villagers, by the police. Now if police was already aware of the place where articles were hidden, then obviously recovery cannot be said to have been effected on the basis of disclosure statement (Ex.PW-7/A) so recorded by the police. Now, if this witness was socially not allowed to enter the house, then why is it that police did not associate any other person present on the spot? That apart, witness states that axe was lying outside on the floor of the courtyard. It was visible to all and not concealed. Investigating Officer as also other prosecution witnesses admit that prior to 17.9.2006, police had already visited the village, on a number of occasions, yet no recovery was effected at that point in time. This totally renders the prosecution case of having effected the recovery to be doubtful, if not false. Further prosecution wants the Court to believe that blood soiled *Chappal* of the deceased was also recovered by the police. Reports of the Forensic Science Laboratory (Ex. PW-18/N & 18/O) reveal that no blood was found on any of the articles recovered by the police, including the weapon of offence, i.e. axe (Ex. P-3).

26. We find that prosecution has also examined Sunu Ram (PW-5), Shukru Ram (PW-6) as also Sukh Ram (PW-10) to establish its case. Sukh Ram has not supported the prosecution and testimony of the remaining witnesses is only hearsay in nature, for they learnt about the incident after recovery of the dead body and during the course of investigation.

27. Version of police officials, namely HC Kushal Kumar (PW-13), ASI Jagroop Singh (PW-14) and SI Kapoor Chand (PW-18) also cannot be said to be inspiring in confidence. According to HC Kushal Kumar, he recorded statement of Geeta Devi, under the provisions of Section 154 of the Code of Criminal Procedure (Ex. PW-1/A), whereas Jagroop Singh states that after reaching the spot he recorded the statement of Geeta Devi. The said

statement was sent to the Police Station and Constable Bhagat Ram registered the FIR, which was signed by him, whereas according to Bhagat Ram it was he who had scribed the statement (Ex. PW-1/A) and FIR was written by Milap Chand. Prem Lal (PW-2) states that photographs on the spot were taken by a private photographer. This version of his totally belies and contradicts the testimony of SI Kapoor Chand, according to whom photographs were taken by him from his personal camera.

28. There is yet another mitigating circumstance in favour of the accused. Undisputed case of the prosecution is that deceased was under heavy influence of alcohol, which fact is evident from the report of the Forensic Science Laboratory and the doctors have not ruled out the possibility of vital injury to have been sustained on account of fall.

29. Hence, it cannot be said that prosecution has been able to prove its case, by leading clear, cogent, convincing and reliable piece of evidence so as to prove that the accused persons, in furtherance of their common intention, inflicted injury on the head of Puran Chand, resulting into his death.

30. From the material placed on record, prosecution has failed to establish that the accused are guilty of having committed the offence, they have been charged with. The circumstances cannot be said to have been proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved beyond reasonable doubt to the hilt. The chain of events does not stand conclusively established, leading only to one conclusion, i.e. guilt of the accused. Circumstances when cumulatively considered do not fully establish completion of chain of events, indicating to the guilt of the accused and no other hypothesis other than the same.

31. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence so placed on record by the parties.

32. The accused have had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94*, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged. Appeal stands disposed of, so also pending application(s), if any.

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

State of Himachal Pradesh …Appellant.

Versus

Renuka Devi & others …Respondents.

Cr. Appeal No. 498 of 2009
Judgment reserved on: 07.04.2015
Date of Decision: May 5, 2015

Indian Penal Code, 1860- Section 306 read with Section 34- Deceased solemnized love marriage with accused no. 1- both husband and wife used to quarrel with each other- she wanted to take control of the finances- she and her brother subjected the deceased to cruelty and abetted him to commit suicide- deceased died by jumping into the river- held, that in order to prove the abetment, the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary- parents of the deceased nowhere deposed that accused wanted to control the finances- colleagues of the deceased stated that salary was remitted directly to the bank- Bank Manager deposed that deceased was operating the account himself and all the benefits of the deceased were released to his mother- no complaint was made by the deceased regarding the cruelty- mere daily quarrels cannot amount to abetment – in these circumstances, acquittal of the accused was justified.

(Para-11 to 26)

Cases referred:

Prandas v. The State, AIR 1954 SC 36

M. Mohan Versus State Represented by the Deputy Superintendent of Police, (2011) 3 SCC 626

Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

For the Appellant: M/s Ashok Chaudhary, Addl. AGs., with Mr. J.S. Guleria, Asstt. AG., for the appellant-State.

For the Respondents: Mr. Satyen Vaidya, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Assailing the judgment dated 06.06.2009, passed by learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, H.P., in Sessions Trial No. 9 of 2005, titled as State Versus Renuka Devi & others, State has filed the present appeal under the provisions of Section 378 of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that deceased Hem Singh was working as a Junior Supervisor with the Nathpa Jhakri Power Corporation (hereinafter referred to as NJPC). In the year 2003, he was posted at a place known as Jhakri. Deceased solemnized love marriage with Renuka Devi (accused No.1), sometime in the year 1998. From the wedlock two children were born. Both the husband and wife would often quarrel with each other. Also accused Renuka Devi wanted to take control of all finances. In effect, accused Renuka Devi alongwith her brothers, co-accused, Sat Pal (accused No.2) and Yashpal (accused No.3) subjected the deceased to cruelty and abetted him to commit suicide on 29.09.2003. Prosecution also wants the Court to believe that on 27.09.2003, co-accused Sat Pal, who had come to stay with the deceased, demanded money and picked up a quarrel which incident was witnessed by the maid servant Premi Devi (PW.8). On the complaint of Smt. Nirmala Devi (PW.1), police registered an FIR No.124 of 2003 dated 30.09.2003 (Ex.PW.15/C) under the provisions of Section 306 of the IPC at Police Station, Jhakri, against the accused. Investigation was conducted by police officials SI Vidya Chand (PW.15) and Inspector Phool Chand (PW.18). The incident of deceased jumping into the river and committing suicide was witnessed by Narayan (PW.2), Rakesh Chandel (PW.3) and Rattan

Lal (PW.4). With the completion of investigation, which *prima facie* revealed complicity of the accused in the alleged crime, *Challan* was presented in the Court for trial.

3. Accused were charged for having committed an offence punishable under the provisions of Section 306 read with Section 34 of the Indian Penal Code, to which they did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as eighteen witnesses. Statements of the accused under Section 313 of the Code of Criminal Procedure were also recorded, in which accused Renuka Devi took the following defence:-

> "Sh. Hem Singh was having abnormal behavior and in the evening whenever we wanted to go to Rampur he used to comment that the people wanted to kill him and during nights he never switched off the lights which were normally switched off by me. He used to woke me up during nights and used to say that somebody was outside the window who wanted to kill me and I should sleep on side the bed, sit or draw curtains. I used to teach children of Smt. Bindu Chandel and she wanted to come close to my husband and I found that she wanted to be intimate with my husband which was not to my liking. Smt. Bindu Chandel did not pay tuition fee to me, despite request and got furious. My father in law used to demand money regularly from my husband and my husband even used to take my salary for sending to them on demand. My husband used to be under stress on telephonic call from my father in law as he used to say that his father may disinherit him."

Other co-accused took plea of false implication. Four witnesses were examined by the accused in their defence.

5. Trial Court, after appreciating the testimony of prosecution witnesses acquitted the accused. Hence the present appeal.

6. We have heard M/s Ashok Chaudhary, learned Additional Advocate General assisted by Mr. J.S. Guleria, learned Assistant Advocate General, on behalf of the State as also Mr. Satyen Vaidya, Advocate, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

7. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish the essential ingredients so as to constitute the charged offence.

8. In *Prandas v. The State*, AIR 1954 SC 36, Constitution Bench of the apex Court, has held as under:

> "(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no

power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:

> "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

9. The fact that deceased committed suicide and was not murdered is not in dispute.

10. The apex Court in *M. Mohan Versus State Represented by the Deputy Superintendent of Police,* (2011) 3 SCC 626 has held, "sui" to mean "self" and "cide" to mean "killing", thus implying an act of self-killing.

11. It is also a settled proposition of law that to attract ingredients of offence of abetment, the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary. The act of abetment is thus *sine-qua- non* for invocation of provisions of Section 306 IPC.

12. Smt. Nirmala Devi (PW.1) and Uttam Singh (PW.9), parents of the deceased, have no where disclosed that accused wanted to take control of the finances of the deceased. On the contrary, officials of NJPC, who were colleagues of the deceased, have categorically deposed that salary was directly remitted into the bank account of the deceased, which only he would operate. We find through the testimonies of N.D. Negi (DW.4), Branch Manager of State Bank of India, Branch Jhakri, accused to have established that even her bank account was in fact being operated by the deceased himself. Thus, there is no evidence on record, establishing the fact that accused Renuka Devi attempted or desired of taking over the control of the assets or the salary of the deceased. On the other hand, we find, through the testimony of Smt. Seema Kumari (PW.14) that entire benefits, were released in favour of Smt. Nirmala Devi, mother of the deceased, on the basis of legal heirs certificate, so

produced by her. Noticeably, complainant, who is the mother of the deceased, has not even reflected the children (minor) born out of the wedlock to be the legal heirs**.**

13. It is also alleged that on 27.09.2003, brothers of accused Renuka Devi, who are also the accused persons, came and stayed at Jhakri and demanded money for solemnizing a function in their house. Now except for the testimony of Premi Devi (PW.8), there is no other evidence (documentary or oral) on record to this effect.

14. We find testimony of Premi Devi not to be inspiring in confidence at all, apart from the fact that Investigating Officer Phool Chand (PW.18), himself admits to have introduced her as a witness during investigation. He states that "……..It is correct that Smt. Premi Devi was introduced by us and actually she was not female servant of the deceased Hem Singh. It is correct that from the statements of the witnesses Dr. Jagat Ram, Tameshwar, SI and Avtar Singh it can be said that Hem Singh at that time was mentally disturbed. I also received the treatment slip and reference letter of the doctor by which Hem Singh was referred to the Indira Gandhi Medical College, Shimla. I did not take the account statements of Sh. Hem Singh and Renuka from the banks at Jhakri. I cannot say that Sh. Hem Singh was mentally disturbed and due to this, he committed suicide. I have not filed any final report in this case."

15. Premi Devi is supposed to have stayed in the house of deceased, as a maid servant only for a period of one month and twelve days prior to the incident. She states that on 27.09.2003 accused Sat Pal came to the house of the deceased and at about 3.00 AM in the night, she noticed accused Renuka Devi and deceased quarrelling with each other. A demand of Rs.20,000/-, two Karas and some gold ornaments was raised. Who raised the demand, she does not state. She categorically does not ascribe any role to the co-accused. She further states that Hem Singh resisted the same on the ground that even in the past he had been giving enough money to her brothers and nothing was left with him. Now we do not find this version of hers to be anywhere recorded by the police. There is improvement / exaggeration / embellishment. Veracity of her statement, itself is in doubt, in view of the statement of the Investigating Officer. There is no other evidence proving employment of Premi Devi as a maid servant. Noticeably Hem Singh never disclosed such fact to his mother or any other relative.

16. The question, which needs to be further considered, is as to whether prosecution has been able to establish, through the testimonies of Smt. Nirmala Devi (PW.1), Rakesh Chandel (PW.3), Bindu Chandel (PW.5), Surjeet Singh (PW.6) and Jyoti Prakash (PW.12) that the accused abetted the crime or not.

17. At this juncture, we take notice of the testimonies of defence witnesses on the question of mental state of the deceased. Dr. J.R. Thakur (DW.1) has categorically deposed that on 19.05.2003, at about 6.00 AM, he saw a person whom he identified to be the deceased, throwing pieces of glass and stones. Deceased also climbed the roof of his house. Since the behaviour was abnormal, police was called for help. Such version is corroborated by Attar Singh (DW.3).

18. That deceased was suffering from acute schizophrenia stands witnessed by prosecution witness Dr. R.L. Gupta (PW.7), according to whom, he had referred the deceased, through the Chief Medical Officer, for treatment to the IGMC Hospital at Shimla.

19. Dr. Hardayal Chauhan (PW.11) does state that he did examine the deceased but found him to be normal. But the fact of the matter is that all was not well with the

mental state of the deceased. He had to undergo medical treatment at two places. He may have become normal when so examined by this person. According to the mother, accused wanted the deceased to be declared insane for getting the monetary benefits and as such, on one occasion, noticed the deceased tied with a rope by the accused. We do not find such version to be believable. Had it been so, deceased would have not come from Kullu/Jhakri to Shimla for showing himself at the State level Hospital. In fact the defence taken by the accused to some extent stands probablized.

20. Prosecution also wants the Court to believe that accused Renuka Devi used to constantly quarrel with the deceased, which prompted him to take away his life. We find the testimony of Smt. Nirmala Devi (PW.1), Rakesh Chandel (PW.3), Bindu Chandel (PW.5), Surjeet Singh (PW.6) and Jyoti Prakash (PW.12) to be vague on the issue. One cannot forget that marriage was solemnized in the year 1998. No complaint whatsoever, of any nature, was ever lodged by the deceased with any person with regard to any acts of cruelties/maltreatment. In fact, mother of the deceased admits that on most of the occasions she used to reside with the parties at Jhakri. In any event her version of such quarrels is vague and unspecific with respect to time, nature, duration and place. Also mother admits that 4-5 days prior to the incident, she had left for her native place.

21. What was that immediate cause, which prompted the deceased to have committed suicide has not come on record. In fact it has come on record, as also is the prosecution case, that on the fateful day, in his car, deceased himself took his wife and children for visiting the temple. However, after driving for some distance, he suddenly stopped the vehicle on the side and went towards the river and jumped from the boulder. None of the witnesses have deposed that on the fateful day, deceased and the accused had quarrelled. Though it has come in the testimony of Bindu Chandel that the previous night, accused and the deceased quarrelled and she had also noticed scratch marks on his face. But the question is whether version of this witness is believable or not. In our considered view, no. This we say so for the reason that she never ever informed anyone about the same. Accused Renuka Devi was employed as a teacher at DPS School, Jhakri. Children of Bindu Chandel were also studying in the same school, yet no grievance was made with any person. In fact, witness admits that she had no knowledge of any quarrel between the accused and the deceased, which took place the night preceding the fateful day. Thus, she contradicts herself.

22. Uttam Singh (PW.9), father of the deceased, states that even Bhupinder Singh, father of accused Renuka had threatened of murdering the deceased. But then such version has emerged for the first time, only in Court. Bhupinder Singh is not an accused. This witness produced a letter (Ex.PW.9/A), allegedly written by the deceased, so found by him two years prior to his deposition in Court. But this document is absolutely inadmissible in evidence. Mere exhibiting of a document would not prove contents thereof. Father does state that letter was written by his son, but then prosecution has not led any evidence to prove the author of the same and the letter is not despatched in the normal course of business/routine. After all deceased was employed with a Public Sector undertaking and his hand writing could have been matched with the material, contemporaneous in nature, which was easily available. Father does not even remember the date when he handed over this letter to the prosecution. In any event contents of the letter do not reveal any act of abetment.

23. None of the witnesses, in our considered view, have been able to establish the essential ingredients, required for constituting an offence of abetment. Mere daily

quarrels and discords cannot be termed as abetment, forcing the deceased to commit suicide.

24. On the contrary, we find that accused Renuka Devi, who loved her husband, despite his mental state, not only continued to reside with him, but also gave birth and brought up his children.

25. To our mind, prosecution has not been able to establish, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence so as to prove that suicide was abetted by the accused.

26. The Court below, in our considered view, has correctly and completely appreciated the evidence so placed on record by the prosecution. It cannot be said that the judgment of trial Court is perverse, illegal, erroneous or based on incorrect and incomplete appreciation of material on record, resulting into miscarriage of justice.

27. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others* versus *Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94*, since it cannot be said that trial Court has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice, no interference is warranted in the instant case.

For all the aforesaid reasons, present appeal, being devoid of merit, is dismissed, so also the pending application(s), if any. Bail bonds furnished by the accused are discharged. Record of the trial Court be immediately sent back.

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

Surinder Singh son of Darshan Singh …..Applicant.
Versus
State of Himachal Pradesh. …….Non- applicant.

Cr.MP(M) No. 372 of 2015.
Order reserved on: 1.5.2015.
Date of Order: May 5,2015.

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 465 and 471 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- police had not claimed that custodial interrogation is necessary in the present case- interests of the State or general public will not be affected by keeping the accused inside the jail- therefore, bail granted. (Para-6 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179

The State Vs. Captain Jagjit Singh AIR 1962 SC 253
Sanjay Chandra Vs. Central Bureau of Investigation 2012 Cri.L.J 702

For the applicant: Mr. Naresh Verma, Advocate.
For non-applicant . Mr. M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No.180 of 2014 dated 27.9.2014 registered under Sections 457 and 380 of the Indian Penal Code at Police Station Jawalamukhi District Kangra Himachal Pradesh.

2. It is pleaded that investigation of the present case is completed and recovery has been effected. It is further pleaded that there is no direct evidence against the applicant and he is innocent. It is further pleaded that applicant will not induce or threat prosecution witness in any manner and will abide by the terms and conditions imposed by the Court. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report FIR No. 180 of 2014 dated 27.9.2014 registered under Sections 457 and 380 IPC at Police Station Jawalamukhi District Kangra HP. There is recital in police report that statement of co-accused Jitender Singh was recorded under Section 27 of the Indian Evidence Act and as per disclosure statement of co-accused Jitender Singh site plan of location was prepared where cash chest of ATM machine was kept. There is further recital in police report that broken locks of shutter which were thrown in the bushes by accused persons were also recovered as per disclosure statement given by co-accused Jitender Singh. There is further recital in police report that one CD and bank statement dated 26.9.2014 and statement of cash kept in the ATM machine also took into possession vide seizure memo. There is further recital in police report that on dated 26.9.2014 the ATM machine kept by PNB Bank Kaloh Tehsil Rukker District Kangra HP was broken and Rs.6,24,200/-(Six lac twenty four thousand two hundred) was stolen from cash chest of ATM machine by accused persons. There is further recital in police report that one spray bottle, cash chest of ATM machine and cash to the tune of Rs.5,97,700/- (Five lac ninety seven thousand seven hundred) and car having registration No. HR-51E-6011 were also took into possession vide seizure memo. There is further recital in police report that investigation is complete and challan is filed in the competent Court of law on dated 2.12.2014.

4. Following points arise for determination in the present bail application:

(1) Whether bail application filed under Section 439 of the Code of Criminal Procedure 1973 is liable to be accepted after completion of investigation and after filing of challan in competent Court of law as alleged?.

(2) Final Order.

5. Court heard learned Advocate appearing on behalf of applicant and Court also heard learned Additional Advocate General appearing on behalf of State.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the applicant that applicant is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that investigation is complete and challan already stood filed in competent court of law and criminal case will be disposed of in due course of time and on this ground bail application be allowed is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri.L.J 702 titled Sanjay Chandra Vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. As per police report investigation is complete and challan already stood filed in Court in the present case and criminal case will be disposed of in due course of time. It is well settled law that accused is presumed to be innocent till proven guilty by the competent of Court of law. Court is of the opinion that if applicant is released on bail at this stage then interests of the general public or the State will not be adversely effected.

8. Submission of learned Additional Advocate General that if the applicant is released on bail then applicant will induce and threat prosecution witness and on this ground bail application be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that conditions will be imposed in the bail order that applicant will not commit similar offence in future. If applicant commits similar offence in future then prosecution will be at liberty to file application for cancellation of bail in accordance with law. It is not expedient in the ends of justice to keep applicant in jail because investigation is complete and challan stood filed in competent Court of law. Point No.1 is answered in affirmative.

Point No.1 (Final order).

9. In view of my findings on point No.1 bail application filed by applicant is allowed. It is ordered that applicant will be released on bail on following terms and conditions on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of learned trial Court (i) That applicant will join investigation as and when called for by the Investigating Officer in accordance with law. (ii) That applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That applicant will not leave India

without prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address to the Investigating Officer in written manner so that applicant can be located after giving short notice. (vi) That applicant will attend the proceedings of learned trial Court regularly. Observation made hereinabove is strictly for the purpose of deciding the present bail application and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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

Babita Rani. ....Petitioner
versus
Divisional Commissioner Kangra & others. ...Respondents.

CMPMO No. 37 of 2015
Decided on: 6.5.2015.

Code of Civil Procedure, 1908- Order 23 Rule 1- Learned Counsel for the petitioner submitted that he did not want to continue with the present petition and same be dismissed as withdrawn- In view of statement of the Learned Counsel, petition is dismissed as withdrawn.

For the petitioner : Ms. Sacholan Rana, Advocate.
For the respondents: Mr. M.L. Chauhan, Additional Advocate General, for respondents No. 1 to 4.
Mr. Sanjeev Kuthiala, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Advocate appearing on behalf of the petitioner submitted that petitioner does not want to continue the petition and the same be dismissed as withdrawn. In view of the submission of learned Advocate appearing on behalf of the petitioner petition is dismissed as withdrawn. No order as to costs. Petition disposed of. Pending applications if any also disposed of.

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

State of Himachal Pradesh .....Appellant.
Vs.
Kaur Singh son of Utam Singh & others ...Respondents.

Cr. Appeal No. 569 of 2008
Judgment reserved on: 17th March, 2015
Date of Decision: 8th April, 2015

Indian Penal Code, 1860- Section 306 read with Section 34- Deceased was married to accused 'K'- accused harassed the deceased for bringing insufficient dowry- she narrated the incident of harassment to her father, step mother, Pardhan and ward member- milk was not provided to her children on which she complained to her father- complainant had provided cow to the deceased two months prior to her death - deceased died and was cremated without intimating any person- held, that there should be nexus between abetment and suicide- no positive, cogent and reliable evidence was led to prove that accused had abetted the deceased to commit suicide- accused acquitted of the commission of offence punishable under Section 306 of IPC. (Para-11)

Indian Penal Code, 1860- Section 498-A read with Section 34 - Accused 'K' used to harass the deceased for bringing insufficient dowry- she narrated the incident of harassment to her parents as well as Pardhan and ward member- milk was not provided to her children on which she complained to her father- two months prior to her death, complainant provided cow to the deceased- deceased died and was cremated without intimating any person-PW-1 specifically stated that accused used to call the deceased 'Kanjar' (Person leading illicit life)- held, that calling a married woman 'Kanjar' ipso facto amounts to cruelty upon married woman- other prosecution witnesses also deposed that deceased used to complain about the harassment- held that the prosecution had proved its case for the commission of offence punishable under Section 498-A read with Section 34 IPC. (Para-13)

Indian Penal Code, 1860- Section 201 read with Section 34- Accused cremated the deceased without intimating any person- held, that in order to establish Section 201 of IPC, prosecution has to prove that accused had knowledge about the commission of offence and that they had caused disappearance of evidence of commission of criminal offence- two persons were sent to intimate the parents of the deceased about the death- deceased was cremated in presence of co-villagers- in these circumstances, offence punishable under Section 201 read with Section 34 of IPC is not proved against the accused. (Para-14)

Cases referred:

Sangaralonia Sreenoo vs. State of A.P., 1997 (4) Supreme Court page 214
M.Mohans vs. State, AIR 2011 SC page 239
Sita Ram and others vs. State of Haryana and another, 1997(3) Crimes 362 (P&H)
Jagdish and others vs. State of Rajasthan and another, 1998 Cr.L.J. 554
Ram Saran Mahto vs. State of Bihar, AIR 1999 Supreme Court page 3435
Bhee Ram vs. State of Haryana, AIR 1980 SC 957
Rai Singh vs. State of Haryana, AIR 1971 SC 2505
State of West Bengal vs. Orilal Jaiswal and another, 1993(3) Crimes 518 SC
Ramaiah alias Rama vs. State of Karnataka, (2014)9 SCC 365
Bhola Ram vs. State of Punjab, (2013)16 SCC 421
State of H.P. vs. Umardeen, 2012(1) Shim.LC 108
State of H.P. vs. Ani Kumar and others, 2012(2) Shim. LC 710
Jose Vs. The State of Kerla (Full Bench), AIR 1973 SC 944
Dalbir Singh Vs. State of Punjab, AIR 1987 S.C. 1328
State of M.P. vs. Surendra Singh, AIR 2015 SC 398

For the Appellant: Mr. Ashok Chaudhary Additional Advocate General with Mr. V.S.Chauhan, Additional Advocate General and Mr.J.S.Guleria, Assistant Advocate General.

For the Respondents: Mr. Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, J.

Present appeal is filed against the judgment of acquittal passed by learned Additional Sessions Judge Court No.1 Kangra at Dharamshala in Sessions case No. 1-N of 2006 decided on dated 28.3.2008.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that deceased Veena @ Sanju Devi was married with co-accused Kulwant about 10-12 years back. It is alleged by prosecution that co-accused Kaur Singh is father-in-law of deceased, co-accused Krishna Devi is mother-in-law of deceased, co-accused Parvesh Lata is sister-in-law and Ravindr is brother-in-law of deceased. It is alleged by prosecution that accused persons have committed cruelty with deceased Veena Devi for bringing insufficient dowry. It is alleged by prosecution that all accused persons used to call the deceased as 'Kanjar' (Person leading illicit life). It is further alleged by prosecution that deceased had narrated the incident of harassment to her father and her step mother and also narrated the incident of cruelty to Pardhan and ward member. It is alleged by prosecution that milk was not provided to the children of deceased Veena Devi and she has complained to her father two months prior to her death and thereafter on advice of Panchayat Pardhan complainant Chanda Singh had provided cow to deceased in order to arrange milk for her children. It is also alleged by prosecution that accused persons have cremated deceased Veena Devi without informing her parents and destroyed the evidence. It is alleged by prosecution that FIR Ext.PW1/A was recorded in police station Nurpur and after registration of FIR statements of prosecution witnesses were recorded. It is also alleged by prosecution that site plan Ext.PW14/A was prepared where deceased was cremated and thereafter ash and bones at the spot were collected and sealed in separate piece of cloth. It is alleged by prosecution that deceased had committed suicide by way of consuming poison due to cruelty committed upon the deceased in her matrimonial house. It is alleged by prosecution that post mortem of deceased was not allowed to be conducted. It is also alleged by prosecution that ash and bones of deceased were collected from cremation site on dated 30.7.2004 after four days of cremation of dead body of deceased and sent to FSL Junga for chemical analysis through C. Dhani Ram who deposited the same in FSL Junga and chemical analyst report Ext.PA was sought.

3. Charge was framed against the accused persons by learned Additional Sessions Judge Court No.1 Kangra at Dharamshala on dated 21.6.2006 under Sections 498-A read with Section 34 IPC, under Section 306 read with Section 34 IPC and under Section 201 read with Section 34 IPC. 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	Chanda Singh

PW2	Veena Devi
PW3	Roshan Lal
PW4	Baldev Singh
PW5	Balbir Singh
PW6	Harbans Singh
PW7	Joginder Singh
PW8	Kuldeep Singh
PW9	Ramesh Chaudhary
PW10.	C. Dhani Ram
PW11	Anju
PW12	Dr. Sanjeev Aggarwal
PW13	Rajinder Singh
PW14	SI Parkash Chand
PW15	Inspector Nathu Ram

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

Sr.No.	Description:
Ex.PW1/A.	FIR
Ex.PW13/A.	Recovery memo
Ex.PW14/A	Site plan
Ext.PW14/B	Sample of seal
Ex.PW14/C to Ext.PW14/H	Statements
Ext.PA	Chemical Examiner report
Ext.P1	Parcel
Ex.P2 &Ext.P3	Ash and bones

5. Statements of the accused recorded under Section 313 Cr.P.C. Accused did not lead any defence evidence. Learned trial Court acquitted all accused persons qua offence under Sections 498-A, 306 and 201 read with Section 34 IPC.

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

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

8. Point for determination in present appeal is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice.

9. ***ORAL EVIDENCE ADDUCED BY PROSECUTION:***

9.1. PW1 Chanda Singh has stated that he was married twice. He has stated that his first wife Leela Devi died and from loins of his first wife he has two daughters and one

son. He has stated that deceased Veena Devi @ Sanju was born from the loins of first wife. He has stated that deceased was married with co-accused Kalwant Singh about 10-12 years back and out of wedlock three children born. He has stated about 2/3 years before the death of Veena Devi she was harassed and beaten by accused persons present in Court. He has stated that accused persons used to harass and beat his daughter for bringing insufficient dowry and further stated that same fact was narrated to him directly by his deceased daughter Veena Devi. He has further stated that accused persons used to taunt deceased that she did not perform household work and also used to taunt the deceased that father of deceased had married second time. He has stated that accused persons used to address his deceased daughter as 'Kanjar' (Person leading illicit life). He has stated that whenever deceased used to come to her parental house she used to disclose the facts of harassment and beating. He has stated that deceased has also informed the facts of cruelty to Pardhan and ward members Prem Singh and Baldev Singh. He has stated that two months prior to her death she had visited her parental house and directly told him that accused persons were not provided milk to her children. He has stated that thereafter he had given cow to his daughter on advice of Pardhan of Panchayat. He has stated that his son-in-law co-accused Kulwant Singh is working in factory at Jammu. He has stated that on dated 25.7.2004 he came to know about 9 PM from Roshan about death of his daughter. He has stated that deceased had consumed poison because of harassment given to deceased by accused persons. He has stated that on dated 26.7.2004 he went to house of accused but dead body of his daughter was not found and deceased was already cremated by accused persons. He has stated that FIR Ext.PW1/A was lodged on police station Nurpur and further stated that at that time Pardhan, Prem Singh, his wife and Baldev Singh were also with him. He has admitted that all three children of deceased Veena Devi are residing in the house of accused. He has denied suggestion that on dated 25.7.2004 Pawan Kumar came to his house on motor cycle and informed that his daughter died because of vomiting and dysentery. He has denied suggestion that accused persons had not harassed and beaten his deceased daughter. He has denied suggestion that accused persons have not told his deceased daughter that she was daughter of 'Kanjar' (Person leading illicit life). He has denied suggestion that deceased has not personally narrated to him the facts of harassment. He has denied suggestion that deceased had died natural death due to dehydration. He has denied suggestion that he has inimical relations with accused persons and due to inimical relations he has deposed falsely against accused persons in present case.

9.2 PW2 Veena Devi Pardhan Gram Panchayat has stated that PW1 Chanda Singh belonged to her village and deceased Veena Devi was daughter of Chanda Singh and was married to co-accused Kulwant Singh in the year 1994. She has stated that her house is situated adjacent to the house of Chanda. She has stated that 2/3 months prior to death of deceased Veena Devi visited her parental house and deceased directly told her that she was ill-treated by accused persons for bringing insufficient dowry. She has stated that deceased has also told her directly that accused persons were taunting her that she did not perform the household work properly. She has stated that deceased also directly told her that deceased was beaten by accused persons. She has stated that deceased has also visited her parental house 2/3 months prior to her death and told that accused persons did not provide milk to her children and thereafter she requested her father to purchase a cow for deceased so that milk could be provided to children of deceased. She has stated that on dated 25.7.2004 she heard the cries of weeping from house of Chanda Singh and thereafter she went to the house of Chanda Singh and came to know about death of Veena Devi. She has stated that accused persons have not informed about death. She has stated that deceased had committed suicide by way of consuming poison as she was harassed and

beaten by accused persons. She has admitted that children of deceased are residing in the house of accused. She has stated that she does not know that on dated 25.7.2004 at about 12 Noon Pawan Kumar co-villager of accused persons had visited the village on motor cycle and informed the parents of deceased about death. She had denied suggestion that deceased had not disclosed any fact to her during her life time relating to harassment by accused persons. She has denied suggestion that deceased had not narrated to her any fact during her life time relating to beatings to deceased by accused persons. She has denied suggestion that she did not advice PW1 Chanda to purchase cow for deceased. She has denied suggestion that PW1 has not given any cow to deceased. She has denied suggestion that being co-villager and relative of deceased she had given statement to police after due deliberation in connivance with Chanda.

9.3 PW3 Roshan Lal has stated that on dated 25.7.2004 at about 8.30 PM he was at bus stop in connection with his personal work. He has stated that two boys came there on motor cycle and they asked about Chanda Singh. He has stated that he told them that there are 3-4 Chanda Singh in their village. He has stated that thereafter they told him that they wanted to inquire about Chanda Singh whose daughter was married to co-accused Kulwant Singh of village Randoh. He has stated that thereafter they told him to inform that his daughter had died. He has stated that he informed Chanda Singh at about 8.45 PM. He has stated that he does not know that information about death of deceased was given to Chanda Singh at about 12 Noon. He has denied suggestion that he remained busy in deliberating false story against accused persons for about 2/3 days.

9.4 PW4 Baldev Singh has stated that he was BDC member during the year 2004 and further stated that he also remained Pardhan of G.P. Khehar. He has stated that he is familiar with Chanda Singh and further stated that Chanda Singh had married twice. He has stated that deceased Veena Devi was born from first wife. He has stated that deceased was married 8-10 years back with co-accused Kulwant Singh of village Randoh. He has stated that 2-3 years prior to death deceased came to her parents’ house and told her father that accused were harassing her for bringing insufficient dowry. He has stated that deceased father has also personally told him that deceased was taunted and ill-treated by her husband, brother-in-law, sister-in-law, father-in-law and mother-in-law. He has stated that he tried to console the deceased. He has further stated that deceased also came to her parental house two months prior to her death and told that accused were not providing milk to her children. He has stated that thereafter he asked the father of deceased Chanda Singh to purchase cow for deceased so that she could provide milk to her children. He has stated that on dated 26.7.2004 early in the morning Chanda Singh came to his home and informed that his daughter was killed and her last rites were also performed without informing him. He has stated that thereafter he along with Pardhan of Gram Panchayat along with 2/3 persons went to village Randoh. He has stated that he inquired from father-in-law of deceased as to how the deceased had died and thereafter father-in-law of deceased informed that deceased had died by consuming poison. He has stated that thereafter he also inquired from father-in-law of deceased as to why post mortem of deceased was not conducted but father-in-law of deceased did not reply. He has stated that deceased had died at 6 AM in the morning and was consigned to flames without giving intimation to parents of deceased. He has stated that deceased had died because of harassment given to her by accused persons. He has denied suggestion that deceased Veena Devi and her father Chanda Singh did not informed him about non-supply of milk to her children. He has denied suggestion that deceased Veena Devi and her father did not tell him about harassment and beatings on behalf of accused persons.

9.5 PW5 Balbir Singh has stated that Kaur Singh accused is his real uncle. He has stated that at about 6-7 AM he heard noise from house of Kaur Singh and thereafter he went to the house of Kaur Singh and he saw that Veena was vomiting in verandah of house. He has stated that Kaur Singh was not in his house and he arrived in house after some time. He has stated that he, Bhuri Singh, Kaur Singh took the deceased Veena Devi to hospital in tractor and thereafter from Bhojpur they hired a jeep and took Veena Devi to the hospital in jeep. He has stated that he remained outside the hospital. He has stated that he does not know what happened inside hospital because he had not gone inside hospital. The witness was declared hostile. He has stated that incident took place on dated 25.7.2004. He has denied suggestion that yellow water was emitting. He has denied suggestion that Kaur Singh had disclosed to medical officer that deceased Veena had consumed some poisonous substance. He has denied suggestion that medical officer had applied pipe to deceased and extracted the poisonous water from her body. He has denied suggestion that he has resiled from his earlier statement in order to save accused persons. He has admitted that co-accused Parvesh sister-in-law of deceased is married and is residing in her in-laws house. He has stated that one Pawan Kumar was sent at 12 Noon to the house of parents of deceased on motor cycle for giving information to parents of deceased about death and he came back around 1 PM.

9.6 PW6 Harbans Singh has stated that after retirement from Army he was performing the agriculture work at village Randoh. He has stated that he heard noise from house of accused and thereafter he asked his wife and thereafter his wife told him that wife of co-accused Kulwant Singh had died. He has stated that thereafter he went to the house of co-accused. He has stated that dead body of deceased was kept in room and many people of village had assembled. He has stated that he told Kaur Singh to inform parents of deceased about death but he kept mum. He has stated that co-accused Kulwant arrived at 4 PM and thereafter dead body was took for last rites at about 5 PM. He has stated that he had also joined the funeral procession. He has stated that he does not know that accused persons have sent Pawan Kumar to the house of parents of deceased to inform them about death.

9.7 PW7 Joginder Singh has stated that after retiring from Army he is plying Mahindra jeep bearing number HP-38-7203. He has stated that jeep is driven by him. He has stated that on dated 25.7.2004 Bhuri Singh of village Randoh came to his house and told that one lady was to be taken to hospital as she was unconscious. He has stated that lady was brought upto Bhojpur in tractor and thereafter she was took to Pathankot in private hospital in his jeep. He has stated that accused Kaur Singh, Manju and Balbir were accompanying the deceased. He has stated that lady was in unconscious condition and she was daughter-in-law of co-accused Kaur Singh. He has stated that deceased had vomited in the vehicle and further stated that deceased was took to Krishna hospital. He has stated that he does not know what happened inside the hospital. He has stated that thereafter the person who took the lady to hospital came out and told that Veena had died. He has stated that thereafter he brought back the dead body to place near the village of accused. He has stated that thereafter he returned to his village.

9.8 PW8 Kuldeep Singh has stated that on dated 25.7.2004 he had gone to his fields at about 7 AM. He has stated that his sister-in-law came to him in field and told him that Veena was ill and she was to be taken to hospital. He has stated that he took his tractor and took deceased Veena upon tractor upto Bhojpur. He has stated that Balbir Singh, Kaur Singh, Manju, Bhuri Singh were with deceased Veena Devi and further stated that Veena Devi was unconscious when he took her in his tractor. He has stated that thereafter from

Bhojpur the deceased was took to hospital at Pathankot in jeep of Joginder. He has stated that thereafter they returned back at 10.30 AM with dead body of deceased. He has stated that dead body of deceased was consigned to flames at 4 PM. He has stated that he does not know what was consumed by deceased. The witness was declared hostile. He has stated that accused Kaur Singh is his real uncle and his wife is real aunt and other co-accused are his brother and sister. He has stated that he wanted that accused should be saved from criminal punishment. He has stated that he does not know whether Pawan was sent to the house of parents of deceased to inform about the death.

9.9 PW9 HC Ramesh Chaudhary has stated that in the year 2004 he was posted as MHC in P.S. Nurpur and on dated 23.7.2004 Parkash Chand had deposited with him one parcel sealed with seal 'M' containing bones and ash. He has stated that he recorded the entry in register and thereafter sent to FSL Junga through C. Dhani Ram vide RC No. 175/04. He has stated that after depositing the articles in office of FSL Junga RC was returned by constable. He has stated that articles remained intact in his custody.

9.10, PW10 C. Dhani Ram has stated that in the year 2004 he was posted in P.S. Nurpur and further stated that on dated 10.10.2004 MHC Ramesh Chand handed over him one parcel, sample of seal and docket vide RC No. 175/04 for depositing the same in FSL Junga. He has stated that he deposited the same in office in proper condition and further stated that articles remained intact during his custody.

9.11 PW11 Anju has stated that accused Kaur Singh is her father-in-law and her house is situated at about 30-40 feet from house of accused. She has stated that on dated 25.7.2004 she was milking the cow at 7 AM in her house. She has stated that Bhuri Singh came to her house and asked and inquired about Kuldeep Singh. She has stated that Kuldeep Singh is her brother-in-law. She has stated that when she reached in house of co-accused Kaur Singh at that time whole villagers were present there and she has stated that Veena was vomiting in verandah and she came to know that Veena was ill. She has stated that she does not know that what Veena Devi had consumed. She has stated that thereafter Veena took to hospital in tractor of her brother-in-law and she, her husband, Kaur Singh and Bhuri Singh were also accompanying Veena Devi in tractor which was driven by her brother-in-law Kuldeep Singh. She has stated that they travelled in tractor upto Bhojpur and thereafter they went to Krishna hospital at Pathankot in a hired vehicle from there. She has stated that at Krishna hospital the deceased was checked by medical officer. Again stated that she was sitting in vehicle and she does not know what was stated by doctor. She has stated that from Krishna hospital they came back. She has stated that Veena Devi had died on way to hospital. She has stated that thereafter deceased was took to cremation place for her last rites. She has stated that Parmanand was sent to call the parents of deceased but none came from parents' side of deceased. She has denied suggestion that Bhuri Singh had told her that Beena Devi had consumed poison due to which she would be taken to hospital. She has denied suggestion that doctor working in Krishna hospital informed that deceased had died due to consumption of poison. She has denied suggestion that deceased was not brought to government hospital deliberately by accused persons. She has denied suggestion that parents of deceased were not informed about death of deceased. She has admitted that all accused are relatives i.e. father-in-law, mother-in-law and brother-in-law. She has denied suggestion that in order to save accused persons she has resiled from her previous statement. She has admitted that parents of deceased could not come on the day for cremation and they came on next day.

9.12 PW12 Dr. Sanjeev Aggarwal has stated that he was proprietor of Krishna hospital Pathankot. He has stated that he does not know what had actually happened. He has stated that some police officials came to the hospital for inquiries. He has denied suggestion that on dated 25.7.2004 accused persons present in Court have brought deceased Beena Devi to his clinic at about 8.30 AM. He has denied suggestion that he examined the deceased and told the accused to take the deceased to government hospital because deceased had consumed poison.

9.13 PW13 Rajinder has stated that he remained associated with police. He has stated that police has collected the ash and bones and were sealed in cloth parcel with seal 'M' and same were took into possession vide memo Ext.PW13/A. He has stated that he could not state that dead body of deceased was consigned to flames in absence of her parents. He has stated that he does not know that accused persons have informed the police officials that cause of death of deceased was consumption of poison. Witness was declared hostile by prosecution. He has admitted that accused had helped his wife in the elections of Panchayat. He has denied suggestion that he has resiled from his earlier statement from portion 'A' to 'A' and 'B' to 'B' in order to give benefit to accused.

9.14 PW14 SI Parkash Chand has stated that during the year 2004 he was posted as ASI in P.S. Gangth. He has stated that FIR Ext.PW1/A was registered and matter was investigated. He has stated that he recorded statements of witnesses and thereafter he went to village Randoh. He has stated that he also went to cremation ground and prepared site plan Ext.PW14/A. He has stated that from cremation ground he collected ash and bones. He has stated that accused persons have not informed the parents of deceased and also did not inform the police officials qua consumption of poison by deceased. He has stated that accused persons destroyed the evidence by way of burning the dead body and thereafter took the bones to Haridwar on the same day. He has stated that deceased had died on dated 25.7.2004. He has stated that no report of incident was lodged till dated 30.7.2004. He has denied suggestion that deceased had died due to vomiting and dysentery. He has denied suggestion that FIR was lodged after due deliberation at the instance of Pardhan, Veena Devi, Baldev Singh and parents of deceased. He has denied suggestion that he recorded the statements of witnesses according to his own choice. He has denied suggestion that he has implicated the accused persons forcibly in false case.

9.15 PW15 Inspector Nathu Ram has stated that in the year 2004 he was posted as SHO P.S. Nurpur. He has stated that case file was taken by him for investigation on dated 1.8.2004. He has stated that he recorded statements of six witnesses correctly as per their versions. He has stated that after completion of investigation ASI Parkash Chand handed over the file to him. He has stated that after receipt of FSL report he prepared final report. He has denied suggestion that deceased was residing in her in-laws house properly. He has stated that deceased was treated in her matrimonial house with cruelty. He has denied suggestion that he recorded statements of witnesses according to his own choice.

10. Statements of accused recorded under Section 313 Cr.P.C. Accused have stated that deceased had died due to natural death and further stated that deceased was not harassed in any manner and accused have also stated that parents of deceased were informed well in time and when they did not come only then deceased was cremated. Accused persons did not lead any defence evidence.

11. Submission of learned Additional Advocate General appearing on behalf of the State that offence of abetment under Section 306 IPC is proved against accused persons

beyond reasonable doubt is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that 'sui' means self and 'cide' means self-killing. It is well settled law that there should be direct nexus between abetment and suicide and there should be proximity of time between abetment and suicide. It is well settled law that there are two types of abetment (1) Active abetment (2) Passive abetment. Active abetment is done to end the life of deceased while in passive abetment something is not done to save the life of deceased. Court has carefully perused the testimonies of PW1 to PW15. There is no positive, cogent and reliable evidence on record in order to prove that accused persons had abetted the deceased to commit suicide. Hence it is held that criminal offence of abetment is not proved against accused persons beyond reasonable doubt because there is no positive evidence of proximity of time between abetment and suicide in present case. ***See 1997 (4) Supreme Court page 214 titled Sangaralonia Sreenoo vs. State of A.P. See AIR 2011 SC page 239 titled M.Mohans vs. State***.

12. Submission of learned Additional Advocate General appearing on behalf of State that prosecution has proved beyond reasonable doubt that accused persons have committed criminal offence under Section 498-A IPC is accepted for the reasons hereinafter mentioned. We have carefully perused the testimony of PW1 Chanda Singh. PW1 Chanda Singh has specifically stated in positive manner that deceased was harassed in her matrimonial house and was beaten in her matrimonial house by accused persons for bringing insufficient dowry. PW1 has also specifically stated in positive manner that accused persons used to address the deceased as daughter of 'kanjar' (Person leading illicit life). PW1 has specifically stated in positive manner that above stated fact was directly narrated by deceased to him when deceased had visited her parental house. We are of the opinion that uttering the word 'Kanjar' (Person leading illicit life) to a married woman *ipso facto* amounts to mental cruelty upon married woman. It is well settled law that cruelty is of two types i.e. mental cruelty and physical cruelty. By way of uttering the word 'Kanjar' (Person leading illicit life) to deceased the mental cruelty in matrimonial house upon deceased is proved on part of accused persons.

13. We have carefully perused the testimony of PW2 Veena Devi. PW2 Veena Devi who was Pardhan of Gram Panchayat has specifically stated in positive manner when she appeared in witness box that deceased had directly told her when deceased came to her parental house that her husband, her sister-in-law and others ill-treated her for bringing insufficient dowry and deceased had also directly narrated to PW2 Veena Devi Pardhan that deceased was beaten by accused persons in her matrimonial house. Mental cruelty upon deceased in her matrimonial house is proved beyond reasonable doubt as per testimony of PW2. We have carefully perused the testimony of PW4 Baldev Singh BDC member. PW4 has specifically stated in positive manner that when deceased came to her parental house she told her father about cruelty and demand of insufficient dowry and thereafter father of deceased directly told these facts to PW4. Testimony of PW4 is also trustworthy reliable and inspires confidence of Court. It was held in case reported in ***1997(3) Crimes 362 (P&H) titled Sita Ram and others vs. State of Haryana and another*** that cruelty is not physical only but mental cruelty is also cruelty as defined under Section 498-A IPC. It is well settled law that offence under Section 498-A IPC is continuing offence. ***(See 1998 Cr.L.J. 554 titled Jagdish and others vs. State of Rajasthan and another)*** Court is of the opinion that uttering work 'kanjar' (Person leading in illicit relations) to a married woman in her matrimonial house amounts to mental cruelty as defined under Section 498-A IPC. It is well settled law that every woman has legal right to live in her matrimonial house with

dignity and honour and any derogatory remarks to a married woman in her matrimonial house amounts to mental cruelty.

14. Another submission of learned Additional Advocate General appearing on behalf of State that criminal offence under Section 201 IPC is also proved beyond reasonable doubt against accused persons is rejected being denied of any force for reasons hereinafter mentioned. Ingredients of Section 201 IPC are (1) That accused should have knowledge that an offence has been committed (2) That thereafter accused persons have caused disappearance of evidence of commission of criminal offence. ***See AIR 1999 Supreme Court page 3435 titled Ram Saran Mahto vs. State of Bihar***. In the present case two persons were sent to inform parents of deceased about death of deceased and thereafter about 4 p.m. deceased was cremated in presence of co-villagers. There was no concealment of dead body on the part of accused person. All the co-villagers were allowed to see dead body in the house of accused persons. It is held that offence under Section 201 IPC is not proved on record beyond reasonable doubt.

15. Submission of learned defence Advocate appearing on behalf of accused persons that conduct of complainant himself renders the case of prosecution doubtful because incident took place on dated 25.7.2004 and information in police station was given on dated 30.7.2004 after a gape of sufficient time and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. In present case delay in lodging the FIR is not fatal to prosecution because there was mental shock to the father of deceased when deceased had died in her matrimonial house all of a sudden. PW1 has specifically stated in positive manner that on dated 26.7.2004 he had gone to the house of accused and dead body of his daughter was not found and it was informed to him that deceased was cremated by accused persons. He has stated that thereafter on dated 27.7.2004 PW1 father of deceased had gone to police station Indora and thereafter officials of P.S. Indora informed him that case would be registered in police station Nurpur. Thereafter PW1 father of deceased went to P.S. Nurpur and criminal case was registered. We are of the opinion that delay in filing FIR has been satisfactorily explained by PW1 when he appeared in witness box. Hence it is held that delay in filing the FIR is not fatal to prosecution case.

16. Another submission of learned defence Advocate appearing on behalf of accused that there is material contradiction and improvement in testimonies of PW1 and PW4 and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused testimonies of PW1 and PW4. Incident took place on 25.7.2004 and testimonies of prosecution witnesses were recorded on 6.10.2006, 10.10.2006, 11.10.2006, 12.10.2006, 12.11.2006, 21.11.2007, 22.11.2007, 22.1.2008 and 23.1.2008 after a gape of sufficient time. We are of the opinion that minor contradictions are bound to come in criminal case when testimonies of prosecution witnesses are recorded after a gape of sufficient time. In present case learned defence Advocate appearing on behalf of accused did not point out any material contradiction which goes to the root of case. It is also well settled law that concept of *falsus in uno falsus in omnibus* is not applicable in criminal cases. ***(See AIR 1980 SC 957 titled Bhee Ram vs. State of Haryana. See AIR 1971 SC 2505 titled Rai Singh vs. State of Haryana.)***

17. Another submission of learned defence Advocate appearing on behalf of accused that deceased was residing separately from her in-laws and her in-laws have been falsely implicated in present case is rejected being devoid of any force. No suggestion has

been given by accused persons to the prosecution witnesses when they appeared in witness box that deceased used to reside separately from her in-laws prior to her death. No reason has been assigned by accused persons as to why suggestion was not given to prosecution witnesses when they appeared in witness box that deceased was residing separately from her in-laws. There is no evidence on record in order to prove that deceased was residing separately from her in-laws prior to her death. In view of above stated facts plea that deceased was residing separately from her in-laws is not tenable before High Court of H.P. for the first time.

18. Another submission of learned Advocate appearing on behalf of accused that Smt. Parvesh Kumar sister-in-law of deceased was married at a distant place and no role has been attributed by prosecution to her is also rejected being devoid of any force for the reasons hereinafter mentioned. PW1 Chanda Singh has specifically stated in positive manner that deceased had directly disclosed him the factum of cruelty on the part of accused persons when deceased came to her parental house. Even PW2 Veena Devi has specifically stated when she appeared in witness box that deceased had directly narrated to her when she came to her parental house that accused persons have ill-treated her for bringing insufficient dowry and PW2 has also stated that deceased had directly informed her the fact of taunting and beating the deceased in her matrimonial house. Testimonies of PW1 and PW2 are trustworthy reliable and inspire confidence of Court. There is no evidence on record in order to prove that co-accused Parvesh Lata did not come to matrimonial house of deceased along with her husband at several intervals prior to death of deceased.

19. Another submission of learned defence Advocate appearing on behalf of accused that no offence has been committed by husband of deceased because husband of deceased was working at a distant place at Jammu and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that deceased had committed suicide in her matrimonial house leaving behind her three minor children. Court is of the opinion that no mother would commit suicide in her matrimonial house without any reasonable cause leaving her three minor children at the mercy of society. Factum of mental cruelty was informed by deceased during her life time to her father PW1 and also informed to PW2 Pardhan of G.P. Court is of the opinion that husband is under legal obligation to maintain his legally wedded wife in her matrimonial house properly. In present case it is proved on record that derogatory remarks 'kanjar' (Person who deals in illicit relations) were given to deceased in her matrimonial house. It is well settled law that offence under Section 498-A is a continuing offence and criminal offence under Section 498-A is offence against society at large. Mental harassment by way of demand of dowry and by way of uttering derogatory words to a married woman in her matrimonial house is not permissible in advance civilized society. Criminal offence under Section 498-A IPC is punishable upto three years imprisonment and fine. As per Section 468 of Cr.P.C. 1973 cognizance of criminal offence can be taken within three years if punishment of criminal offence is exceeding one year but not exceeding three years. In present case there is no evidence on record in order to prove that husband of deceased and sister-in-law of deceased did not come to their parental house within three years prior to the death of deceased. No suggestion has been given to prosecution witnesses that co-accused Kulwant and co-accused Parvesh did not come to their parental house within three years prior to death of deceased. On contrary there is positive cogent and reliable evidence on record that deceased had personally told to PW1 when she came to her parental house within two month prior to her death about factum of cruelty committed by accused persons.

20. Another submission of learned Advocate appearing on behalf of accused that minor children of deceased have not been examined by prosecution in present case 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 number of witnesses to prove the fact is not required as per Section 134 of Indian Evidence Act 1872. We are of the opinion that fact in criminal case can be proved even by testimony of a single witness. The facts of demand of dowry and facts of mental cruelty and fact of utterance of words 'kanjari' (Person who deals in illicit relations) are proved on record in present case as per testimonies of PW1, PW2 and PW4.

21. Another submission of learned Advocate appearing on behalf of accused that seller of cow is not examined in present case and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. In present case it is proved on record as per testimonies of PW1, PW2 and PW4 that father of deceased had provided cow to deceased so that deceased could provide milk to her minor children. Testimonies of PW1, PW2 and Ext.P4 remain unrebutted on record. It is held that examination of seller of cow was not mandatory in the presence of testimonies of PW1, PW2, and PW4.

22. Another submission of learned Advocate appearing on behalf of accused that PW1, PW2 and PW4 are interested witnesses and conviction under Section 498-A IPC could not be given to accused persons on their testimonies is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that mental cruelty upon the deceased was committed in four walls of matrimonial house. It is well settled law that generally married women used to narrate the factum of mental cruelty to her near relatives only. It is held that procurement of independent witness is impossible when mental cruelty is committed upon married woman inside the four walls of residential house. It was held in case reported in ***1993(3) Crimes 518 SC titled State of West Bengal vs. Orilal Jaiswal and another*** that where evidence about physical and mental torture of deceased came from relatives same should not be discarded simply on ground of absence of corroboration from independent witness.

23. Facts of case law cited by learned defence Advocate appearing on behalf of accused persons i.e. ***(2014)9 SCC 365 titled Ramaiah alias Rama vs. State of Karnataka (2013)16 SCC 421 titled Bhola Ram vs. State of Punjab, 2012(1) Shim.LC 108 titled State of H.P. vs. Umardeen , 2012(2) Shim. LC 710 titled State of H.P. vs. Ani Kumar and others*** and facts of present case are entirely different. It is held that case law cited supra by learned defence Advocate are not applicable in facts and circumstances of present case and case law cited supra are distinguishable.

24. It is well settled law that conviction could be based on testimony of a single witness in the criminal case if testimony of single witness inspires confidence of Court. ***(See: AIR 1973 SC 944 Jose Vs. The State of Kerla (Full Bench)*** It was held in case reported in ***AIR 1987 S.C. 1328 Dalbir Singh Vs. State of Punjab*** that there is no hard and fast rule which could be laid down for appreciation of evidence and it is a question of fact and each case has to be decided on the fact as they proved in a particular case.

25. In view of above stated facts and case law cited supra appeal is partly allowed. Acquittal of accused persons qua criminal offence punishable under Section 306 and 201 IPC are upheld. Acquittal of accused persons qua criminal offence punishable under Section 498-A read with Section 34 IPC is set aside and all accused persons are

convicted qua criminal offence punishable under Section 498-A read with Section 34 IPC. Judgment of learned trial Court is modified to this extent only. Now convicted persons be heard on quantum of sentence on 6.5.2015.

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Cr. Appeal No. 569 of 2008

QUANTUM OF SENTENCE

6.5.2015

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

Mr. Rajesh Mandhotra, Advocate with the convicted persons.

Convicted persons are in custody of HHC Nardev Singh No. 1142 P.S. Nurpur, C. Darpan Kumar No. 1064 P.P. Gangth, L.C. Rita Devi No. 617, P.S. Nurpur, L.C. Mumtaz No. 578 P.S. Jawali, ASI Ashok Kumar P.P. Gangth and ASI Sukhdev Raj P.S. Jawali.

26. We have heard learned Advocate appearing on behalf of convicted persons and learned Additional Advocate General appearing on behalf of the State upon quantum of sentence.

27. Learned Advocate appearing on behalf of the convicted persons submitted before us that age of convicted Kaur Singh is 80 years, age of convicted Krishna Devi is 75 years, age of convicted Parvesh Lata is 50 years, age of convicted Kulwant Singh is 45 years and age of convicted Ravinder Singh is 40 years and they are first offenders and they have family to support and convicted persons namely Kaur Singh, Krishna Devi and Parvesh Lata are suffering from medical ailment and lenient view be adopted. On the contrary learned Additional Advocate General appearing on behalf of State submitted before us that offence under Section 498-A IPC is an offence against Society and deterrent punishment be given to convicted persons in order to maintain majesty of law.

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

29. We are of the opinion that offences under Section 498-A IPC are increasing in the society day by day. We are of the opinion that it is not expedient in the ends of justice to release the convicted persons under Probation of Offenders Act. 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 Kaur Singh is 80 years old, convicted Krishna is 75 years old, convicted Parvesh Lata is 50 years old and in view of the fact that these convicted persons are suffering from medical ailment and keeping in view the fact that all convicted are first offenders, we sentence the convicted persons as follow:-

Sr. No.	Nature of Offence	Sentence imposed
1.	Offence under Section 498-A IPC	Each convicted persons are sentenced to undergo simple imprisonment for one month twenty days and fine to the tune of Rs.10,000/- (Rupees ten thousand only) is imposed upon each convicted person. In default of payment of fine each convicted persons shall further undergo simple imprisonment for twelve days.

30. Period of custody during investigation, inquiry and trial will be set off. Certified copy of judgment and sentence will be supplied to convicted persons forthwith free of cost by learned Registrar (Judicial). Case property if any will be confiscated to State of H.P. after the expiry of period of filing further legal proceedings before the competent Court of law. The Registrar (Judicial) will prepare the warrant of commitment strictly in accordance with law. File of learned trial Court along with certified copy of judgment and sentence be transmitted forthwith. 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 DHARAM CHAND CHAUDHARY, J.

Dharam Singh Negi …Petitioner.
Versus
State of H.P. & others …Respondents.

CWP No. 1890 of 2015-I
Decided on: 07.05.2015

Constitution of India, 1950- Article 226- Petitioner was debarred from taking part in any activities or proceedings of the Gram Panchayat by the Deputy Commissioner- an appeal was preferred before Divisional Commissioner which was dismissed- held that order passed by Divisional Commissioner is non-speaking one, hence, order passed by him set aside with a direction to pass a reasoned and speaking order. (Para-2 to 5)

For the petitioner: Mr. Deepak Kaushal, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. V.S. Chauhan, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

<u>Mansoor Ahmad Mir, Chief Justice</u> *(Oral)*

Petitioner has called in question order, dated 4th March, 2015, made by the Deputy Commissioner, District Sirmaur at Nahan, whereby he has been debarred from

participating and taking part in any of the activities or proceedings of the Panchayat for the period of six months (Annexure P-6) and order, dated 16th March, 2015, made by the Divisional Commissioner, Shimla, whereby the appeal filed by the writ petitioner came to be dismissed (Annexure P-7).

2. It appears that order, dated 4th March, 2015, (Annexure P-6) has been passed by the Deputy Commissioner in terms of the powers vested with him under Section 146 (1-A) of the Himachal Pradesh Panchayati Raj Act, 1994 (for short "the Act"), which reads as under:

> "***146. Removal of office bearers of Panchayats.***
>
> *...................*
>
> *(1-A) The State Government, the Divisional Commissioner or the Deputy Commissioner, as the case may be, may, on consideration of the enquiry report or if it thinks proper, for reasons to be recorded in writing, revoke the suspension order and instead of removing an office bearer, warn him to be vigilant in the discharge of his duties or may also debar him from taking part in any act or proceedings of the Panchayat for the period of six months."*

3. Feeling aggrieved, the petitioner filed an appeal before the Divisional Commissioner, Shimla, which came to be dismissed vide order, dated 16th March, 2015 (Annexure P-7).

4. We have gone through order, dated 16th March, 2015, made by the Divisional Commissioner, is a non-speaking one.

5. Accordingly, order, dated 16th March, 2015, made by the Divisional Commissioner, (Annexure P-7) is set aside, the appeal is restored and the Divisional Commissioner is directed to decide the appeal afresh after hearing the parties by passing a reasoned and speaking order within two weeks with effect from 11th May, 2015.

6. Parties are directed to cause appearance before the Divisional Commissioner, Shimla, on **11th May, 2015.**

7. The writ petition is disposed of, as indicated hereinabove, alongwith all pending applications. Copy **dasti.**

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

Soni Gulati & Co. ....Petitioner.

Versus

JHS Svendgaard Laboratories Limited ...Respondent.

Company Petition No. 8 of 2009.
Judgment reserved on: 17.4.2015
Date of decision: May 7, 2015.

Companies Act, 1956 - Section 433 (e)- Petitioner claimed that respondent/company was indebted to the petitioner for a Sum of Rs. 12,06,580/- against Bill dated 26.9.2006- service tax on previous bill of Rs. 30,000/- and penalty of Rs.1,50,000/- for backing out of the

contract is payable- held, that where the company disputes the claim and the dispute is bona-fide, it cannot be said that company was avoiding its liability- said inference can only be drawn when debt is undisputed or bona-fide or some sham defence is sought to be raised towards the liability -winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bonafide disputed by the Company- balance-sheet shows that Company is financially sound and solvent – respondent has disputed the debt and it cannot be said that there was no bonafide reason for non-payment of the amount- petition dismissed. (Para-22 to 37)

Cases referred:

Amalgamated Commercial Traders (P) Ltd. Vs. A.C.K. Krishnaswami 1965 (35) Company Cases 456
Madhusudan Gordhandas & Co. Vs. Madhu Woollen Industries (P) Ltd. 1971(3) SCC 632
Pradeshiya Industrial and Investment Corporation of Uttar Pradesh Vs. North India Petro Chemical and Another 1994 (79) Company Cases 835
Mediquip Systems (P) Ltd. Vs. Proxima Medical System GmbH 2005(7) SCC 42
Vijay Industries Vs. NATL Technologies Limited 2009(3) SCC 527
IBA Health (India) Private Limited vs. INFO-Drive Systems SDN. BHD. (2010) 10 SCC 553

For the Petitioner : Mr. K.D. Sood, Senior Advocate with Ms. Ranjana Chauhan, Advocate.
For the Respondent : Mr. Atul Jhingan, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J.

The petitioner by medium of this petition under Section 433(e) of the Companies Act, 1956 seeks winding up of the respondent company.

2. It has been averred that the petitioner firm is registered with the Institute of Chartered Accountants of India and is carrying on the profession of the Chartered Accountants. Whereas, the respondent - company is a Public Limited Company constituted under the provisions of the Companies Act, 1956 and is limited by shares and is indebted to the petitioner for a Sum of Rs.12,06,580/- against Bill No. TS 5/09/06 dated 26.9.2006 for rendering services in connection with preparation of detailed project report for getting term loan and working capital limits sanctioned from Punjab National Bank. In addition, service tax or previous bill of Rs.30,000/- and penalty for default in honouring the contract/backing out amounting to Rs.1,50,000/- is also payable.

3. It is further averred that the respondent used to avail professional services of the petitioner in matters of preparation of project reports, conducting audit, liaison with banks for term loans and working capital etc. and even company law matters. The petitioner also used to render such services on credit and also after taking some advance from time to time. The petitioner used to take instructions from the respondent on e-mail from its Managing Director as well as other officers of the company. Even information supplied for onward submission to various authorities/Bank was through e-mail.

4. It is further averred that the petitioner had been doing his work properly but suddenly problem started when the Managing Director asked the petitioner to show EPS of more than Rs.15/- on a share of Rs.10/- on the balance sheet of September, 2005 on annualized basis (as per MD this was the minimum EPS wanted by MB).

5. In addition to this, the petitioner pointed out that:

(i). the land building at MCIA which is in the name of Proprietor of erstwhile firm should be transferred to the company as part of going concern or disclosure made for the same ;

(ii). identified some nonexistent assets and was against issue of shares to promoters against that and told not to take over those assets even from the promoters as on 31.3.2005;

(iii). the petitioner refused to compromise with the professional duties cast upon by the professional ethics.

This was sometime in Nov. 2005. On 29th Nov. 2005 the petitioner got e-mail from MD asking to go slow with bank proposal, so as to match it with post public issue. The bank proposal at that time was in its final stage. On Dec. 27, 2005, petitioner got a call from MD and then an e-mail message that MD wants to change the auditors. Petitioner was offered assignment of internal audit and all work of IPO, but terms were not acceptable and so he declined the offer.

6. It is further averred that during February petitioner was asked to resign as auditor which was done. Later petitioner was asked to give no objection certificate by new auditors which was also given but informed that the fee amounting to Rs.6.65 lacs for work done has not been paid. However, this amount was settled by MD at Rs.3 lacs as time already spent and claimed in the bill would be compensated by the continued assignment of bank loan proposal and with the condition that petitioner will continue with the job of Bank Term Loan and w/c limits of Rs.25 crore with fee of 0.5% of sanctioned amount. In addition, it was agreed that the fee settled at Rs.3 lacs would include Rs.1.5 lacs as advance towards bank work (because the significant part this work has already been done and in Principal sanction obtained). The terms of payment were Rs.50,000/- cheque dated 16.2.2006, Rs.1,00,000/- cheque dated March, 2006, Rs.2,00,000/- on clearance from Zonal office of the bank, Rs.5,00,000/- on sanction and balance on take over from Bank of Punjab.

7. However, the work was to be done in such a way that sanction matches with the Public issue. Letter was sent through e-mail for the same, as the work was done very fast as compared to the expectations of the respondent during the first assignment. Further, it was agreed that if at any stage the company backs out/or do not take the loan sanctioned/or take only in parts, the fee will still be payable as agreed and additional Rs.1,50,000/- being agreed advance will also be payable as penalty by the respondent in case the loan is not taken or company backs out at any stage.

8. It is further averred that no dues certificate was issued to enable the new auditors to take the assignment, but the respondent was asked not to put any date on that, because the auditors may have to sign the balance sheet as on 31.12.2005 in back date, as prospectus etc. has already been finalized and circulated. The petitioner looking at the time spent on the job including procuring Principal sanction from PNB, preparing various

documents and taking over of or running business of firms, incorporation of the respondent company etc. accepted this. But by the time fresh papers were filed with PNB the time of validity of IPS was over, so the case had to be filed afresh by preparing fresh documents.

9. It is the further case of petitioner that respondent through MD and other staff continued to chase the petitioner on daily basis till final sanction on 23rd September, 2006. The petitioner handed over the bill for Rs.12,06,580/- to the MD of the company on 26.9.2006 after final sanction of the loan. It is averred by the petitioner that during personal visit of the partner of petitioner to company office on 23rd, 25th September, 2006, the MD of the respondent promised the payment after he would be free from the public issue i.e. a week later but was asked to deliver the bill immediately since the MD was going to various cities for IPO conferences during those days.

10. It is averred that these promises continued to be postponed and commitment changed for availing the facilities sanctioned which constrained the petitioner to issue legal notice on 9.1.2007 asking to pay the amount due within 30 days and on failure to pay winding up petition would be filed. Reply to the notice was received on 5.9.2007 wherein respondent accused the petitioner for blackmailing etc. and claimed that all payments had already been made to the petitioner. On 11.10.2007, the petitioner sent a letter to the MD advising him to inform the facts of the case to his solicitor enclosing some papers.

11. It is further averred that the partner of the petitioner got a telephone call from the elder brother of the MD of respondent Mr. Punit, who is settled in USA, advising not to take any legal step and assured that he will convince the MD to make the payment. During February, 2008 the partner of petitioner got a call from MD of respondent asking him to prepare Power Project Report which the petitioner refused on the pretext of his outstanding dues. During May & June, 2008, it is claimed that the partner of petitioner again visited to MD of respondent and requested him to pay outstanding amount upon which MD threatened the petitioner with dire consequences. The partner of the petitioner had suffered heart attack on 26.6.2008 and was admitted in CCU of IGMC, Shimla.

12. On these allegations, it is alleged that respondent had "failed and "ignored" to make payment of the outstanding amount which had become due on 26.9.2009 alongwith penalty of Rs.1,50,000/- and interest on the whole amount. It has been prayed that the respondent-company having its registered office at Trilokpur Road, Kheri (Kala-Amb), Tehsil Nahan, District Sirmaur, Himachal Pradesh be ordered to be wounded up being "unable to pay its debts".

13. The respondent opposed the petition by filing its reply wherein preliminary objections regarding suppressing of material facts, malafide intentions, maintainability, disputed question of facts, claim being time barred, dismissal for non-compliance of Section 434(1)(a) of the Companies Act, 1956, no legally recoverable dues payable by the respondent, non-performance of the contract etc. were raised. In paragraphs I, J and K of the reply, the respondent has made the following averments:-

> *"I. that the respondent has paid all fees and expenses to the petitioner which has been duly admitted and acknowledged by them which is clear from the document filed b y the petitioner appearing at page No.70 of their paper book wherein it has been stated by them on 11.2.2006 that they acted as the Statutory Auditors of the respondent company till 14.1.2005. Further, it has been declared therein by the petitioner that they have received all the*

claims/dues from respondent for whatever work done by them for the respondent and no dues/claim is pending from respondent in respect of any matter whatsoever, whether in their professional or personal capacity.

J. That it is most humbly submitted that the petitioner volunteered to the respondent to get them term loan and working capital limits of Rs.*23 crores sanctioned from Punjab National Bank on the condition that they will get the Zonal Office clearance by 6.3.2006, proposal cleared from Head Office by 25.3.2006, L/C opening by 1.4.2006 and get the sanction on or before 15th April, 2006 vide agreement in writing signed by the parties on 11.2.2006. The petitioner received a sum of* Rs.*1,50,000/- from the respondent through three cheques for* Rs.*50,000/- each dated 16.2.2006, 22.2.2006, and 25.3.2006 respectively towards advance for sanction. However, due to the inability of the petitioner to obtain the promised financial facility and loan and as a result of non availability of funds in time, respondent company suffered huge loss on account of Excise Duty loss as the land was already bought by the respondent company to set up their unit through internal resources but was unable to construct and move production to the tax free location due to inordinate delay and pressure tactics by the petitioner to continue extract money on one pretext or the other. It is submitted that apart from these the petitioner's partner Sh. S.C. Soni cajoled the MD of the respondent company to cough out money in cash on the ground of his personal difficulties like his child's admission to college etc., and* Rs.*1,00,000/- (Rupees one lakh) was thus extracted with promise to return the same on completion of work and on payment of fees which also he is liable to return.*

K. That it is most respectfully submitted that petitioner failed inter alia to get the sanction of the financial facility and loan within the time as mutually agreed between the parties and thereby became liable to refund to the respondent the said entire advance received i.e. Rs.*1,50,000/- . This is evident and clear from the various documents filed by the petitioner with their paper book. It is submitted that the petitioner also made the respondent pay a sum of* Rs.*5,00,000/- (Rupees five lakhs) to the bank towards processing fees much before the proposal was sanctioned. Despite repeated correspondences of the respondent to the bank to return the same the bank is yet to return the same causing loss to the respondent. Thus, the petitioner by their various acts of omission and commission has put the respondent to great loss and damages which he is fully liable to compensate.*

14. Similarly in para-7 of the reply on merits the respondent has stated as thus:-

"It is most humbly submitted that respondent company had appointed their Merchant Bankers in August 2005 and filed RHP in SEBI by Feb, 2006. The petitioner was out of the whole IPO matter the day respondent appointed their Merchant Banker and EPS allegations of petitioner is nothing but a means to blackmail the respondent company. It is wrong and denied that the alleged work was done very fast as compared to the alleged expectations of the defendant during the alleged first assignment as alleged or otherwise. It is wrong and denied that the defendant was asked not to put any date on the No Dues Certificate as alleged or otherwise. Even otherwise, since it is a no objection to be given by the petitioner where is the question of asking

defendant not to put a date on the same and especially when a date was already put on the same by the petitioner. It is wrong and denied that bill for Rs.*12,06,580/- was delivered by petitioner on 26.9.2006 as alleged or otherwise. It is denied that alleged last letter the petitioner got from the defendant regarding alleged work was on 12th Sept. 2006 as alleged or otherwise. On the other hand, no such alleged letter dated 12th Sept., 2006 was handed over by the respondent to the petitioner. It is wrong and denied that during alleged personal visit of the alleged partner of petitioner to company office on 23rd, 25th Sept., 2006 the MD of the defendant promised the alleged payment after the MD is free from alleged Public issue viz a week later but was asked to deliver the alleged bill immediately since MD was going to various cities for IPO conferences during those days as alleged or otherwise. It is wrong and denied that the alleged promises continued to postpone and alleged commitment changed for availing the alleged facilities sanctioned. It is wrong and denied that alleged reminder was also sent on 20.12.2006 by alleged partner of firm requesting to make payment of at least the alleged amount which had become allegedly due on sanction as alleged or otherwise and it is also denied that alleged bill was submitted on 26th Sept. 2006 as alleged or otherwise. It is wrong and denied that it was requested to pay at least* Rs.*5 lakhs out of* Rs.*12 lakhs as alleged or otherwise. It is wrong and denied that on phone the MD of defendant informed that payment would be made in full on alleged documentation with bank as alleged or otherwise. It is wrong and denied that looking at the lapse of sanction and alleged bad intention of the MD of the defendant, alleged notice was sent on 9.1.2007 asking to pay within 30 day and on failure to pay winding up petition would be filed as alleged or otherwise. It is wrong and denied that on 11.10.2007 petitioner sent alleged letter to the MD advising him to inform the facts of the case to his solicitor enclosing some alleged papers evidencing the alleged facts as stated in the said alleged letters and enclosures as alleged or otherwise. It is wrong and denied that the brother of the MD from USA, Mr. Punit called partner of the petitioner advising him not to take any legal step and assured that he would convince MD of defendant to make the alleged payment as alleged or otherwise. It is wrong and denied that during Feb. 2008 partner of the petitioner got a call from MD of defendant asking him to prepare alleged power project report to which petitioner asked to pay alleged previous dues first before alleged fresh assignment could be taken as alleged or otherwise. It is wrong and denied that during May & June, 2008 the alleged partner of petitioner called MD of the defendant requesting him to pay otherwise he would be compelled to take legal help for recovery including winding up petition as alleged or otherwise. It is wrong and denied that upon this, MD threatened with alleged dire consequences as alleged or otherwise. It is wrong and denied that purported bill for alleged services was sent on 26th Sept. 2006 and the limitation fall on 26.09.2009 as alleged or otherwise. It is most humbly submitted that contents of para D of the reply may also form part and parcel of the present para."*

All the other averments, as contained in the petition were denied.

15. The petitioner filed rejoinder, reiterating the submissions made in the petition and the contrary submissions made in the reply were denied.

16. This Court on 14.3.2014 had heard detailed arguments whereafter the judgment was reserved. But, before the judgment could be pronounced, the learned counsel for the petitioner moved an application for placing on record the documents relating to the public issue for which the services of the petitioner had been engaged by the respondent-Company for sanctioning the loan from the Punjab National Bank.

17. In this application, it is alleged that the prospectus for public issue was published by the respondent-Company and even thereafter on 21.8.2006 the respondent-Company continued to correspond with the petitioner for sanctioning of the loan from the Punjab National Bank. In this regard a copy of financial results for the quarter ended 30.6.2006 was given to the petitioner for onward submission to the Punjab National Bank. It is further alleged that the loan was sanctioned to the respondent-Company by the Punjab National Bank on 23.9.2006 and communication in this regard was duly sent by the bank to the respondent-Company and the public issue was subsequently opened on 26.9.2006.

18. In reply to this application, it is submitted that the averments of the petitioner to the effect that the respondent-Company even after 31.8.2006 continued to correspond with the petitioner for sanctioning of the loan was factually incorrect and projects an incomplete picture. As per the terms and conditions/regulations concerning the public issue, the respondent-Company prior to opening of the public issue was essentially required to arrange for the sanction of term loan. Since the petitioner failed to get the term loan sanctioned in a timely manner, the opening of the public issue got delayed. In order to avoid continuous and further delay in the opening of the public issue, the Company was constrained to seek sanction of the term loan from the Centurion Bank of Punjab Ltd. It was after obtaining this loan that the public issue was floated on 26.9.2006 and not due to any effort of the petitioner in attempting to get the term loan sanctioned from the Punjab National Bank. It was not denied that some functionaries of the Company may have corresponded with the petitioner, who by then had started blackmailing and threatening the respondent-Company that he would write letters to the regulatory bodies like SEBI and others for stalling the launching of the public issue.

19. In rejoinder to the reply of this application, the petitioner has stated that the Managing Director of the respondent-Company vide his e-mail dated 11.9.2006 had asked the petitioner not to send e-mail on Airtel/Blackberry as he was not in station in Delhi and had been frequently touring. Earlier an unsigned statement had been sent by the Company to the petitioner and it had been requested that the Managing Director of the Company send signed statements and documents for submission to the Punjab National Bank.

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

21. The following point arises for determination:-

> *"Whether in the given facts and circumstances the respondent-Company is required to be wound up having failed and ignored to make payments of the outstanding amount being unable to pay its debts."*

22. In a petition for winding up of a company on the basis that the company is unable to pay its debts, apart from the merits of dispute, the sincerity of the respondent-Company in raising the same is also relevant. In such a situation, where the company disputes the claim and the said dispute appears to be bonafide, it naturally follows that the company has declined to pay the claim on account of a dispute and not on account of its

inability or negligence to pay the debts. The assumption that the company is unable to pay its debts can only be made in a situation where the debt is undisputed or an illusory and a sham defense is sought to be raised towards the liability. In both these cases, the company is liable to pay the debt and the fact that it has failed and neglected to pay the same despite a notice under Section 434 (1) (a) of the Act would indicate that the Company is unable to discharge its liability. However, in a case where the company sincerely believes that the amount is not payable and is able to establish that there are bonafide disputes, the question of failure and neglect to pay an admitted debt does not arise as the claim is neither accepted as a debt nor admitted to be payable. In such circumstances there can be no failure or neglect to pay a debt as contemplated under Section 434(1) (a) of the Act.

23. Though number of judgments have been cited on either side, but in view of the comprehensive law laid down by the Hon'ble Supreme Court, this Court shall be confining itself to the pronouncements made by the Hon'ble Supreme Court from time to time.

24. The Hon'ble Supreme Court in the matter of **Amalgamated Commercial Traders (P) Ltd.** Vs. **A.C.K. Krishnaswami** reported in **1965 (35) Company Cases 456** has held that a winding up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the Company but if debt is not disputed on some substantial ground, the court may decide on the petition and make the order.

25. The Hon'ble Supreme Court in the matter of **Madhusudan Gordhandas & Co.** Vs**. Madhu Woollen Industries (P) Ltd.** reported in **1971(3) SCC 632** has culled out the following rules for passing the order of winding up:-

> *"20. Two rules are well settled.*
>
> *First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. See London and Paris Banking Corporation (1874) LR 19 Eq 444. Again, a petition for winding up by a creditor who claimed pauyment of an agreed sum for work done for the company when the company contended that the work had not been properly was not allowed. See Re. Brighton Club and Horfold Hotel Co. Ltd (18565) 35 Beav 204.*
>
> *21. Where the debit is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt, see Re. A Company 94 SJ 369. Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely see Re. Tweeds Garages Ltd 1962 Ch 406. The principles which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly the company adduces prima facie proof of the facts on which the defence depends".*

26. In the case of **Pradeshiya Industrial and Investment Corporation of Uttar Pradesh** Vs. **North India Petro Chemical and Another** reported in **1994 (79) Company**

Cases 835, the Hon'ble Supreme Court has held that an order under Section 433(e) is discretionary and there must be a debt due and the company must be unable to pay the same and the debt must be a determined or definite sum of money payable immediately or at a further date and inability u/S.433(e) should be taken in the commercial sense.

27. In the matter of **Mediquip Systems (P) Ltd.** Vs. **Proxima Medical System GmbH** reported in **2005(7) SCC 42** Hon'ble Supreme Court has reiterated the principles relevant for passing winding up order by holding as follows:-

> *"25. The rules as regards the disposal of winding-up petition based on disputed claims are thus stated by this Court in Madhsudan Gordhandas & Co. v. Madhu Woollen Industries (P) Ltd (1971) 3 SCC 632.*
>
> *This Court has held that if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The principles on which the court acts are;*
>
> > *[i] that the defence of the company is in good faith and one of substance;*
> >
> > *[ii] the defence is likely to succeed in point of law; and [ii] the company adduces prima facie proof of the facts on which the defence depends.*

28. In the matter of **Vijay Industries** Vs. **NATL Technologies Limited** reported in **2009(3) SCC 527**, the Hon'ble Supreme Court has reiterated the prerequisites for winding up on the ground of inability to pay debt by holding that for invoking Sec.433(e) what is necessary that despite service of notice by the creditor, the company which is indebted in a sum exceeding one lakh rupees then due, failed or neglected to pay the same within three weeks thereafter or to secure or compound for it to the reasonable satisfaction of the creditor. It has further been held that Section 433(e) does not state that the debt must be precisely a definite sum and it is not a requirement of law that the entire debt must be definite and certain.

29. The Hon'ble Supreme Court in the case of **IBA Health (India) Private Limited** vs. **INFO-Drive Systems SDN. BHD. (2010) 10 SCC 553,** has also explained that a dispute would be substantial if it is bonafide and not spurious, speculative, illusory or misconceived, the relevant extract from the decision is quoted below:

> *"20. The question that arises for consideration is that when there is a substantial dispute as to liability, can a creditor prefer an application for winding up for discharge of that liability? In such a situation, is there not a duty on the Company Court to examine whether the company has a genuine dispute to the claimed debt? A dispute would be substantial and genuine if it is bonafide and not spurious, speculative, illusory or misconceived. The Company Court, at that stage, is not expected to hold a full trial of the matter. It must decide whether the grounds appear to be substantial. The grounds of dispute, of course, must not consist of some ingenious mask invented to deprive a creditor of a just and honest entitlement and must not be a mere wrangle. It is settled law that if the creditor's debt is bonafide disputed on substantial grounds, the court should dismiss the petition and leave the creditor first to establish his claim in an action, lest there is danger of abuse of winding up procedure. The Company Court always retains the discretion, but*

a party to a dispute should not be allowed to use the threat of winding up petition as a means of forcing the company to pay a bonafide disputed debt."

30. From the aforesaid judgments, the following broad legal principles can be deduced:

1. If the debt is bonafide disputed and the defense is a substantial one, the Court will not wind up the company. Conversely, if the plea of denial of debit is moonshine or a cloak, spurious, speculative, illusory or misconceived, the Court can exercise the discretion to order the company to be wound up.

2. A petition presented ostensibly for winding up order, but in reality to exert pressure to pay the bonafide disputed debt is liable to be dismissed.

3. Solvency is not a stand alone ground. It is relevant to test whether denial of debt is bonafide.

4. Where the debt is undisputed and the company does not choose to pay the particular debt, its defence that it has the ability to pay the debt will not be acted upon by the Court.

5. Where there is no dispute regarding the liability, but the dispute is confined only to the exact amount of the debt, the Court will make the winding up order.

6. An order to wind up a company is discretionary. Even in a case where the companys liability to pay the debt was proved, order to wind up the company is not automatic. The Court will consider the wishes of shareholders and creditors and it may attach greater weight to the views of the creditors.

7. A winding up order will not be made on a creditors petition if it would not benefit him or the companys creditors generally and the grounds furnished by the creditors opposing winding up will have an impact on the reasonableness of the case.

In the light of the settled legal principles, the endeavour of this Court must be to find out whether the debt claimed by the petitioner is a bonafide disputed debt or not and in this process this Court will not dwell into the intricate disputed questions of fact like a Civil Court exercising its jurisdiction in a suit filed for recovery of money. It is for this precise reason that the pleadings of the parties has been quoted in extenso.

31. The respondent has placed on record its balance-sheets as on 31.3.2006 from which it can safely be gathered that the Company was in a financially sound and in solvent condition. Therefore, the question would arise is as to whether the dispute between the parties is extant and not illusory. No doubt, numbers of e-mails and other correspondences have been exchanged between the parties, which would indicate that the petitioner had indeed raised a dispute with the respondent, but then the question arises as to whether the defense raised by the respondent is a bonafide one or not. After all, to raise a presumption of a company's inability to pay its debts it is not enough merely to show that the company had omitted to pay the debt despite service of statutory notice, it must be further shown that the company had omitted or neglected to pay without reasonable excuse and conditions of insolvency in the commercial sense exist.

32. While considering the issue of commercial solvency, the Hon'ble Supreme Court in **IBA Health (India)** Supra held that the examination of the company's insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bonafide dispute as to liability or whether it reflects an inability to pay, and in such a situation, solvency is relevant not as a separate ground. It was held as under:

> *"24. The appellant Company raised a contention that it is commercially solvent and, in such a situation, the question may arise that the factum of commercial solvency, as such, would be sufficient to reject the petition for winding up, unless substantial grounds for its rejection are made out. A determination of examination of the company's insolvency may be a useful aid in deciding whether the refusal to pay is a result of the bona fide dispute as to liability or whether it reflects an inability to pay, in such a situation, solvency is relevant not as a separate ground. If there is no dispute as to the company's liability, the solvency of the company might not constitute a stand alone ground for setting aside a notice under Section 434(1)(a), meaning thereby, if a debt is undisputedly owing, then it has to be paid. If the company refuses to pay on no genuine and substantial grounds, it should not be able to avoid the statutory demand. The law should be allowed to proceed and if demand is not met and an application for liquidation is filed under Section 439 in reliance of the presumption under Section 434(1)(a) that the company is unable to pay it debts, the law should take its own course and the company of course will have an opportunity on the liquidation application to rebut that presumption.*
>
> *25. An examination of the company's solvency may be a useful aid in determining whether the refusal to pay debt is a result of a bona fide dispute as to the liability or whether it reflects an inability to pay. Of course, if there is no dispute as to the company's liability, it is difficult to hold that the company should be able to pay the debt merely by proving that it is able to pay the debts. If the debt is an undisputedly owing, then it should be paid. If the company refuses to pay, without good reason, it should not be able to avoid the statutory demand by proving, at the statutory demand stage, that it is solvent. In other words, commercial solvency can be seen as relevant as to whether there was a dispute as to the debt, not as a ground in itself, that means it cannot be characterised as a stand alone ground."*

33. It would be noticed here that the petitioner has neither made any averment nor has placed any document on record to demonstrate that the respondent is commercially insolvent. On the other hand, from the documents on record, it is evident that the respondent is a profit making solvent company and is in a position to meet its debt as and when it arises.

34. The Company Court exercises an equitable jurisdiction. It is well settled that a winding up petition is not legitimate means of seeking to enforce for payment of dues which is bonafidely disputed by the respondent.

35. The respondent-Company has clearly set out in their reply the reasons why the amount as claimed by the petitioner has not been paid to them and the contents thereof have already been reproduced (infra). The debt, therefore, is disputed and it cannot also be said that the respondent-Company has no genuine or substantial ground for refusal to pay or is unable to pay the same. The Company refusal to pay debt is as a result of bonafide

dispute. The dispute is substantial and genuine and cannot be termed to be spurious, speculative, illusory or misconceived.

36. In view of the preceding analysis, it is evident that the amount due in the instant case has not crystallized and there is a bonafide dispute with regard to liability of the respondent to pay the amount in question to the petitioner. The petitioner has also failed to prove that the respondent is insolvent in the commercial sense.

37. It is well settled that proceeding for winding up, is not a proceeding for the recovery of outstanding dues. Nor for that matter, can the remedy of a petition for winding up be utilized to pressure a company which is commercially solvent to pay a debt which is bonafide disputed.

38. For the reasons aforesaid, no case for winding up of the respondent is made out. In the result, the company petition fails and is hereby dismissed, so also the pending application(s) if any.

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

State of H.P. …..Appellant**.**

Versus

Kulbhushan Sood and others …Respondents.

Cr. Appeal No.: 24 of 2012
Reserved on: 23.04.2015
Date of Decision : 07.05.2015

Prevention of Corruption Act, 1988- Section 13(2)- **Indian Penal Code, 1860-** Sections 467, 468, 471, 419, 420 and 120-B- a surprise checking of the record was conducted during which signatures on some of the forms were found to be forged- FIR was registered- SDM, Palampur initiated inquiry regarding the licence being forged by the accused- ADM, Kangra concluded that accused had forged the signatures- however, signatures on the forged licences, signatures of the accused and SDM were not sent for comparison- SDM admitted that accused used to bring licences in bulk and he used to sign them in bulk - hand-writing expert also found that licences were in hand-writing of the accused but this opinion is not sufficient as the hand-writing of the SDM was not sent for comparison- further, no evidence was led that applicant had paid the driving licence fee in excess of the prescribed fee, therefore, offence punishable under Section 13(2) of Prevention of Corruption Act, 1988 was not proved- held, that in these circumstances, acquittal of the accused was justified.
(Para-10 and 11)

For the Appellant:	Mr. Ramesh Thakur, Asstt. A.G.
For the respondents:	Mr. Adarsh Sharma, Advocate vice Mr. Ashok Sharma, Advocate, for respondent No.1. Mr. Rajnish Maniktala, Advocate, for respondents No. 2 & 5.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, *Judge*

This appeal is directed against the judgement of acquittal rendered on 6.6.2011 by the learned Special Judge, Kangra at Dharamshala, H.P. in Corruption Case No. 4-P/2004 whereby he acquitted the respondents for theirs having committed offences punishable under Sections 467, 468, 471, 419, 420 and 120-B IPC and under Section 13(2) of the Prevention of Corruption Act, 1988.

2. The prosecution story, in brief, is that during the period July 2001 to January 2002, PW-50 Devesh Kumar was posted as SDM, Palampur and was incharge of license branch and at that time accused Kulbhushan was working as license clerk. It is alleged that in the month of January, 2002 PW-50 Devesh Kumar conducted a surprise checking of the record pertaining to the licenses and it was found that in some of the forms his signatures were found forged, regarding which he sent intimation to Deputy Commissioner, Kangra. Deputy Commissioner, Kangra, ordered for an inquiry into the matter and during inquiry PW-31 found that the licenses were not signed by the then SDM and forged signatures of SDM were on the licenses, about which PW-31 prepared his report and submitted the same to the Deputy Commissioner, Kangra, on which F.I.R. Ext.PW-49/A came to be registered. During investigation, the police impounded the record of the forged driving license from the SDM Office, Palampur. Some of the prosecution witnesses deposed during investigation that they had given money to accused Kulbhushan, which was in excess of the license fees and that the driving licenses after preparation were given to them by the accused. During investigation, accused Rameshwar Singh, Manager, Kundan Driving School, produced one register Ext.PW-43/A which was from November, 2001 to February 2002 which was impounded by the police vide memo Ext.PW-43/B. Accused Dinesh Awashti produced one diary to the police which was taken into possession vide seizure memo Ext.PW-47/A. Dr. Varinder Kumar, also produced one register of his clinic which was taken into possession vide memo Ext.PW-53/A. The specimen signatures for comparison of Devesh Kumar were taken before learned JMIC, Mandi and before the learned CJM, Hamirpur. I.O. during investigation took into possession some of the licenses and recorded the statements of the witnesses under Section 161 Cr.P.C. Dr. Meenakshi Mahajan, G.E.Q.D had examined the above questioned writings, specimen handwritings and admitted writings and given her report Ext.PW-58/B.

3. After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court. The trial Court charged the accused for theirs having committed offence punishable under Sections 467, 468, 471, 419, 420 and 120-B IPC and under Section 13 of the Prevention of Corruption Act, 1988. to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 61 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C. were recorded, in which they pleaded innocence. On closure of proceedings under Section 313 Cr.P.C. the accused were given an opportunity to adduce evidence in defence and they chose not to adduce any evidence in defence.

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

6. The State of H.P. is aggrieved by the judgement of acquittal, recorded by the learned trial Court. Shri Ramesh Thakur, Assistant Advocate General, has concertedly and vigorously contended that the findings of acquittal, recorded by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of conviction and concomitantly an appropriate sentence be imposed upon the accused/respondents.

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

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

9. PW-50 the then SDM Palampur, Devesh Kumar, initiated an inquiry qua the factum of driving licenses issued to PWs being forged by accused Kulbhushan Sood. PW-31 the then ADM, Kangra, S.S.Guleria, was appointed an inquiry officer. He submitted his report PW-31/A wherein he concluded that the accused Kulbhushan Sood had forged the signatures of PW-50 on driving licenses Ext.PW-4/D, Ext.PW-5/E, Ext.PW-7/A, Ext.PW-10/A, Ext.PW-17/A, Ext.PW-18/A, Ext.PW-19/A, Ext.PW26/A, Ext.PW-34/A, Ext.PW-35/A, Ext.PW-37/F, Ext.PW-39/A, Ext.PW-42/D. However, the preliminary inquiry does not hold good nor conclusively determines the factum of the prosecution hence having been able to prove its case against the accused, especially when then the signatures existing on the purportedly forged driving licenses of the prosecution witnesses, as also of the accused besides of PW-50 were not sent for comparison to the handwriting expert for rendition of opinion qua the factum of the accused Kulbhushan having forged the signatures of PW-50. In sequel to the furnishing of report by PW-31 comprised in Ext.PW-31/A an F.I.R. was lodged against the accused persons. The accused Kulbushan was working as a license clerk in the office of PW-50, the then SDM Palampur and Motor Licensing Authority. PW-50 has deposed that accused Kulbhushan used to bring forms for preparation of license etc in bulk for signatures before him and he used to sign the licenses and forms in routine. Nonetheless, apart from offences of forgery attributed to Kulbhushan Sood, there is no depiction or disclosure in the deposition of the Investigating Officer of the driving license issued to the prosecution witnesses having not preceding their issuances to the prosecution witnesses undergone the enjoined processes of theirs having not come to be entered in the apposite register. Consequently, it can be with aplomb at this stage held that the accused Kulbhushan Sood did not present driving license before PW-50 without the necessary enjoined processes prior to their presentation before PW-50 having come to be completed or consummated.

10. In the month of January, 2002 when PW-50 conducted a surprise checking of the license register he found that in some of the forms his signatures did not exist and were forged qua which he sent intimation letter to Deputy Commissioner, Kangra. He disputed his signatures existing on the licenses of the prosecution witnesses. Though PW-58 has proved her opinion Ext.PW-58/B, underscoring the factum of the specimen handwritings of the accused Kulbhushan comprised in Ext.PW58/S-1 to Ext.PW58/S-18 on comparison with the questioned writings having been found to be in the handwritings of the accused, nonetheless the aforesaid opinion rendered by the hand writing expert is of no avail

to the prosecution in clinching the fact of the aforesaid accused having forged signatures of PW-50 on the license register as also on the driving licenses of PWs, especially when preponderantly the admitted handwritings of PW-50 the then Motor Licensing Authority were not sent for comparison with his purported disputed signatures existing on the license register or on the purported fake driving licenses held by the PWs. Hence, the deposition of PW-50 qua the factum of his having not signatured either the license register or the driving licenses cannot be construed to be truthful, besides even in the absence of the investigating officer having uncontrovertedly not sent the specimen handwritings of the accused alongwith the purportedly forged signatures of PW-50 existing on the driving licenses of the PWs or the ones existing on the driving license for their interse comparison for facilitating an opinion thereupon by the handwriting expert that hence the specimen handwritings of accused on being tallied with the disputed handwritings existing on both the driving licenses of the PWs and also those existing on the license register were similar, for as such constraining a conclusion that hence the accused Kulbhushan Sood had forged the signatures of PW-50 on both the license register and the driving licenses issued to PWs. Consequently, a sound and formidable conclusion, which is to be formed is that the prosecution has been unable to prove the factum of accused Kulbushan Sood having forged the signatures of PW-50 either on the license register or on the driving licenses issued to PWs. Even the opinion of the handwriting expert comprised in Ext.PW-58/B does connect the accused in his having forged the signatures of PW-50 on driving license application forms. The reason for so concluding is anvilled on the factum that the specimen handwritings of accused Kulbhushan had been collected during the investigation of the case and not during its trial and with the amendment to Section 311 Cr.P.C. whereby clause (A) had come to be introduced on the statute book in the year 2006 to the provisions of Section 311 Cr.P.C. which then alone facilitated the collection of the specimen handwritings of the accused during the investigation of the case and not earlier in the year 2002 when the case was investigated against the accused, renders the collection of the specimen handwritings and signatures of the accused during investigation of the case to be legally impermissible besides constitutes the opinion of the handwriting expert comprised in Ext.PW-58/B connecting the accused Kulbhushan Sood with his having forged the signatures of PW-50 on driving license application forms to be concomitantly not binding upon this Court. Provision, if any, which empowered the Court to render any conclusion on comparison of the specimen handwritings of the accused collected by it from the accused with his admitted handwritings qua the factum of accused Kulbhushan Sood hence having forged the signatures of PW-50 on driving license application forms existed in Section 73 of the Evidence Act. However, the said provisions have their application, only during the course of trial of the case. Nonetheless the said provisions were never resorted to by the learned Court. In aftermath, for reiteration the opinion of the handwriting expert comprised in Ext.PW-58/B connecting the accused Kulbhushan Sood in his having forged the signatures of PW-50 on the driving license forms are rendered to be acquiring no probative tenacity or force. Consequently, the opinion of the handwriting expert comprised in Ext.PW-58/B is not handy to the prosecution for succoring a conclusion qua the factum of accused Kulbhushan Sood having forged the signatures of PW-50 on driving license application forms.

11. Moreover, accused Kulbhushan Sood was charged for his having committed offence punishable under Section 13(2) of the Prevention of Corruption Act, 1988 inasmuch, as, in the face of the testimonies of the prosecution witnesses underlining the factum of theirs having paid the driving license fees to accused Kulbhushan Sood in excess of their mandatory obligation to do so, hence he is canvassed to be liable for conviction for committing an offence punishable under Section 13(2) of the Prevention of Corruption Act.

However, the license fee as purportedly received by him from the prosecution witnesses had come to be deposited by Kulbhushan Sood in the manner as ordained by law. Potent evidence ought to exist on record portraying the factum of the precise quantum of the license fees to be deposited by the PWs in the branch concerned, as a pre requisite process for theirs obtaining a driving license from the Motor Licensing Authority, Palampur, for rendering an apt and concomitant finding that the money, if any, constituting the license fee was purportedly in excess of the enjoined fee. Now when the license fees stood deposited in the branch concerned even though it was handed over to Kulbhushan Sood by the PWs, the factum of its deposit by Kulbhushan Sood in the branch concerned, as also the prosecution witnesses omitting to underline in their respective testimonies that the accused was demanding fees, purportedly in excess of the license fees, per se entwined with the factum that when they took to handover the cash to Kulbhushan Sood rather than depositing it with the branch concerned, renders an inference that except for the immunity granted to them under Section 24 of the Prevention of Corruption Act for theirs allegedly paying bribe to the accused, who is a public servant, they would have stood prosecuted for the offence constituted under Section 7 of the Prevention of Corruption Act for giving bribe and would have also rendered themselves punishable under Section 12 of the prevention of Corruption Act. Even if they enjoyed the immunity from Section 24 of the Prevention of Corruption Act against their prosecution yet their testimonies are fraught with discrepancies constituted in the fact that they omitted to at the time of handing over license fees in its purported excess to accused Kulbhushan Sood, which came to be deposited by Kulbhushan Sood in the branch concerned of the Motor Licensing Authority, reported the said fact to the authority concerned or rather when they remained reticent qua the aforesaid fact till the lodging of the F.I.R. qua the occurrence, renders their testimonies to be suspect qua accused Kulbhushan Sood having committed offence punishable under Section 13(2) of the Prevention of Corruption Act, 1988.

12 In so far accused Ajay Mehta is concerned, he is the proprietor of Kundan Driving School, Dharamshala. No specific evidence of probative worth has been brought by the prosecution portraying his connectivity or collusion with accused Kulbhushan Sood in the preparation of forged driving license especially when none of the witnesses deposed against the accused. Hence, his exculpation from guilt by the learned trial Court does not warrant any interference. Besides, accused Rameshwar Singh, who is the owner of Kundan Driving School at Dharamshala and whom PW-21 paid Rs.3000/- for his being imparted training in driving by accused Rameshwar Singh is alleged to have as connoted by the testimony of PW-21 to have obtained Rs.1500/- from him for his getting his driving license prepared. However, his testimony is vague qua the date and time on which he handed over the money to accused Rameshwar Singh as also qua the persons in whose presence such money was demanded and handed over to accused Rameshwar Singh, as such, with an imprecise occurrence in his deposition qua the date and time on which he handed over Rs.1500/- to accused Rameshwar Singh to get his driving license prepared renders the testimony of PW-21 while connoting a role to accused Rameshwar Singh of his having colluded with accused Kulbhushan Sood for the offences which the latter came to be charged, to be legally unworthwhile.

13. Accused Dinesh Kumar is a document writer and is alleged to be working as a middleman for accused Kulbhushan Sood. However, the investigating officer impounded his diary Ext.PW47/B. In it there is no portrayal of his having colluded or connived with accused Kulbhushan Sood and theirs having committed an offence for which the latter came to be charged. There has also been omission on the part of the prosecution to either collect

the opinion of the handwriting expert telling upon the factum of accused Dinesh Kumar having forged signatures of PW-50 on driving licenses as also on license register. As such, his role in the alleged commission of offence stands negated.

14. Lastly the only role which has been ascribed to Dr. Varinder Kumar is that of his having issued medical certificates. However, there has been no evidence on record by the prosecution underscoring the factum of his having played any role in the preparation of the purportedly forged licenses held by the PWs. Rather even the factum of his having issued medical certificate Ext.PW59/A to one of the prosecution witnesses perse would not render him liable inculpation for his having purportedly colluded or connived with other accused in the commission of offences attributed to other accused. Moreso when Ext.PW-59/A has not been proved by cogent evidence to be a forged medical certificate.

15. In view of the above discussion, the learned trial Court is to be concluded to have appreciated the evidence in a mature and balanced manner and its findings, hence, do not necessitate interference. The appeal is dismissed being devoid of any merit and the findings rendered by the learned trial Court are affirmed and maintained.

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

Subhash Kumar .....Appellant/Defendant.
Versus
Mandra Devi (deceased) through L.R.s
Ujjagar Singh and others ..... Respondents/Plaintiff.

RSA No. 425 of 2001-E.
Judgment reserved on :01.05.2015.
Date of decision: May 7, 2015.

Indian Succession Act, 1925- Section 63- Plaintiff claimed that no Will was executed by her husband during his life time and the Will propounded by the defendant is invalid, inoperative and ineffective qua the rights of the plaintiff- wife and mother of the deceased were alive at the time of execution of the Will, however, no reference was made to them in the Will- there is no evidence to suggest that deceased did not have a cordial relation with his mother and wife, therefore, it is highly improbable that a person executing a Will in favour of third person, will not make a reference to his wife and mother at the time of execution of the Will- deprivation of the natural heirs is not a suspicious circumstance but in view of non-mentioning of the legal representative of the deceased, the Will is required to be seen with care and caution- propounder is required to prove that there was some reason for leaving aside his aged mother and wife- propounder had failed to prove that he attended to the deceased at the time of his illness and was with him in the hospital- mere registration of the Will does not dispense with the statutory requirement of proving the Will in accordance with law- where there are some suspicious circumstances, burden is upon the propounder to prove the due execution of the Will. (Para-16 to 18 and 25)

Indian Evidence Act, 1872- Section 50- Plaintiff was married to the deceased- plaintiff stated that marriage was witnessed by the respectables of the village- PW-3 deposed that marriage of the plaintiff and the deceased was solemnized in accordance with customary rites - statement was corroborated by PW-4 and PW-5- testimonies regarding the marriage

can be taken into consideration under Section 50 of Indian Evidence Act – held that it was duly proved that marriage of the plaintiff was solemnized with the deceased as per custom. (Para- 20 to 24)

Cases referred:

Shakuntala Devi versus Savitri Devi and others AIR 1997 HP 43
Pentakota Satyanarayana and others versus Pentakota Seetharatnam and others AIR 2005 SC 4362
Savithri and others versus Karthyayani Amma and others (2007) 11 SCC 621
Bharpur Singh and others versus Shamsher Singh (2009) 3 SCC 687
Gurpal Singh versus Darshan Singh 1998 (1) S.L.J. 174
Baru Ram and others versus Smt.Kishani Devi 1992 (1) Sim. L.C. 115
Babu Ram versus Shrimati Roshan Devi 1997(2) Current Law Journal (H.P.) 251
Balbir Singh versus Smt.Kaushalaya Devi (now deceased) through her L.R. Bakshi Ram 2000(1) Current Law Journal (H.P.) 240.

For the Appellant : Mr. Sanjeev Kuthiala, Advocate.
For the Respondents : Mr.Neeraj Gupta, Advocate, for respondent No.1(b).
Mr.Tara Singh Chauhan, Advocate, for respondents No.1(a), 1(c), 1(d), 1(g) and 1(h), except minors.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge .

The defendant is the appellant, who has lost in both the Courts below.

2. The predecessor-in-interest of the respondents, Mandra Devi, had filed a suit for declaration to the effect that she is owner in respect of estate of her husband namely Ramesh Chand which is fully detailed in the head note of the plaint. Ramesh Chand, husband of the plaintiff, died on 30.07.1983 and the plaintiff being the only legal heir is entitled to succeed the estate of her husband. It was alleged that the defendant is very head strong person and being influential in the locality managed to procure some forged document alleged to be the Will having been executed by deceased Ramesh Chand in his favour during his life. The alleged Will is invalid, inoperative and ineffective and has no bearing on the right, title or interest of the plaintiff over the suit land. It was further alleged that on the basis of the alleged Will the defendant has started extending threats to interfere over the suit land.

3. The suit was contested by the defendant by filing written statement wherein he raised preliminary objections that the plaintiff was neither widow of deceased Ramesh Chand nor his legal heir and thus had no concern with the suit property. On merits, it was admitted that Ramesh Chand son of Biru was owner of the suit land, but it was specifically denied that he was married to plaintiff. Ramesh Chand, infact, was unmarried and was living with the defendant. Since the plaintiff was neither the widow of Ramesh Chand nor his legal heir, therefore, the plaintiff was not entitled to the suit property. It was admitted by the defendant that Ramesh Chand died on 30.07.1983 and during his lifetime he bequeathed his entire property including the suit land in favour of the defendant vide

registered sale deed dated 25.07.1983. Lastly, it was alleged that the defendant is in possession of the suit property on the basis of the aforesaid Will.

4. Plaintiff filed replication whereby she reiterated and reaffirmed the averments made in the plaint and denied the averments made by the defendant in the written statement.

5. On the pleadings of the parties, the following issues were framed by the learned trial Court on 04.02.1985:-

1. Whether the plaintiff is the widow of deceased Ramesh Chand. If so, its effect? OPP
2. Whether the deceased Ramesh Chand executed a valid Will in favour of the defendant as alleged? OPD
3. Whether the plaintiff has cause of action? OPP.
4. Relief.

6. After recording the evidence and evaluating the same, the learned trial Court on 31.03.1994 decreed the suit filed by the plaintiff with costs. The appeal preferred against the judgment and decree by the appellant was dismissed. Aggrieved by the judgments and decrees passed by the learned Courts below, the appellant has filed the present appeal and this Court was pleased to admit the same on the following substantial question of law:-

> "Whether the learned Courts below have misread and misconstrued the oral and documentary evidence on record especially the statements of PW-2 Mandra Devi, PW-5 Surat Ram, PW-6 Ujjagar Singh, DW-1 Subhash Kumar, DW-3 Om Parkash, DW-4 Balak Ram (both marginal witnesses), Ex.D1 extract of family register, Ex.DX extract of pass book, Ex.DA extract of voter list and Ex.DW-2/A Registered Will dated 25-7-1997 (it should be 25.07.1983)?"

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

8. Shri Sanjeev Kuthiala, learned counsel for the appellant has strenuously argued that the Will Ex.DW-2/A has been duly executed in accordance with the requirements of law. He further contended that once the appellant had proved the due execution of the Will, then the onus shifted on the plaintiff/respondent to prove by cogent and reliable evidence that the Will is shrouded with suspicious circumstances. He further contended that merely because there is no recital in the Will regarding disinheritance of the plaintiff, who was not even the wife of the deceased Ramesh Chand and the mother of Ramesh Chand namely Durgi Devi admittedly who was alive at that time would not in any manner prove that the Will in question was a fake document. After-all, the entire purpose of executing the Will was to disinherit the natural heirs. The learned counsel for the appellant would further contend that the learned Courts below have failed to take into consideration the oral and documentary evidence available on record and thereby reached a wrong conclusion.

9. The learned counsel for the appellant has drawn the attention of this Court to various judgments wherein it has been held that debarring natural successors should not raise any suspicion. Reliance has been placed upon the judgment of this Court in ***Shakuntala Devi*** *versus* ***Savitri Devi and others AIR 1997 HP 43***, wherein it was held

that merely because certain natural heirs had been excluded would not be a suspicious circumstance because the whole idea behind making a Will is to interfere in normal line of succession. The relevant paras read thus:-

> *"25. The Hon'ble Supreme Court in Smt. Sushila Devi v. Pandit Krishna Kumar Missir, AIR 1971 SC 2236, has held that prima facie, the circumstance that no bequest was made to the natural heir(s) by the testator would make the will appear unnatural, but if the execution of the Will is satisfactorily proved, the fact that the testator had not bequeathed any property to one of his children cannot make the Will invalid."*
>
> *26. Again, in Rabindra Nath Mukherjee v. Panchanan Benerjee (dead) by LRs., (1995) 4 SCC 459: (AIR 1995 SC 1684), it has been held by the Hon'ble Apex Court that deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of will is to interfere with the normal line of succession. So natural heirs would be debarred in every case of will; of course, it may be that in some cases they are fully debarred and in others only partially. The Hon'ble Apex Court in the said case, where the will was executed by the testator in favour of the sons of a half-blood brother by excluding the descendants of a full blood sister, held the Will to be valid and that disinheritance of the descendants of a full blood sister could not have been taken as a suspicious circumstances."*

10. It would be seen that this Court in ***Shakuntala Devi's case*** *(supra)* has only followed what the Hon'ble Supreme Court had held in ***Sushila Devi and Rabindra Nath Mukherjee's*** cases. To similar effect is the judgment of the Hon'ble Supreme Court in ***Pentakota Satyanarayana and others*** *versus* ***Pentakota Seetharatnam and others AIR 2005 SC 4362*** and judgment of the Hon'ble Supreme Court in ***Savithri and others*** *versus* ***Karthyayani Amma and others (2007) 11 SCC 621***, wherein again it has been held that mere exclusion of natural heirs would not in itself be a suspicious circumstance.

11. The learned counsel for the appellant has though relied upon the judgment of Hon'ble Supreme Court in ***Bharpur Singh and others*** *versus* ***Shamsher Singh (2009) 3 SCC 687***, but the ratio thereof as would be discussed later goes against the appellant.

12. The learned counsel for the appellant further relied upon a judgment of learned single Judge of Punjab and Haryana High Court in ***Gurpal Singh*** *versus* ***Darshan Singh 1998 (1) S.L.J. 174***, wherein it was held that registered Will raises a presumption of the Will having been executed in a sound disposing mind, especially, when there is no evidence to show that at the time of execution of the Will the testator was suffering from any mental ailment or other disability or was incapable of making disposition.

13. On the other hand, Shri Neeraj Gupta, learned counsel for the respondent No.1(b) has vehemently argued that registration of a Will in itself does not raise any presumption of the genuineness of the Will and has relied upon the following observations from judgment rendered by this Court in ***Baru Ram and others*** *versus* ***Smt.Kishani Devi 1992 (1) Sim. L.C. 115***.

> *"5. Sh. K.D.Sood, learned Counsel for Sh. Baru Ram and others, has urged that since the will was registered, presumption of its correctness and genuineness arises in the facts and circumstances of the present case. This argument deserves to be rejected outrightly in view of the law laid down in*

Gopal Das and another v. Sri Thakurji and others, AIR 1943 Privy Council 83, that even after the endorsement of Registrar made under section 60(2) of the Registration Act is proved, it remains to be shown that the person admitting execution before the Registrar was Balandu. The registration of the will does not create any presumption of its genuineness, which is to be proved independently and statement of the Registrar is only a piece of evidence which is to be assessed to Judge how far it proves that the execution of will is in accordance with section 63 of Indian Succession Act. It is to be kept in mind that the Registrar cannot be statutory attesting witness. (Please refer to Karri Nookaraju v. Putra Ventataro and others, AIR 1974 And Pra 13; In the Goods of Late Shri C.Rai, Barrister-at-law, 1980 RLR 346, Punjab and Haryana High Court; Labh Singh and others v.Piara Singh (deceased) by L.Rs)and another, AIR 1984 P & H 270 and Dharam Singh v.A.S.O. and another, 1990 (Supp) SCC 684."

14. He has further argued that once the two Courts below have concurrently on a question of fact regarding the execution of the Will held against the appellant, then these findings cannot be challenged and interfered with in the present second appeal. In support of his submission, he has relied upon a judgment of this Court in ***Babu Ram*** *versus* ***Shrimati Roshan Devi 1997(2) Current Law Journal (H.P.) 251*** wherein it was held as under:-

"*10. The learned counsel for the defendant at the very outset has raised a preliminary objection that the concurrent findings of the two courts below on a question of fact regarding the execution of a Will cannot be challenged and interfered with in the present Second Appeal.*

11. In Ladli Parshad Jaiswal v. The Karnal Distillery Co. 1, Ltd. Karnal & Ors., AIR 1963 SC 1279, it was held that whether a particular transaction was vitiated, on the ground of undue influence, is primarily a decision on the question of fact and that the High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact howsoever gross or in executable the error may seem to be.

12. In Ramanuja Naidu v. V. Kanniah Naidu & Anr., JT 1996(3) SC 164, the question of genuineness of a sale -deed was involved. The trial Court and the first appellate court had upheld the genuineness of the sale -deed. The High Court in second appeal had set aside the concurrent findings of the two courts below as to the genuineness of the sale-deed. On further appeal before the Apex court, it was held:

> *".....The concurrent findings of the courts below that Ex.B-2, sale deed in favour of the first defendant is earlier in point of time and was genuine and valid is a finding of fact. Such a finding was not open to any challenge in Second Appeal. The learned single Judge of the High Court totally misconceived his jurisdiction in deciding the second appeal under Section 100 of the Code of Civil Procedure in the way he did. No question of law arose for consideration before the learned single Judge. The sole question that arose for consideration was, whether Ex.B-2, sale deed, in favour of the first defendant dated*

5.5.1967, which is admittedly earlier in point of time to Ex.A-1 dated 5.6.1967, in favour of the plaintiff is genuine and valid ..."

13. The Apex court further held that in interfering with the concurrent findings of fact of the lower courts, the High Court acted in excess of the jurisdiction vested in it, under Section 100, Code of Civil Procedure. The High Court totally erred in its approach to the entire question, and in reappraising and reappreciating the entire evidence, and in considering the probabilities of the case, to hold that the judgments of the courts below were perverse and that the plaintiff was not entitled to the declaration of title to suit property and recovery of possession."

15. To similar effect is the judgment of this Court in ***Balbir Singh*** *versus* ***Smt.Kaushalaya Devi (now deceased) through her L.R. Bakshi Ram 2000(1) Current Law Journal (H.P.) 240***.

16. It is more than settled that the onus to prove the Will lies upon the propounder. The learned Courts below have concurrently found that at the time of execution of the Will Ex.DW-2/A, not only Mandra Devi wife of Ramesh Chand, but even his mother Durgi Devi was very much alive. If that be so, atleast a reference qua them ordinarily and in normal course would have been made in the Will. This assumes greater importance because there is nothing on the record to suggest that the deceased Ramesh Chand prior to his death was not having cordial relations with his mother or wife. Therefore, in such circumstances, the learned Courts below have rightly concluded that it is highly improbable that an ordinary man at the time of execution of the Will in favour of a person, who is not even related to him, would not make reference regarding his legal heirs, particularly, his wife and mother.

17. Undoubtedly, mere deprivation of the natural heirs in itself may not raise any suspicion but then this contention has to be appreciated in the peculiar facts and circumstances of each case. Why would anyone execute a Will in favour of a person, who is not even related to him, when his mother and wife with whom he is sharing cordial relations are alive and living with him? This fact is further required to be viewed with suspicion when the appellant has failed to lead clear, cogent and convincing evidence that he had served Ramesh Chand during his lifetime. The appellant was further required to prove that there were special reasons why Ramesh Chand leaving aside his aged mother and wife executed a Will in his favour.

18. The appellant has tried to prove that he was looking after deceased Ramesh Chand during his lifetime and had got him admitted at T.B. Hospital, Tanda and spent money on his treatment, but he has failed to prove any record in support of his claim. Shri Balwant Singh from Tanda Hospital was though examined as DW-5, who in his statement has stated that the name of the attendant, who was accompanying the patient from 12.05.1980 to 27.05.1980 is mentioned in the record Ex.DW5/A. But, then a perusal of this document shows that it does not indicate that some attendant or atleast the appellant was infact accompanying Ramesh Chand at that time.

19. The learned counsel for the appellant would further argue that Mandra Devi was not the wife of Ramesh Chand. He has further contended that in the family register Ex.D1 pertaining to the year 1983 to 1990 relating to the family of Ramesh Chand, the plaintiff Mandra Devi has been shown as daughter of Balandu Ram aged about 24 years.

This extract of family register pertains to the village of the plaintiff prior to her marriage. The learned counsel for the appellant has thereafter drawn the attention of this Court to Ex.DX wherein Mandra Devi has been shown to be the wife of one Harmesh Chand and would contend that it has not been proved on record as to whether Harmesh was also known by the name of Ramesh Chand. He would further argue that in the voter list Ex.DA, Mandra Devi has been shown to be the wife of one Sadhu Ram at Serial No.546.

20. However, the learned counsel for the respondents, on the other hand, would argue that as per the statement of Bal Krishan, Election Kanungo, in the voter list at Serial No.833, Ramesh Chand son of Biru is shown to be married and the name of his wife has been reflected as Sundri. Since Ramesh Chand was not having any wife except the plaintiff, hence, this entry pertains to the plaintiff only. Regarding marriage between the plaintiff and deceased Ramesh Chand, he further made reference to the statement of PW-2 Mandra Devi herself, who stated that she had been married to Ramesh Chand and this marriage had been witnessed by the respectable of the village.

21. The learned counsel for the respondents also invited my attention to the statement of PW-3 Jeet Singh, who has stated that plaintiff was married to Ramesh Chand, son of Biru and he had also participated in the marriage which was solemnized about 26-27 years ago. Jeet Singh further deposed that the marriage was solemnized in accordance with the customary rites. This statement is corroborated and supported by PW-4 Surat Ram, who is uncle of the plaintiff. This witness has deposed that marriage was solemnized in accordance with the customary rites. PW-5 Ujjagar Singh is from the family of deceased Ramesh Chand and father of Ramesh Chand namely Biru was grandfather of this witness. He has deposed that Ramesh Chand was his uncle and had solemnized marriage with the plaintiff at Indora and since then Mandra Devi and Ramesh Chand had been living together as husband and wife.

22. At this stage, it may be noticed that the learned lower appellate Court has rightly invoked the provisions of Section 50 of the Evidence Act to conclude that the plaintiff was married to deceased Ramesh Chand. Section 50 of the Evidence Act reads as follows:-

> *"50. Opinion on relationship, when relevant.- When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as the existence of such relationship, or any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:*
>
> *Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869) or in prosecution under sections 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860)."*

23. Now, once the plaintiff alongwith other respectable persons from her as well as her husband's relations have stepped into the witness box and stated regarding the marriage of the plaintiff and Ramesh Chand and they have further stated that they had participated in the marriage or had seen solemnization of marriage was a relevant factor and could, therefore, be taken into consideration. Statements of Jeet Singh PW-3, who belongs to the village of Ramesh Chand, PW-4 Surat Ram, who is uncle of the plaintiff, PW-5 Ujjagar Singh, who is the nephew of Ramesh Chand, are very relevant. As discussed above, these witnesses have clearly stated that marriage between Ramesh Chand and the plaintiff was solemnized in accordance with customary rites.

24. The learned Courts below have concurrently found Mandra Devi to be the wife of deceased Ramesh Chand and such finding being a finding of fact is not open to challenge. Moreover, the appellant has no locus-standi to challenge her status, particularly, when he has failed to prove on record the so-called Will and also the fact that he had served Ramesh Chand during his lifetime. Suffice it to say that the learned Courts below have correctly appreciated the statements of Bal Krishan, Election Kanungo, PW-2 Mandra Devi, PW-3 Jeet Singh and PW-4 Surat Ram and PW-5 Ujjagar Singh and after evaluating their statements have come to the firm conclusion that Mandra Devi was the wife of deceased Ramesh Chand.

25. The appellant has vehemently argued that the deceased had executed a registered Will in his favour and, therefore, greater weight as to the presumption of its genuineness should be attached to the same. In ***Bharpur Singh's case*** (supra), it was categorically held by the Hon'ble Supreme Court that it may be true that the Will was registered one, but the same by itself would not mean that the statutory requirements of proving the Will need not be complied with. In terms of Section 63(c), Succession Act, 1925 and Section 68, Evidence Act, 1872, the propounder of the Will must prove its execution by examining one or more attesting witnesses. It was further held that when the Will is surrounded with suspicious circumstances, it would not be treated as the last testamentary disposition of the testator, its proof ceases to be a simple lis between the plaintiff and the defendant and adversarial proceeding in the case becomes a matter of Court's conscience and propounder of the Will has to remove all suspicious circumstances to satisfy that the Will was duly executed by the testator wherefor cogent and convincing explanation of suspicious circumstances shrouding the making of Will must be offered.

26. The concurrent findings recorded by both the Courts below are in the realm of appreciation. They are pure findings of fact and these findings are properly and reasonably arrived at. No perversity could be pointed out. Second appeal is limited to substantial question of law and cannot be converted into a third innings of fact. The substantial question of law is accordingly answered against the appellant.

27. In view of aforesaid discussion, I find no merit in this appeal and accordingly the same is dismissed. Pending application, if any, also stands disposed of. The parties are left to bear their own costs.

****

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

Vipin Sharma & anr. …… Petitioners.

Vs.

Punjab State Electricity Board & anr. …….. Respondent

Civil Revision No. 12 of 2015.
Date of decision: 7.5.2015.

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- Petitioner was held to be in arrears of rent to the extent of Rs. 20 lakh - amount was not deposited by the petitioner within 30 days of the order- held, that Court does not have power to extend time to deposit arrears of rent beyond the period of 30 days. (Para-4 to 8)

Cases referred:
Krishan Murari vs. Amar Dutt Sharma 1994 (Suppl.) Sim. L.C. 242
Ram Niwas vs. Rajinder Prasad 1996 (1) RCR 427
Bilasi Ram vs. Bhanumagi 2007 (1) Shim. LC 88
Rewat Ram vs. Ashok Kumar and others 2011 (Supp) Him L.R. 1580,
Hindustan Petroleum Corporation Ltd. Vs. Dilbahar Singh (2014) 9 SCC 78

For the petitioners : Mr. Neel Kamal Sood, Advocate.
For the respondents : Mr. Anand Sharma, Advocate with Mr. Jagan Nath, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J. (Oral).

The petitioner is a tenant, who has suffered an eviction order passed by the learned Rent Controller, Jogindernagar, which in turn has been affirmed by the appellate authority holding the petitioner to be arrears of rent of more than Rs.20,00,000/- (twenty lacs) as on the date of eviction.

2. Sh. Neel Kamal Sood, learned counsel for the petitioners has strenuously argued that order passed by the learned Rent Controller is based on surmises and conjectures and that the learned Rent Controller had not correctly calculated the amount in question.

On the other hand Sh. Anand Sharma, learned counsel for the respondents has supported the order of eviction passed by the learned Rent Controller and has argued that this court would have no jurisdiction to extend the time period for deposit of arrears of rent, even if the petitioner is now ready and willing to deposit the amount.

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

3. Indisputably even as on date the entire arrears of rent as determined by the learned Rent Controller have not been tendered/ paid by the petitioner. However, learned counsel for the petitioner states that his clients are ready to deposit the arrears in instalments. Therefore, in this background one of the questions which requires to be determined is as to whether this court, under section 14 of H.P. Urban Rent Control Act, 1987 (hereinafter referred to as the Act) can enlarge the period of deposit of arrears beyond the statutory period of 30 days from the order of eviction as passed by the learned Rent Controller.

4. This question is no longer *res integra* in view of numerous judgements of this court, some of which are being noticed below.

5. In **Krishan Murari** vs. **Amar Dutt Sharma 1994 (Suppl.) Sim. L.C. 242,** this court has held as follows:-

> "12. Tenant in the aforesaid provisions has been afforded two opportunities to be availed of by him in order to avoid his eviction on the ground of non-payment of arrears of rent. The first and Second proviso referred to above deal with first opportunity which the tenant can avail in

order to avoid eviction order. In this regard third proviso contains the second opportunity.

13. It has been contended on behalf of the landlord-respondent that third proviso only gives to a tenant thirty days from the order of the Controller alone to deposit the amount due and not otherwise. It has been contended on behalf of the tenant that in case Controller dis-allowed the eviction petition and the lower Appellate Authority accepts the same on the ground of non-payment of arrears of rent, time for depositing the arrears of rent and other amounts, thirty days time limit would start from the date of the order passed by the lower Appellate Authority and not from the order of Controller.

14. Insofar as, third proviso is concerned it clearly makes out that where the Controller has made an order for eviction on the ground of non payment of arrears of rent, due from him, in that event, tenant shall not be evicted as a result of his order (i. e. order of eviction passed by the Rent Controller), if the tenant pays the amount due within a period of 30 days from the date of order. This proviso clearly speaks regarding the order of eviction passed by the Controller, but this provision is not to be read in isolation. There may be a case as submitted by the learned Counsel for the tenant-petitioner that Controller has dis-allowed eviction petition on the ground of non-payment of arrears of rent but the same has been allowed by the lower Appellate Authority and in case third proviso deals with order of Controller alone, it will not at all serve the purpose and intention of the Act insofar as the order of eviction passed upon arrears of rent due is to be made and complied with.

15. At this stage, sections 24 (4) and (5) of the Act can safely be referred which runs as under :-

> "Section 24 (4) The decision of the Appellate Authority and subject only to such decision, an order, of the Controller shall be final and shall not be liable to be called in question in any court of Jaw except as provided in sub-section (5) of this section.
>
> Section 24 (5), The High Court may at any time, on the application' of any aggrieved party or on its own motion call for and examine the records relating to any order passed or proceedings taken under this Act for the purpose of satisfying itself as to the legality or propriety of such order or proceedings and may pass such order in relation thereto as it may deem fit."

16. Section 24 deals with Power of the State Government for conferring powers of Appellate Authority for the purposes of the Act and also deals with right of the party to file an appeal assailing the order of the Controller passed for recovery of possession etc The aforesaid provision of law makes it very clear that the decision of the Appellate Authority and subject only to such decision, an order, of the Controller shall b; final and shall not be liable to be called in question in any court of law except as provided in sub-section (5) of this section. This provision only means that insofar as the order of Controller, is concerned it would remain final subject to variations made to such an order by the Appellate Authority in an appeal preferred before this

Authority or subject to revisional powers of the High Court as provided under sub-section (5) above.

17. These provisions clearly reflected that in case Rent Controller has dis-allowed the petition and the Appellate Authority has accepted the eviction petition on the ground of non-payment of arrears of rent, tenant could legally avoid eviction order in case tenant deposits the arrears of rent etc. within thirty days from the passing of the order by the Appellate Authority and in case Rent Controller and lower Appellate Authority have both disallowed the eviction petition, and the High Court in revision passed eviction order, in that event, thirty days period for depositing rent would start from the date of passing of the eviction order by the High Court.

18. In the present case, Rent Controller passed eviction order on 25-11-1993, which order of eviction was maintained by the lower Appellate Authority, though amount due was varied. It may be very specifically referred here that admittedly the amount due was not deposited by the tenant within thirty days from the passing of the eviction order by the Rent Controller on 25-11-1993 The eviction order has been maintained uptil High Court though the amount due as observed by the Appellate Authority was maintained by the High Court also. It is not a case where the Rent Controller dis-allowed the petition and the lower Appellate Authority allowed the eviction petition on the ground of non-payment of arrears of rent but it is otherwise. Order of eviction passed by the Rent Controller was assailed before the Appellate Authority, was not at all stayed by the lower Appellate Authority, otherwise if it had been stayed insofar as depositing of amount due within thirty days from the order of Rent Controller was concerned, this statutory period could not have been enlarged by any authority whatsoever. The tenant selected not to deposit the amount due as ordered by the Rent Controller within 30 days of the passing of the order. The risk was his and he assailed the order of eviction before the lower Appellate Authority. On the basis of the grounds taken by him, entire order passed by the Rent Controller, could have been set aside and in that event tenant could have got the benefit but the risk taken by him was not successful. He avoided to comply with the directions of the Rent Controller to deposit the amount within thirty days He has to bear all the legal consequences for not complying with that order.

19. At this stage, some decided case law can safely be referred.

20. In 1994 Supp (1) SCC 437, Madan Mohan and another v. Krishan Kumar Sood, it has been held that the Rent Control Acts are necessary social measures for protection of tenants, and the Rent Control laws have tried to balance the equity. Their Lordships observed that landlord is duty bound to satisfy the ground of eviction mentioned in various Rent Acts and if he does not satisfy, he cannot get the order of eviction merely because the Act restricts his rights, but there are certain Rent Acts which, even when a ground of eviction is satisfied, still confer powers on the Rent Controllers to consider the question of comparative hardship and it is only in those types of cases, if the Controller is satisfied, he can decline passing orders of eviction. But if there is no such limitations, the Rent Controllers, after the ground of eviction specified in the Act is made out, have no discretion to reject the

application. It was further observed that once the order of eviction is passed, the executing court is duty bound to execute its orders. No question of equity or hardship arises at this stage.

21. Their Lordships further observed taking note of the facts of the case that in the present case, the tenant spared no efforts to harass the landlords and after the order of eviction, the tenant again failed to pay the rent and the landlord was forced to file another eviction petition on the ground of non-payment of arrears of rent and it was only after the filing of the said eviction petition and in order to avoid eviction he deposited the rent. The matter did not rest there even and it was only after the notice of the special leave petition was issued in the present case that the tenant chose to pay the rent after keeping it in arrears for practically six years and under the circumstances, Supreme Court's interference under Article 136 is called for.

22. It was further held that in view of the aforesaid facts and circumstances of the case, impugned order of the High Court dated May 17, 1991 and the order of the Rent Controller dated May 18, 1990 were set aside and the Rent Controller was directed to issue warrants of possession for ejectment of the respondent from the premises in dispute and place the landlords/appellants in possession. The apex Court held that order being not without jurisdiction, right or wrong, executing court had not to go behind its own order and grant extension of time.

23. In ILR (Himachal Series) (1982) p 279, in M/s. K. N. Trading Company v. Masonic Fraternity of Simla, following observations of this Court would be very much relevant:

> "Section 14. This section (section 14) gives various opportunities to a tenant to pay the arrears of rent. The second proviso gives a last chance to the tenant to pay up the amount due from him. This he can avail even after the order of eviction has been passed. The period during which be can deposit the dues is fixed. It is 30 days from the date of the order. He can save the eviction only if he pays the amount due within the prescribed period in terms of the aforementioned proviso. This period can neither be enlarged nor abridged by the court. There is no provision for condonation of the delay in depositing the rent. Since the time is fixed by law there is no question of anyone misleading the tenant about the same."

24. Earlier decision of this very court in Krishan Kumar v. Gurbax Singh, 1977 (2) RCR 62, was also taken note of while disposing of the aforesaid proposition of law. In Krishan Kumar's case {supra) this court held:

> "It is apparent that the statute itself provides a period of 30 days from the date of the order for payment of rental arrears by the tenant. On such payment, the statute declares, effect will not be given to the order of eviction. The statute does not leave the determination of the period to the Rent Controller. It is ' not open to the Rent Controller when, disposing of the petition for eviction, to make an order either abridging or enlarging the period of 30 days

Indeed, the period having being determined by the statute itself, no order was necessary by the Rent Controller."

25. In M/s. K. N. Trading Company v. Masonic Fraternity of Simla, referred to above, facts appear to be of identical nature as in the present case. However, in the reported case, even there was a stay order passed by the Appellate Authority against the order of eviction of the Controller, but inspite of that it was held that period of 30 days would start from the passing of the eviction order passed by the Controller.

26. The aforesaid citations clearly established that the date when eviction order was passed by Rent Controller on the basis of arrears of rent, would be the date to be taken note of for depositing the amount due by the tenant within 30 days and not from the date of the order passed by the Appellate Authority or by the High Court where the eviction order had been maintained, as passed by the Controller.

27. In the present case, the tenant if so advised could have deposited the amount due as arrived by the Rent Controller within thirty days from the date of passing of the order by Rent Controller and in case, as has happened in the present case, the amount being varied by the higher authority it could have been permitted to be withdrawn by the tenant but the original amount required to be deposited could not have been under the provisions of the Act deferred for a period not allowed by the statute."

6. The matter was again considered by this court in **Ram Niwas** vs. **Rajinder Prasad 1996 (1) RCR 427,** wherein the aforesaid proposition was reiterated and it was held that period of 30 days provided under the Act for the deposit of arrears of rent cannot be extended.

7. Yet again when the matter came up before this court in **Bilasi Ram** vs. **Bhanumagi 2007 (1) Shim. LC 88,** it was held as follows:-

"3. Third proviso to clause (i) of sub-section (2) of Section 14 of the H.P. Rent Control Act, 1987 clearly enjoins upon the tenant against whom the Rent Controller has made an order for eviction on the ground of nonpayment of rent due from him, the statutory duty to pay the amount due within a period of 30 days from the date of order.

4. By now it is well established, in the light of the authoritative pronouncements by a Full Bench of this Court in the case of Wazir Chand v. Ambaka Rani and another, reported in 2005 (2) Shim. L.C. 498, based upon and in the light of the ratio in the case of Madam Mohan and another v. Krishan Kumar Sood, reported in 1994 Supp (1) Supreme Court Cases 437, that the expression "amount due" occurring in the aforesaid third; proviso includes the arrears of rent, the interest thereupon @ 9% per annum and the amount of costs. It is also a well settled proposition of law by now that if the tenant fails to deposit the amount due within a period of 30 days from the date of the order, the only option available in law is to enforce the eviction order. Whether the shortfall is Re. 1/- or the shortfall is more than Re. 1/- if there is any shortfall in the deposit of the amount the eviction order has to be executed, because by not depositing the amount due in its entirety, the

tenant forfeits the concession granted to him under the aforesaid third proviso and the only option thereafter is to execute the eviction order.

5. While interpreting the aforesaid third proviso in the light of the fact situation that there occurred a shortfall, howsoever small, in the matter of deposit of the amount due, the Court cannot take into consideration either any extenuating circumstance or any circumstance based upon leniency or amplitude or any other circumstance-which may be based upon or linked with any compelling reason or reasons of difficulty or discomfiture. If there is a shortfall with respect to the deposit of the amount due within a period of 30 days or if the amount due has not been deposited within the aforesaid period of 30 days and even if the deposit is late by one day, concession granted under the aforesaid third proviso immediately goes away. There is no escape to that."

8. The third proviso to clause (1) of sub-section (2) of section 14 of the Act was yet again a subject matter of discussion by this court in **Rewat Ram** vs. **Ashok Kumar and others 2011 (Supp) Him L.R. 1580,** wherein after analyzing the entire provisions of the Rent Act, it was held as follows:-

"5. Section 14(1) and 14(2)(i) of the H.P. Urban Rent Control Act read as follows:-

"Section 14(1) A tenant in possession of a building or rented land shall not be evicted there from in execution of a decree passed before or after the commencement of this Act or otherwise, whether before or after the termination of the tenancy, except in accordance with the provisions of this Act.

(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant is satisfied-

(i) that the tenant has not paid or tendered the rent due from him in respect of the building or rented land within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement by the last day of the month next following that for which the rent is payable:

Provided that if the tenant on the first hearing of the application for ejectment after due service pays or tenders the arrears of rent and interest at the rate of 9% per annum on such arrears together with the cost of application assessed by the Controller, the tenant shall be deemed to have dully paid or tendered the rent within the time aforesaid;

Provided further that if the arrears pertain to the period prior to the appointed ay, the rate of interest shall be calculated at the rate of 6% per annum:

Provided further that the tenant against whom the Controller has made an order for eviction on the ground of non payment of rent due from him, shall not be evicted as a result of his order, if the tenant

> pays the amount due within a period of 30 days from the date of the order; or"

6. A bare reading of this provision clearly shows that a landlord can apply for eviction of a tenant in case the tenant has not paid or tendered the rent due from him in respect of the rented premises within the stipulated time. Since the Rent Control legislation is in the nature of a legislation to protect the tenant, the legislature in its wisdom included a proviso that if the tenant on the first hearing of the application for ejectment pays or tenders the arrears of rent alongwith interest @ 9% per annum alongwith the costs assessed by the Rent Controller, the tenant shall be deemed to have duly paid or tendered the rent within time and therefore no order of eviction can be passed.

7. We are not concerned with the second proviso since admittedly the arrears relate to the period after the appointed day i.e. 18th August, 1997 and all the arrears which are subject matter of this petition fell due after the said date.

8. By the third proviso to this sub section the legislature gave another protection to the tenant. Even after the order of eviction is passed the tenant can avoid being affected if he pays or deposits the arrears of rent alongwith interest @ 9% per annum alongwith costs of the petition as assessed by the Rent Controller.

9. These provisions have come up for consideration in a number of cases. A Division Bench of this Court in Om Parkash vs. Sarla Kumari and others, 1991(1) Sim. LC 45, held that the "amount due" in the third proviso is only the arrears of rent and not interest. This judgement of the Division Bench was overruled by the Apex Court in Madan Mohan and another vs. Krishan Kumar Sood, 1994 Supp(1) SCC 437, wherein the Apex Court held as follows:-

> "12. A reading of the aforesaid relevant part of the section shows that sub-section (1) of Section 14 creates a ban against the eviction of a tenant except in accordance with the provisions of the Act. The ban is liable to be lifted. Sub-section (2) of Section 14 provides the circumstances in which the ban is partially lifted. It contemplates that where an eviction petition is filed, inter alia, on the ground of non-payment of rent by the landlord, the Controller has to be satisfied that the tenant has neither paid nor tendered the rent in the circumstances mentioned in clause (i) of sub Section (2) of Section 14. He has to arrive at this satisfaction after giving a reasonable opportunity of showing cause against it to the tenant. But there may be cases where the tenant, on being given notice of such an application for eviction, may like to contest or not to contest the application. The tenant is given the first chance to save himself from eviction as provided in the first proviso to clause (i) of sub-section (2) of Section 14. This first proviso contemplates that the tenant may on the first hearing of the application for ejectment pay or tender in court the rent and interest at the rate mentioned in the proviso on

such arrears together with the cost of application assessed by the Controller and in that case the tenant is deemed to have duly paid or tendered the rent within the time as contemplated by clause (i) of sub section (2) of Section 14. Where the tenant does not avail of this opportunity of depositing as contemplated by the first proviso and waits for an ultimate decision of the application for eviction on the ground of non-payment of rent, the Controller has to decide it and while deciding, the Controller has to find whether the ground contained in clause (i) of sub-section (2) of Section 14 has been made out or not. If the Controller finds that the ground as contemplated by clause (i) of sub-section (2) of Section 14 is made out, he is required to pass an order of eviction on the ground of non-payment of rent due from him. A second opportunity to avoid eviction is provided by the third proviso to clause (i) of sub section (2) of Section 14. But the second opportunity is provided after the order of eviction. The benefit of avoiding eviction arises if the tenant pays the "amount due" within the period of 30 days of the date of order.

13. The question is what is the meaning of the words "amount due" occuring in the third proviso to clause (i) of sub-section (2) of Section 14 of the Act.

14. It will be noticed that there is no provision in the Act for giving powers to the Controller to direct payment or deposit of 'pendente lite' rent for each month during the pendency of the petition for eviction of the tenant. First proviso to sub-section (2) of Section 14 shows that in order to show payment or valid tender as contemplated by clause (i) of Ss. (2) of Section 14 by a tenant in default, he has to pay on the first date of hearing the arrears of rent along with interest and costs of the application which are to be assessed by the Controller. Surely where a tenant does not avail of the first opportunity and contests the eviction petition on the ground of non-payment of arrears of rent and fails to show that he was not in default and court finds that the ground has been made out, an order of eviction has to follow. Therefore, it does not stand to reason that such a tenant who contests a claim and fails to avoid order of eviction can still avoid it by merely paying the rent due till the date of the filing of the application for ejectment. The third proviso to clause (i) of Ss. (2) of Section 14 should also receive an interpretation which will safeguard the rights of both the landlord and tenant. The "amount due" occurring in the third proviso in the context will mean the amount due on and up to the date of the order of eviction. It will take into account not merely the arrears of rent which gave cause of action to file a petition for eviction but also include the rent which accumulated during the pendency of eviction petition as well. If the tenant has been paying the rent during the pendency of the eviction petition to the landlord, the "amount due" will be only arrears which have not been paid. The landlord, as per the scheme of the section, cannot be worse off vis-a-vis a tenant who was good enough to deposit in court the arrears of rent together with interest and costs

on the first date of hearing. If the interpretation given by the High court is accepted the result would be that the tenant will be better off by avoiding to pay the arrears of rent with interest and costs on the first date of hearing and prefer suffering order of ejectment after contest and then merely offer the amount due as mentioned in the application for ejectment to avoid eviction. This could not be the intention of the legislature.

15. In such cases it will be advisable if the Controller while passing the order of eviction on the ground specified in clause (0 of Ss. (2 of Section 14 of the Act specifies the "amount due" till the date of the order and not merely leave it to the parties to contest it after passing of the order of eviction as to what was the amount due.

16. Surely the Rent Control Acts, no doubt, are measures to protect tenants from eviction except on certain specified grounds if found established. Once the grounds are made out and subject to any further condition which may be provided in the Act, the tenants would suffer ejectment. Again the protection given in the Acts is not to give licence for continuous litigation and bad blood,

17. Surely the legislature which made the Act could not have envisaged that after the parties finish off one round of litigation, the party should be relegated to another round of litigation for recovery of rent which accrued pendente lite. Whatever protection Rent Acts give they do not give blanket protection for "non-payment of rent". This basic minimum has to be complied with by the tenants. Rent Acts do not contemplate that if one takes a house on rent, he can continue to enjoy the same without payment of rent."

10. The Apex Court in no uncertain terms held that a tenant who pays the rent after an order of eviction is passed can in no circumstances be placed on a better footing than a tenant who pays the arrears of rent on the first date of hearing. A reading of the first proviso shows that on the first date of hearing, a tenant, can avoid an order of eviction if he deposits not only the rent but also the interest due thereupon and the costs as assessed by the Rent Controller. Obviously, the interest has to be calculated from the date when the interest fell due and is not the day of the institution of the petition or any other date.

11. The question which arises in this petition is whether a tenant who deposits the amount due after an order of eviction is passed can claim that he is liable to deposit the interest only from the date of the institution of the petition? The answer is obviously no. The Full Bench of this Court in Wazir Chand vs. Ambaka Rani and another, 2005(2) Shim.L.C.498 again considered the import of Section 14(2)(i) after taking note of the judgement of the Apex Court in Madan Mohan's case supra and held as follows:-

"9. Taking a cue from the aforesaid observations of their Lordships of the Supreme Court in Madan Mohan and another vs. Krishan Kumar Sood (supra), we hereby issue a binding direction to

all the Rent Controllers in the State that whenever a Rent Controller passes an eviction order in terms of Section 14(2)(i) of the 1987 Act, it must in the same eviction order, in its concluding part specify the exact amount of rent payable by the tenant to the landlord, of course, alongwith interest and costs. Undoubtedly, based on the ratio of Madan Mohan and another vs. Krishan Kumar Sood (Supra), the rent payable by the tenant to the landlord, which the Rent Controller would be specifying in the order of eviction would be the arrears of rent uptil the filing of the eviction petition under Section 14(2)(i) as well as the arrears of rent which have accumulated ruing the pendency of eviction petition, right up to the date of passing of the eviction order. The purpose behind the Rent Controller specifying in the eviction order the exact amount of rent payable by the tenant is to directly link it with the third proviso so as to effectively enable the tenant to know with certainty the amount that he is liable to pay to save his eviction.

10. There can be situations and circumstances where a tenant may have a grievance that even though the Rent Controller in the final eviction order has specified the amount of rent payable by the tenant to the landlord, yet while doing so the Rent Controller did not take into account any amount paid by the tenant by way of arrears of rent during the pendency of the eviction petition. Disputes and controversies can arise with regard to this aspect of the matter, in as much as in certain situations and circumstances a tenant can contend and agitate that during the pendency of the petition he had been paying the rent to the land lord and despite such payments having been made by him, the Rent Controller did not reflect such payments nor took note of them, nor adjusted such payments while assessing and specifying, in the course of final eviction order the rent payable by the tenant to the landlord. To avoid the happening of any such eventuality, we wish to observe and direct that the onus to prove that the tenant had been paying any rent or arrears of rent during the pendency of the eviction petition, with a view to claim adjustment of such amount in the final analysis, would lie on the tenant alone and upon no one else. The only way in which such apprehended dispute can effectively be avoided is for the tenant to conclusively establish before the Rent Controller, before the passing of the final eviction order, that the tenant had actually paid a specified amount by way of arrears of rent during the pendency of eviction petition. A duty, therefore, would be cast always on the tenant to establish beyond any doubt before the Rent Controller, before the passing of final eviction order, that during the pendency of the eviction petition the tenant had paid a particular amount towards the arrears of rent so that the tenant gets the amount adjusted in the final analysis. With a view to minimize or ourtail any scope for any dispute on this account we wish to observe and lay down as a binding principle of law that any prudent tenant in normal course of wisdom would like to avoid any dispute about establishing the fact of such payment being made during the pendency of the eviction

petition by taking recourse to Section 21 of the 1987 Act because the endeavour of every tenant should be to establish beyond any doubt conclusively the fact of any amount of rent having been paid during the pendency of the petition. After all, when the landlord and the tenant are locked in a litigation over the fact of the tenant allegedly having committed defaults and the landlord seeking eviction of the tenant from the property in question on the ground of default, it cannot legitimately be believed that the tenant in the face of such litigation would risk payment to the landlord without his insisting on conclusive proof of such payment having been made. The Rent Controller, therefore, while taking not of any such submission of the tenant has to take into account above referred circumstances and, therefore, while passing the final eviction order and specifying the exact amount payable, has to give credit and adjustment only to such amount which the tenant claims it has paid as has been conclusively established. Any claim of the tenant which is shrounded in doubt, or which does not have the trappings of any conclusive proof, has to be rejected."

12. Thereafter, a learned Single Judge of this Court in Bilasi Ram vs. Bhanumagi, 2007(1) Shim.LC 88, while considering the provisions of Section 14 held as follows:-

"4. By now it is well established, in the light of the authoritative pronouncements by a Full Bench of this Court in the case of Wazir Chand vs. Ambaka Rani and another, reported in 2005 (2) Shim. L.C. 498, based upon and in the light of the ratio in the case of Madam Mohan and another vs. Krishan Kumar Sood, reported in 1994 Supp (1) Supreme Court Cases 437, that the expression "amount due" occurring in the aforesaid third proviso includes the arrears of rent, the interest thereupon @ 9% per annum and the amount of costs. It is also a well settled proposition of law by now that if the tenant fails to deposit the amount due within a period of 30 days from the date of the order, the only option available in law is to enforce the eviction order. Whether the shortfall is Re.1/- or the shortfall is more than Re.1/-, if there is any shortfall in the deposit of the amount, the eviction order has to be executed, because by not depositing the amount due in its entirety, the tenant forfeits the concession granted to him under the aforesaid third proviso and the only option thereafter is to execute the eviction order.

5. While interpreting the aforesaid third proviso in the light of the fact situation that there occurred a shortfall, howsoever small, in the matter of deposit of the amount due, the Court cannot take into consideration either any extenuating circumstance or any circumstance based upon leniency or amplitude or any other circumstance which may be based upon or linked with any compelling reason or reasons of difficulty or discomfiture. If there is a shortfall with respect to the deposit of the amount due within a period of 30 days or if the amount due has not been deposited within the aforesaid period of 30 days and even if the deposit is late by one

> day, concession granted under the aforesaid third proviso immediately goes away. There is no escape to that."

9. In so far as the contention of the petitioner that the amount has not been correctly calculated or worked out by the learned Rent Controller is concerned, the petitioner was unable to convince this court in this regard. Moreover, the petitioner cannot be permitted to raise this ground more particularly when the same was not agitated before the learned Lower Appellate Authority.

10. This Court in exercise of its revisional jurisdiction is only entitled to satisfy itself as to the correctness, legality or propriety of any decision or order impugned before it. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or order, this Court shall not exercise its powers as an appellate power to reappreciate or reassess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a Court of first appeal. This was so held by the Hon'ble Supreme Court in ***Hindustan Petroleum Corporation Ltd. Vs. Dilbahar Singh*** *(2014) 9 SCC 78* wherein after discussing various provisions of rent laws in India, the following conclusion was arrived at:-

> *"43. We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the first appellate court/first appellate authority because on reappreciation of the evidence, its view is different from the court/authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that findings of facts recorded by the court/authority below is according o law and does not suffer from any error of law. A finding of fact recorded by court/authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself as to the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall exercise its power as an appellate power to reappreciate or reassess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity."*

11. In view of the aforesaid discussion and also taking into consideration the settled position of law, I find no infirmity, impropriety or illegality in the order passed by the learned Rent Controller as affirmed by the learned Appellate Authority. Accordingly, there is no merit in the revision petition and the same is dismissed, leaving the parties to bear their own costs.

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

Amarjeet Singh. ....Petitioner
versus
State of H.P. ....Non-petitioner.

Cr.MMO No. 114 of 2015
Decided on: 8.5.2015.

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.

For the petitioner : Mr. Vishal Aggarwal & Sanjay Sharma, Advocates.
For the non-petitioner : Mr. M.L. Chauhan Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Petition filed under Section 482 Cr.P.C. against the anticipatory bail order passed by the learned Sessions Judge Shimla H.P. on 4.5.2015 in Criminal Bail Application No. 56-8/22 of 2015. Notice. At this stage learned Additional Advocate General appears and waives service of notice on behalf of the respondent. Learned Additional Advocate General submitted that he does not want to file any reply and he has no objection if the word H.P. State mentioned in para-5 of order dated 4.5.2015 is deleted and word India is incorporated. In view of the above stated facts and in view of the express provision mentioned under Section 438 (2) (iii) Cr.P.C. petition filed under Section 482 Cr.P.C. is allowed in the ends of justice and word H.P. State mentioned at Sr. No. (iv) of para-5 of the order dated 4.5.2015 is ordered to be deleted and word India is ordered to be incorporated. Order passed by the learned Sessions Judge Shimla dated 4.5.2015 in Criminal Bail Application No. 56-8/22 of 2015 is modified to this extent only. Petition disposed of. Pending applications if any also disposed of. Dasti copy.

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

Hema Ram ......Appellant.
Versus
State of Hemachal Pradesh ....Respondent.

Cr. Appeal No. 223 of 2009
Reserved on: May 06, 2015.
Decided on: May 08, 2015.

Indian Penal Code, 1860- Section 302- Deceased was posted as Assistant. Lineman, in HPSEB- he left home after his duty but did not return- his dead body was found with the injuries on the head in the jungle by PW-1- PW-4 admitted that deceased had consumed alcohol and was unable to walk properly- 316.25 mg % ethyl alcohol was found in the blood sample of the deceased- since, deceased was heavily drunk, therefore, possibility of his fall from a height cannot be ruled out, especially when body was recovered at a distance of more than 100 meters below the path- accused acquitted. (Para- 27 to 36)

Cases referred:

Parkash vrs. State of Karnataka, (2014) 12 SCC 133,
Ashok vrs. State of Maharashtra, 2015(4) SCC 393,
Bhim Singh and another vrs. State of Uttarakhand, (2015) 4 SCC 281

For the appellant: Mr. Umesh Kanwar, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 23/26.05.2009, rendered by the learned Sessions Judge, Shimla, H.P. in Sessions Trial No. 16-S/7 of 2008, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Sections 302 IPC, has been convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- and in default of payment of fine to further undergo simple imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that Hitender Kumar was posted as Asstt. Lineman, in the HPSEB at Drabla, Sub Section. On 3.7.2008, at about 8:30 AM, Hitender Kumar left from his house for duties to Drabla and did not return in the evening and also till the evening of 4.7.2008. On 4.7.2008, at about 11:00 PM, PW-5 Devloo Ram, resident of Village Malyan, telephonically informed his brother PW-1 Tikhu Ram, that one dead body was lying in Jug Forest, upon which PW-1 alongwith his elder brother Hukmi Ram proceeded to the forest in search of his brother Hitender Kumar. But, they could not locate the dead body in the forest and they returned back. On the following day, PW-1 alongwith PW-4 Kamlesh Kumar, his brother Hukmi Ram and Mathu Ram proceeded to the Jungle in search of his brother Hitender Kumar. During their search, they found that Hitender Kumar was lying dead facing downward at a distance of 100-120 meters down from the path in the Jungle. Hitender Kumar had suffered injuries on his head and forehead, apparently caused with heavy object. PW-1 telephonically informed PW-12 Deep Ram, who in turn informed the police. The police reached the spot and recorded the statement of PW-1 Tikhu Ram under Section 154 Cr.P.C., vide Ext. PW-1/A. The FIR was registered vide Ext. PW-19/A. PW-23, proceeded with the investigation of the case and inspected the dead body of Hitender Kumar. He took photographs of the spot and also prepared the site plan. The articles lying near the body were seized and taken into possession. PW-23 also lifted blood with cotton swab from the spot. The dead body was sent for post mortem examination. The post mortem on the dead body was conducted by PW-24 Dr. Piyush Kapila. The report is Ext. PW-24/B. According to the report, the deceased died as a result of gross head injury leading to laceration of brain and death. The accused was arrested. Disclosure statement

was recorded vide Ext. PW-6/B, on the basis of which, the recoveries were effected. The case property was sent for chemical examination. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 24 witnesses. The accused was also examined under Section 313 Cr.P.C. He specifically denied the incriminating circumstances put to him. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Umesh Kanwar, Advocate for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. M.A.Khan, Addl. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 23/26.5.2009.

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

6. PW-1 Tikhu Ram, deposed that his brother was posted as Asstt. Lineman in HPSEB. On 3.7.2008, his brother Hitender Kumar, left for his duties to Drabla. He did not return from his duties in the evening. He also did not return from his duty till the evening of 4.7.2008. On 4.7.2008, at about 11:00 PM, PW-5 Devloo Ram, resident of Village Malyan, telephonically informed him, that one unknown person was lying in Jug Forest. He alongwith his elder brother Hukmi Ram proceeded to the forest in search of his brother Hitender Kumar. But, they could not locate the person who was lying in the forest and they returned. On the following day, he alongwith Kamlesh Kumar, his brother Hukmi Ram and Mathu Ram proceeded to the Jungle in search of his brother Hitender Kumar. During the search, they found that Hitender Kumar was lying dead by his face downward at a distance of 160/170 feet down from the path in the said Jungle. Hitender Kumar had suffered injuries on his head and forehead. It appeared that he had been inflicted injuries with some heavy object. The police was informed. The police reached the spot. He further deposed that on 4.7.2008, at 11:00 PM, while Devloo Ram informed him telephonically that there was a person lying in the jungle. He also informed him that in the evening of 3.7.2008, Hitender Kumar, Kamlesh Kumar and Hema Ram were together at Baldian and all the three were proceeding downwards. The police reached the spot and recorded the statement Ext. PW-1/A. In his cross-examination, he admitted that Devloo Ram is the father-in-law of his brother Hitender Kumar. Atma Ram is the brother-in-law of Hitender Kumar. The house of Devloo is at a distance of 5-6 km. from his house. The house of Devloo Ram is at a distance of about half kilometer from the place where dead body was found. They did not inquire about the whereabouts of Hitender Kumar during the night intervening 3rd and 4th July, 2008 because sometimes, he was deputed on night duty. He reiterated in his further cross-examination that only Devloo Ram had disclosed on telephone on 4.7.2008 at 11 PM that a person was lying in Jug Jungle and blood was also lying there. He received the telephone of Atma Ram after one hour after receipt of the telephone of Devloo Ram on 4.7.2008. He admitted in his cross-examination that the path below on which the dead body was found in Jug Jungle, is sloppy and rocky in the shape of Dhank (cliff).

7. PW-2 Kamlesh Kumar, deposed that he had gone in search of Hitender Kumar with PW-1 Tikhu Ram. In his cross-examination, he admitted that Hitender Kumar and Hema Ram were not inimical to each other. Both of them were friends. The land was sloppy but not steep. The land was not rocky. There were no stones from the path where blood was lying up to the dead body of Hitender Kumar.

8. PW-3 Const. Tek Singh, has apprehended the accused from the rain shelter alongwith his cousin Bal Krishan.

9. PW-4 Kamlesh Kumar, is the most material witness. He knew accused Hema Ram from his childhood. He also knew Hitender Kumar from childhood. On 3.7.2008 at about 7-7:30 PM, Hema Ram accused and Hitender Kumar both together met him at Baldian. Both were drunk and were under the influence of liquor. Both of them asked him to bring bottle of country liquor and to purchase the said bottle of liquor Hema Ram handed over to him Rs. 70/-. They also asked him to accompany them. He brought the bottle from the liquor vend and handed over to Hema Ram accused. He accompanied Hema Ram accused and Hitender Kumar towards his house. When they reached in the next bazaar of Baldian, Hema Ram accused purchased two disposable glasses and Namkieen from the shop of Rakesh Kumar alias Bhaiya. All of them proceeded from the said shop together towards their houses. When they were proceeding on a path through the forest named Jug Jungle, they stopped near a water tank. At that place, both Hema Ram and Hitender Kumar took liquor. He did not take liquor. Both of them consumed about 3/4th bottle of liquor. While they were taking liquor, he asked both of them to proceed to their houses as they were getting late. They walked on the path for about 15-20 minutes and reached a curve at place Dudladhar in the jungle. Both of them stopped at the said place and wanted to take more liquor. He asked them to proceed further, upon which, Hema Ram accused abused him. At that time, Hema Ram accused was in anger and also abused him and Hitender Kumar. He also threatened Hitender Kumar by saying that he would see him. Thereafter, he left the spot alone. On the following day, at about 8/8:30 AM, he came to Baldian on his duty from his house. When he was proceeding through the same path to Baldian, Devloo Ram, father in law of Hitender Kumar alongwith his wife met him at place curve of Dudladhar, where he had left Hitender Kumar and Hema Ram accused on the previous evening. He disclosed to Devloo Ram that in the previous evening two persons were sitting there taking liquor and abusing each other. He had disclosed that they were Hitender Kumar and Hema Ram. Thereafter, they left for their own houses and he left for his duty. On 5.7.2008, he was called by SHO, PS Dhalli and upon asking, he disclosed to him about the occurrence which was witnessed by him. From SHO he came to know that Hitender Kumar had died. In his cross-examination, he admitted that the dead body was found below the *kenchy more* (curve) on the path where he had left their company. When he started from Baldian, Hitender Kumar was heavily drunk and was not walking properly. While he was walking on the steep path, he was unable to walk properly and walking with jerks by holding grass and bushes. The jungle below the *kenchy more* (curve) was sloppy having trees and stones.

10. PW-5, Devloo Ram deposed that on 4.7.2008 at about 8:15/8:30 A.M., he was returning to his house from Baldian. He was alone. While he was proceeding to his home through a path which passes from Jug-Ka-Jungle, PW-4 Kamlesh Kumar met him at place Dudladhar. He was proceeding from Baldian for his work. He disclosed to him that on the previous evening two persons, namely Hema and Hitender were sitting there on the path taking liquor. He asked about as to whether they have reached home or not. PW-4 had left the spot. On 4.7.2008 at about 8:00 p.m., his son Atma Ram came back. He asked Atma Ram to telephone at the house of Hitender Kumar and enquire as to whether he had reached home or not. It was disclosed on telephone to Atma Ram by PW-1 Tikhu Ram that Hitender Kumar had not come neither on 3rd nor on 4.7.2008. During the night, they remained at home. On 5.7.2008 at about 5:00 a.m, he received a telephone of PW-1 and his daughter. They disclosed that the dead body of Hitender Kumar was found in the jungle. He alongwith his son and other persons proceeded to the spot. The police reached the spot and prepared

the inquest papers vide memo Ext. PW5/A. The police took into possession bag Ext. P1, folding umbrella Ext. P2, two diaries Ext. P3 and P4 alongwith passbook Ext. P5. The blood stained hair were also taken into possession. The police had lifted the blood from the scene of occurrence. In his cross-examination, he deposed that he along with PW-4 Ramesh Kumar remained at the spot named Dudladhar for about 10-15 minutes. There was no blood or any other symptoms of struggle or quarrel. He reached at his house at about 9:00 a.m., in the morning. He did not try to enquire about the whereabouts of Hitender Kumar. He did not ring or talk to Tikhu on the night of 4.7.2008. Volunteered that his son Atma Ram had talked. The place in front of path was sloppy having rock and forest trees. Tikhu Ram told him in the morning of 5.7.2008 that the dead body of his son-in-law was found.

11. PW-6 Khem Raj deposed that the accused made disclosure statement vide Ext. PW6/B, on the basis of which, recoveries were effected. He signed the memo along with Besar Dass. The accused got recovered the clothes stained with blood.

12. PW-7, Bal Krishan deposed that on 5.7.2008 before 1:00 p.m., Hema Ram accused met him at village Jagalru near nullah. Hema Ram had handed over a key of the lock of his room.

13. PW-8, Atma Ram is the brother-in-law of the deceased. He deposed that on 4.7.2008 at about 10:00 a.m., his father came home from Baldian bazaar. Kamlesh disclosed to his father that some quarrel had taken place between Hema Ram and Hitender Kumar. In the evening, his father asked him to telephone at the house of Hitender Kumar and enquire about his welfare. He rang him up. The phone was attended by PW-1 Tikhu Ram. He talked with his sister. He enquired the whereabouts of his brother-in-law Hitender Kumar. His sister disclosed that Hitender Kumar had not come home for the last 2-3 days. He had seen blood in the path in Jug Jungle. He telephoned to them at about 9:30 p.m. On the next morning, the dead body of Hitender Kumar was recovered.

14. PW-11 Besar Dass has deposed the manner in which the disclosure statement was made by the accused vide memo Ext.PW6/B and he signed the same. The recoveries were made on the basis of disclosure statement made by the accused.

15. PW-12 Deep Ram has informed the police of police post Mashobra.

16. PW-13 Dr. Soma Negi has examined the accused and issued MLC Ext.PW13/B.

17. PW-14 Rakesh Kumar deposed that Hitender Kumar was an employee of the electricity department. In the rainy season on 3rd of that month of 2008 at about 8:00 p.m., Hema Ram accused along with accused Kamlesh Kumar came to his shop and purchased Namkeen and two disposable glasses.

18. PW-15 HHC Subhash Chand deposed that he received telephone of Deep Ram son of Rattan Dass to the effect that dead body of Hitender Kumar, his brother-in-law, was lying in Jug Jungle.

19. PW-16 HHG Chander Mohan deposed that he along with SHO left for the spot of incident. The statement of PW-1 Tikhu Ram was recorded by the SHO vide memo Ext. PW1/A.

20. PW-18 HC Shiv Kumar deposed that the case property was deposited with him. He entered the same in malkhana register. The case property was sent through Constable Sant Ram to FSL Junga.

21. PW-21 Constable Sant Ram deposed that he had taken 13 sealed parcels to FSL Junga.

22. PW-23 Insp. Manohar Lal deposed that he received a telephone message from P.P. Mashobra at about 6:45 a.m., that dead body of Hitender was lying in Jug Jungle. He deputed SI Shyam Sunder, to the spot. He along with other staff reached at the spot. The dead body was lying facing downwards. It had injury marks on the head. He recorded the statement of Tikhu Ram under Section 154 Cr.P.C. vide memo Ext.PW1/A. He prepared the site plan. The case property was taken into possession. In his cross-examination he admitted that when they visited the spot, the stone was got recovered by the accused on 9.7.2008. He had removed Section 34 IPC against the accused and Kamlesh as during the investigation, it was found that Kamlesh had left accused Hema Ram and deceased Hitender. Except Kamlesh, nobody told him that Kamlesh had left the company of accused Hema Ram and deceased Hitender.

23. PW-24 Dr. Piyush Kapila has issued post mortem report Ext. PW24/B. According to the final opinion the deceased died as a result of gross head injury leading to laceration of brain. In his cross-examination he admitted that at 316.25 mg % urine alcohol concentration, the person can loose his equilibrium and balance and can fall. He also admitted that the chances of loosing balance and inconsequence of that falling from height are more in case of the heavy alcohol concentration than in a normal person. He also admitted that there were more chances of fall with the concentration of 316.25 mg% if the path is sloppy and narrow.

24. The case of the prosecution, precisely, is that the deceased left his house at 8:30 PM on 3.7.2008. The deceased did not return home on the evening of 3rd and 4th July, 2008. On 4.7.2008, as per the averment contained in rukka Ext. PW-1/A, at about 11:00 PM, Atma Ram son of Devloo Ram telephoned PW-1 Tikhu Ram and told that the dead body was lying at Jug jungle. Then, they went in search of their brother. However, when PW-1 Tikhu Ram appeared in the Court, he testified that on 4.7.2008, at about 11:00 PM, PW-5 Devloo Ram, resident of Village Malyan, telephonically informed him, that one unknown person was lying in Jug Forest, upon which he alongwith his elder brother Hukmi Ram proceeded to the forest in search of his brother Hitender Kumar. Devloo Ram is the father-in-law of his brother Hitender Kumar. Atma Ram is the brother-in-law of Hitender Kumar deceased. Thus, according to PW-1 Tikhu Ram's statement in the Court, PW-5 Devloo Ram told him that the dead body was lying in Jug Jungle. However, PW-5 Devloo Ram, categorically deposed that he asked his son on 4.7.2008 at 8:00 PM to telephone at the house of Hitender Kumar and enquire whether he had reached home or not. It was disclosed on telephone to Atma Ram by PW-1 Tikhu Ram that the deceased has not come home. He has also admitted in his cross-examination that he did not ring Tikhu Ram on the night of 4.7.2008. PW-8 Atma Ram also deposed that on 4.7.2008, at 10:00 AM, his father came home from Baldian bazaar. In the evening his father asked him to telephone at the house of Hitender Kumar and enquire about his welfare. He accordingly telephoned to the house of Hitender Kumar. However, according to the statement made under Section 154 Cr.P.C. by PW-1 Tikhu Ram, it was Atma Ram, who has told him about the body lying in the forest.

25. PW-1 Tikhu Ram, as noticed above, testified that PW-5 Devloo Ram has informed him about the incident. PW-5 Devloo Ram stated that it was his son who informed Tikhu Ram. PW-8 Atma Ram also deposed that he contacted PW-1 Tikhu Ram. An important information has been supplied to Tikhu Ram about the dead body lying in the Jug Jungle. The deceased has not come home in the evening of 3rd July, 2008 and also in the evening of 4th July, 2008. The family members of the deceased have not made any efforts to find out the whereabouts of the deceased. The only explanation given by PW-1 Tikhu Ram is that at times, he was put on night duty. There is no contemporaneous material placed on record to establish that Jitender Kumar deceased was put on night duty on 4.7.2008.

26. The father-in-law of the deceased PW-5 Devloo Ram was apprised by PW-4 Kamlesh that he had seen Hitender and Hema Ram fighting at a particular spot. If that was so, it was expected from PW-5 Devloo Ram to contact his daughter who was residing only at a distance of 5 kms. from his house. He waited till evening and only told his son on 4.7.2008 at night to inquire about the whereabouts of Hitender Kumar. The conduct of PW-5 Devloo Ram is not the one which is expected from a normal person. Rather the conduct of PW-5 Devloo Ram is not worth credence. He should have made inquiries since PW-4 Kamlesh Kumar in his statement has stated that he has told PW-5 Devloo Ram that he has seen Hema Ram and deceased abusing each other. The normal human conduct of PW-5 Devloo Ram and PW-8 Atma Ram would have been to reach the house of the deceased to know about his whereabouts instead of waiting till 5:00 AM.

27. PW-4 Kamlesh Kumar was in the company of accused and Jitender Kumar deceased. His version is that the deceased and Hema Ram were taking liquor and were intoxicated. They asked him to bring bottle of country liquor and to purchase the bottle of liquor Hema Ram handed over to him Rs. 70/-. They also asked him to accompany them. He brought the bottle from the liquor vend and handed over to Hema Ram accused. He accompanied Hema Ram accused and Hitender Kumar towards their houses. When they reached in the next bazaar of Baldian, Hema Ram accused purchased two disposable glasses and Namkieen from the shop of Rakesh Kumar alias Bhaiya. In his cross-examination, he admitted that when he started from Baldian, Hitender Kumar was heavily drunk and was not walking properly. While he was walking on the steep path, he was unable to walk properly. He was walking with jerks by holding grass and bushes. The jungle below the *kenchy more* (curve) was sloppy having trees and stones.

28. The quantity of ethyl alcohol found in the blood sample of deceased was 316.25 mg %. PW-24 Dr. Piyush Kapila, in his cross-examination has admitted that at 316.25 mg % urine alcohol concentration, the person can loose his equilibrium and balance and can fall. The deceased died due to gross head injury leading to laceration of brain. Since the deceased was heavily drunk and was going down the steep path, the possibility of his fall from the height cannot be ruled out, more particularly when his body was recovered at a distance of more than 100 meters below the path.

29. Mr. M.A.Khan, learned Addl. Advocate General has vehemently argued that the accused was last seen in the company of deceased by PW-4 Kamlesh Kumar. It has come in the statement of PW-2 Kamlesh Kumar that the accused and deceased were not inimical to each other but were friends. While relying upon the theory of 'last seen together', all the circumstances have to be taken into consideration including the relationship of the deceased with the person last seen together. The case in hand is based on circumstantial evidence. There is no eye witness. There is variance in the statements made by PW-1 Tikhu

Ram, PW-5 Devloo Ram and PW-8 Atma Ram about the inquiries made about the whereabouts of the deceased and who telephoned PW-1 Tikhu Ram.

30. The statement of PW-4 Kamlesh Kumar, does not inspire confidence for the simple reason that he was also made accused in the case at one point of time. His name was subsequently struck off, as per the statement of PW-23 SI Manohar Lal, only on the ground that he had left Hitender Kumar and Hema Ram at a particular spot and gone to his house. Nobody has told him except Kamlesh Kumar that he had left the company of accused Hema Ram and deceased Hitender Kumar and gone home.

31. Mr. Umesh Kanwar, Advocate, appearing on behalf of the accused has drawn the attention of the Court to Ext. PW-23/E, FSL report of the viscera, whereby the quantity of ethyl alcohol in urine was found to be 316.25 mg%. According to Ext. PW-24/C, final opinion of Dr. Piyush Kapila, the deceased died due to gross head injury leading to laceration of brain in case of consumption of alcohol. The doctor has noticed urine alcohol concentration i.e. 316.25 mg%. The prosecution has failed to prove the case against the accused beyond reasonable doubt. There are major contradictions, embellishments in the statement of witnesses. The conduct of PW-1 Tikhu Ram of not searching his brother till 4.7.2008 and the conduct of PW-5 Devloo Ram, who despite claiming that PW-4 Kamlesh had told him about the fight between the deceased and the accused in the morning of 4.7.2008, has not made inquiries from his daughter, is not worth belief.

32. Mr. M.A.Khan, Addl. AG, has also argued that the blood stained clothes of the deceased were recovered and has also drawn the attention of the Court to Ext. PW-23/D, report of FSL, whereby human blood was found on exhibit-1, 5, 6(a), 6(b), 8(a), 8(b) and 8(c).

33. Their lordships of the Hon'ble Supreme Court in the case of ***Parkash vrs. State of Karnataka,*** reported in ***(2014) 12 SCC 133,*** have held that when the blood stained clothes are recovered, a serological comparison of blood of deceased and appellant and blood stains on his clothes was necessary and that was absent from evidence of prosecution. In this case, the prosecution has sought to prove that blood group of deceased was AB and blood stains on appellant's seized clothes also belong to blood group AB. This does not lead to any conclusion that bloodstains on appellant's clothes were those of deceased's blood. There are millions of people who have blood group AB and it is quite possible that even appellant had the blood group AB. Thus, merely since clothes of appellant were bloodstained and stains bore same blood group as that of deceased, circumstances could not be used against the appellant. Their lordships have further held that in a case of circumstantial evidence, there has to be some degree of trustworthiness and certainly about existence of circumstances. It has been held as follows:

> "40. The second discrepant statement was that Shivanna stated that the police had kept Prakash's clothes on the table. It was submitted, in other words, that the blood stained clothes were already seized by the police and kept on the table. We are not sure whether the actual statement made by Shivanna has been lost in translation.
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> 41. In any event, the recovery of the blood stained clothes of Prakash do not advance the case of the prosecution. The reason is that all that the prosecution sought to prove thereby is that the blood group of Gangamma was AB and the blood stains on Prakash's seized clothes also belong to blood group AB. In our opinion, this does not lead to any conclusion that the blood

stains on Prakash's clothes were those of Gangamma's blood. There are millions of people who have the blood group AB and it is quite possible that even Prakash had the blood group AB. In this context, it is important to mention that a blood sample was taken from Prakash and this was sent for examination. The report received from the Forensic Science Laboratory [Exh.P-27] was to the effect that the blood sample was decomposed and therefore its origin and grouping could not be determined. It is, therefore, quite possible that the blood stains on Prakash's clothes were his own blood stains and that his blood group was also AB.

45. We are not satisfied with the conclusion of the High Court that since the clothes of Prakash were blood stained and the stains bore the same blood group as that of Gangamma, the circumstance could be used Prakash. A serological comparison of the blood of Gangamma and Prakash and the blood stains on his clothes was necessary and that was absent from the evidence of the prosecution."

34. Their lordships of the Hon'ble Supreme Court in the case of ***Ashok vrs. State of Maharashtra,*** reported in ***2015(4) SCC 393,*** have held that *'last seen together'* itself is not conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused etc., non-explanation of death of the deceased, may lead to a presumption of guilt. In the instant case, we have already noticed that the relations of accused with the deceased were cordial. Their lordships have held as under:

"8. The "last seen together" theory has been elucidated by this Court in Trimukh Marotiu Kirkan v. State of Maharashtra, (2006)10 SCC 106, in the following words:

"22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, the doctrine of last seen together shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him."

9. In Ram Gulab Chaudhary v. State of Bihar, (2001) 8 SCC 311, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy.

10. In Nika Ram v. State of H.P., (1972) 2 SCC 80, it was observed that the fact that the accused alone was with his wife in the house when she was murdered with a "Khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt.

11. The latest judgment on the point is Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715. In this case this Page 10 10 Court has held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing the connectivity between the accused and the crime. Mere non-explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.

12. From the study of above stated judgments and many others delivered by this Court over a period of years, the rule can be summarized as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of Indian Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of Page 11 11 weapon from the accused etc., non-explanation of death of the deceased, may lead to a presumption of guilt.

20. From the above discussion, we conclude that the prosecution has not brought any clinching evidence in support of last seen together theory so as to shift the burden of proof on the accused-appellant. In light of this, the prosecution has evidently failed to prove the guilt of the accused-appellant beyond doubt. Therefore, the appeal is allowed and the judgment and order passed by the High Court as also by the Trial Court are set aside. The appellant is directed to be released forthwith if not required in connection with any other case."

35. Their lordships of the Hon'ble Supreme Court in the case of ***Bhim Singh and another vrs. State of Uttarakhand,*** reported in ***(2015) 4 SCC 281,*** have held that there should not be any snap in the chain of circumstances and if there is a snap in the chain, the accused is entitled to benefit of doubt. Their lordships have held as under:

"22. In the present case, the guilt or innocence of the accused has to be adduced from the circumstantial evidence. The law regarding circumstantial evidence is more or less well settled. This Court in a plethora of judgments has held that when the conviction is based on circumstantial evidence solely, then there should not be any snap in the chain of Page 22 22 circumstances. If there is a snap in the chain, the accused is entitled to benefit of doubt. Gurpreet Singh v. State of Haryana (2002) 8 SCC 18 is one of such cases. On the question of any reasonable hypothesis, this Court has held that if some of the circumstances in the chain can be explained by any other reasonable hypothesis, then the accused is entitled to benefit of doubt. But in assessing

the evidence, imaginary possibilities have no place. The Court considers ordinary human probabilities.

23. On circumstantial evidence, this Court has laid down the following principles in Sharad Birdhichand Sardar v. State of Maharashtra, (1984) 4 SCC 116:

> "(1) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely "may be" fully established.
>
> (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say they should not be explainable on any other hypothesis except that the accused is guilty.
>
> (3) The circumstances should be of conclusive nature and tendency.
>
> (4) They should exclude every possible hypothesis except the one to be proved and,
>
> (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. Whenever there is a break in the chain of circumstances, the accused is entitled to the benefit of doubt; State of Maharashtra v. Annappa Bandu Kavatage (1979) 4 SCC 715."

36. In the instant case, there was no eye witness and the case is based on circumstantial evidence. It is the duty of the prosecution to link the accused with the alleged incident. The prosecution could not link the entire chain of events. It is settled law that in a case based on circumstantial evidence, the chain must be complete and the circumstances should point towards the guilt of the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

37. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 23/26.5.2009, rendered by the learned Sessions Judge, Shimla, H.P., in Sessions trial No. 16-S/7 of 2008, is set aside. The accused is acquitted of the charges framed under Sections 302 IPC, by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

38. 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 P.S. RANA, J.

Himesh Sharma. ....Petitioner
Versus
State of H.P. ....Non-petitioner.

Cr.MMO No. 117 of 2015
Decided on: 8.5.2015.

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.

For the petitioner : Mr. Vishal Aggarwal & Sanjay Sharma, Advocates.
For the non-petitioner : Mr. M.L. Chauhan Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Petition filed under Section 482 Cr.P.C. against the anticipatory bail order passed by the learned Sessions Judge Shimla H.P. on 4.5.2015 in Criminal Bail Application No. 60-8/22 of 2015. Notice. At this stage learned Additional Advocate General appears and waives service of notice on behalf of the respondent. Learned Additional Advocate General submitted that he does not want to file any reply and he has no objection if the word H.P. State mentioned in para-5 of order dated 4.5.2015 is deleted and word India is incorporated. In view of the above stated facts and in view of the express provision mentioned under Section 438 (2) (iii) Cr.P.C. petition filed under Section 482 Cr.P.C. is allowed in the ends of justice and word H.P. State mentioned at Sr. No. (iv) of para-5 of the order dated 4.5.2015 is ordered to be deleted and word India is ordered to be incorporated. Order passed by the learned Sessions Judge Shimla dated 4.5.2015 in Criminal Bail Application No. 60-8/22 of 2015 is modified to this extent only. Petition disposed of. Pending applications if any also disposed of. Dasti copy.

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

Inderpal Singh. ....Petitioner
Versus
State of H.P. ....Non-petitioner.

Cr.MMO No. 115 of 2015
Decided on: 8.5.2015.

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General

submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.

For the petitioner : Mr. Vishal Aggarwal & Sanjay Sharma, Advocates.
For the non-petitioner : Mr. M.L. Chauhan Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Petition filed under Section 482 Cr.P.C. against the anticipatory bail order passed by the learned Sessions Judge Shimla H.P. on 4.5.2015 in Criminal Bail Application No. 57-8/22 of 2015. Notice. At this stage learned Additional Advocate General appears and waives service of notice on behalf of the respondent. Learned Additional Advocate General submitted that he does not want to file any reply and he has no objection if the word H.P. State mentioned in para-5 of order dated 4.5.2015 is deleted and word India is incorporated. In view of the above stated facts and in view of the express provision mentioned under Section 438 (2) (iii) Cr.P.C. petition filed under Section 482 Cr.P.C. is allowed in the ends of justice and word H.P. State mentioned at Sr. No. (iv) of para-5 of the order dated 4.5.2015 is ordered to be deleted and word India is ordered to be incorporated. Order passed by the learned Sessions Judge Shimla dated 4.5.2015 in Criminal Bail Application No. 57-8/22 of 2015 is modified to this extent only. Petition disposed of. Pending applications if any also disposed of. Dasti copy.

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

Kamal Deep Bhardwaj. ….Petitioner
versus
State of H.P. ….Non-petitioner.

Cr.MMO No. 113 of 2015
Decided on: 8.5.2015.

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.

For the petitioner : Mr. Vishal Aggarwal & Sanjay Sharma, Advocates.
For the non-petitioner : Mr. M.L. Chauhan Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Petition filed under Section 482 Cr.P.C. against the anticipatory bail order passed by the learned Sessions Judge Shimla H.P. on 4.5.2015 in Criminal Bail Application

No. 61-8/22 of 2015. Notice. At this stage learned Additional Advocate General appears and waives service of notice on behalf of the respondent. Learned Additional Advocate General submitted that he does not want to file any reply and he has no objection if the word H.P. State mentioned in para-5 of order dated 4.5.2015 is deleted and word India is incorporated. In view of the above stated facts and in view of the express provision mentioned under Section 438 (2) (iii) Cr.P.C. petition filed under Section 482 Cr.P.C. is allowed in the ends of justice and word H.P. State mentioned at Sr. No. (iv) of para-5 of the order dated 4.5.2015 is ordered to be deleted and word India is ordered to be incorporated. Order passed by the learned Sessions Judge Shimla dated 4.5.2015 in Criminal Bail Application No. 61-8/22 of 2015 is modified to this extent only. Petition disposed of. Pending applications if any also disposed of. Dasti copy.

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

Rajesh Kumar ……Appellant.
Versus
State of H.P. …….Respondent.

Cr. Appeal No. 387 of 2012
Reserved on: May 07, 2015.
Decided on: May 08, 2015.

N.D.P.S. Act, 1985- Section 20- Accused was carrying a bag which was containing 2 kg 500 grams charas - independent witness had not supported the prosecution version- accused was not apprised of his legal right to be searched before Magistrate or Gazetted Officer- no entry was made regarding the taking out of the case property after it was brought from the Court- it has caused serious prejudice to the accused- held, that in these circumstances, prosecution version was not proved – accused acquitted. (Para-15 to 19)

Case referred:
Makhan Singh vrs. State of Haryana, JT 2015 (4) SC 222

For the appellant: Mr. Bhupinder Ahuja, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 26.3.2012, rendered by the learned Special Judge (II), Kinnaur at Rampur, H.P., in RBT No. 33-AR-3 of 2010/2011, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to

pay fine of Rs. 1,00,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 27.6.2008 at about 6:45 P.M., PW-11 Insp. Sangat Ram, SHO PS Rampur alongwith PW-4 SI Brij Lal, PW-5 HC Uttam Kumar, Const. Sanjeev Kumar, PW-10 Const. Devi Dass was present at Kudidhar near Nirth, in connection with routine patrol duty. PW-2 Pawan Katoch and PW-3 Pal Singh met them there and they started talking to the police party. In the meantime, accused Rajesh came from the side of Snahjhula carrying a bag in his right hand and on seeing the police party, he got scared and tried to flee. He was apprehended. He was informed to exercise his option under Section 50 of the Act. He opted to be searched by the police party. Thereafter, PW-11 Insp. Sangat Ram alongwith other witnesses rendered themselves to be searched by the accused. The accused and his bag was searched. Charas weighing 2 kg 500 grams was recovered from the possession of the accused. The charas recovered was put in the same bag, which was made into parcel and seal impression "O" was taken on it. NCB form Ext. PW-11/B was updated in triplicate. The impression of seal "O" was also taken on a piece of cloth vide memo Ext. PW-11/C. The case property was taken into possession vide seizure memo Ext. PW-11/D. Rukka Ext. PW-9/A was prepared on the spot. It was sent to the Police Station Rampur through Const. Devi Dass, on the basis of which FIR Ext. PW-9/B was registered. Site plan was prepared. PW-11 Insp. Sangat Ram deposited the case property in the malkhana of the Police Station with MHC. PW-9 MHC Liaq Ram incorporated the entries at Sr. No. 734 in the malkhana register vide Ext. PW-9/D. Special report was also prepared and sent to SDPO Rampur. Chemical report is Ext. PW-11/H. 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. Bhupinder Ahuja, Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan learned Addl. AG, for the State has supported the judgment of the learned trial Court dated 26.3.2012.

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

6. PW-1 Prem Singh deposed that on 27.6.2010, HC Uttam Chand visited his shop and borrowed weighing scale and weights of 1 kg, 500 gms, 200 gms and 100 gms at about 7:15 PM.

7. PW-2 Pawan Katoch, deposed that on 27.6.2010 at 6:45 PM, when he was coming to attend his duty and reached at Kuridhar near Nirath on NH-22, the police was present there alongwith the accused person. One bag was lying near the accused. The police told him that charas was contained in that bag but he did not check the stuff but had seen it. He did not see the police apprehending the accused. The police also did not make inquiry about the name and address of the accused in his presence. He remained present on the spot for 15-20 minutes as he was to attend his duty. The police also did not inform the accused that they were suspecting that he was carrying some narcotic substance and as

such it was intended to conduct his personal search as well as search of his bag. The police had prepared documents on the spot and obtained his signatures on those documents. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied that when he alongwith Pal Singh and police were present on the spot, the accused person came from the side of Shnahjhula and on seeing the police party, he turned back and tried to escape. He also denied that on suspicion the police apprehended the accused person in their presence and at that time the accused person was also carrying a bag in his right hand. He also denied that the police had made inquiry about the name and address of the accused person in their presence and thereafter informed that it was intended to conduct personal search as well as search of his bag and if he so desired search could be arranged in the presence of the Magistrate or the gazetted officer but the accused person opted to be searched by the police on the spot in their presence. He also denied that thereafter the bag of the accused was checked in their presence from which one pink colour bag containing three nylon socks containing charas was recovered. He also denied that the charas recovered from the bag was put back into the same bag which was made into parcel and sealed with seal bearing impression "O" which was handed over to Pal Singh after its use. He also denied that NCB form in triplicate were updated in his presence. He identified his signatures on mark A, B and C. In his cross-examination, he admitted that when he reached on the spot, at that time Pal Singh was not present and he reached there after five minutes.

8. PW-3 Pal Singh deposed that on 27.6.2010, when he was coming from Nankhari, the police met him at Kuridhar near Nirath at about 6:45 PM. At that time, besides police accused Rajesh were also present. The police officials were preparing some documents. The police asked him to stop by saying that his signatures were required on some documents as they had seized charas from the accused person. Thereafter, the police obtained his signatures on some documents. He was declared hostile and cross-examined by the learned Public Prosecutor. He admitted that Pawan Katoch was also present on the spot. He denied that when they were talking to the police the accused person came from Snahjhula and on seeing the police party, he tried to flee and on suspicion, he was apprehended. He denied that the police informed the accused that it was intended to conduct his personal search and that if he so desired the search could be arranged in presence of Magistrate of gazetted officer but the accused person opted to be searched by the police on the spot in their presence vide consent memo Mark A. He also denied that bag of the accused was searched and during search, three nylon socks containing chars 2 kg. 500 gms were recovered from the bag of the accused. He also denied that the charas recovered from the bag was put back in the same bag which was made into parcel and sealed with seal bearing impression "O". He also denied that NCB form in triplicate were updated in their presence and thereafter samples of seal were drawn and the seal was handed over to him. He also denied that search and seizure memo mark B was prepared which was witnessed by him and Pawan Katoch. He admitted that consent memo Mark A, seizure memo Mark B, form mark C and sample of seal Mark G bears his signatures. He denied that he has put his signatures on all the aforesaid documents after going through its contents. In his cross-examination, he denied that the bag containing charas was recovered from the accused in his presence.

9. PW-4 SI Brij Lal, deposed the manner in which the accused was apprehended and the charas was recovered, on search from the accused. The same was put back in the bag and thereafter made into parcel which was sealed with seal impression "O". Rukka was scribed by Insp. Sangat Ram, which was sent to the Police Station through

Const. Devi Dass. In his cross-examination, he admitted that a large number of shops are situated at Nirath. According to him, Pawan Katoch and Pal Singh were already present on the spot before they reached there.

10. PW-5 HC Uttam Kumar, also deposed the manner in which the accused was apprehended and the charas was recovered, search and sealing process was completed on the spot. In his cross-examination, he admitted that no search memo about their personal search was prepared.

11. PW-8 Const. Sanjeev Kumar, deposed that on 30.6.2010, MHC PS Rampur Laiq Ram handed over one parcel having seal impression “O” alongwith the NCB form and samples of seal to him vide RC No. 64/2010. He delivered it in FSL, Junga on 1.7.2010 and obtained its receipt on the RC which he handed over to MHC.

12. PW-9 HC Laiq Ram, deposed that he recorded FIR Ext PW-9/B on the basis of rukka. On the same day at 10:35 PM Insp. Sangat Ram deposited the case property of this case alongwith the sample of seal and NCB form in triplicate in malkhana of the Police Station. He incorporated the entries in the malkhana register at Sr. No. 734. On 30.6.2010, he sent the case property to FSL Junga through Const. Sanjeev Kumar vide RC 64/2010 who after depositing the same handed over its receipt on the RC to him.

13. PW-10 const. Devi Dass, also deposed the manner in which the accused was apprehended and the charas was recovered, search and sealing process was completed on the spot. He has carried the rukka which he delivered to MHC Laiq Ram.

14. PW-11 Insp. Sangat Ram, was the I.O. He also deposed the manner in which the accused was apprehended and the charas was recovered, search and sealing process was completed on the spot. He filled up NCB form. He deposited the case property alongwith the NCB form with MHC Laiq Ram at 10:35 PM. He prepared DD 46 to this effect. The case property was produced during the recording of his statement. The seals were found intact. He identified parcel cover Ext. P-1, bag Ext. P-2, socks Ext. P-3, P-4 and P-5. In his cross-examination, he admitted that in the rukka and special report and the statements of the witnesses, there was no specific mention about option of being searched in the presence of Magistrate or the Gazetted Officer.

15. The copy of the consent is mark A. The accused was not apprised that it was his legal right to be searched before the Executive Magistrate or the Gazetted Officer. It is mandatory to apprise the accused of his legal right to be searched before the Executive Magistrate or the Gazetted Officer.

16. The police has cited two independent witnesses, PW-2 Pawan Katoch and PW-3 Pal Singh. They have not supported the case of the prosecution but they have admitted their signatures on mark A, B and C. They were declared hostile and cross-examined by the learned P.P. PW-2 Pawan Katoch has not seen the police apprehending the accused person. According to him, the police also did not make enquiry about the name and particulars of the accused. The police also did not inform the accused person that they were suspecting the accused of carrying some narcotic substance and as such, it was intended to carry his personal search and that of his bag. He denied specifically when cross-examined by the learned P.P. that he alongwith Pal Singh were present alongwith the police on the spot. He has also denied that NCB form were filled in his presence. He also denied that the charas was recovered and put back into the same bag and sealed with seal impression “O”. It was handed over to Pal Singh after its use. In his cross-examination by

the Advocate on behalf of the accused, he testified that when he reached on the spot, at that time, Pal Singh was not present and he reached after five minutes. Similarly, PW-3 Pal Singh, has not supported the case of the prosecution. He was also cross-examined by the learned Public Prosecutor. He denied that charas was recovered from the bag of the accused. He also denied that charas recovered from the bag was put into the same bag which was made into parcel and sealed with seal impression "O".

17. The case property was produced when the statement of PW-11 Sangat Ram was recorded. The copy of the malkhana register is Ext. PW-9/D. There is entry of the deposit of the contraband on 27.6.2010 and when it was received back from the FSL Junga. There is no entry when the case property was taken out from the malkhana and produced in the Court. There is no DDR recorded when the case property was produced before the trial Court. Similarly, there is no entry when the case property after production in the trial Court was re-deposited in the malkhana register. It is necessary for the prosecution to prove that the case property was taken out from the malkhana for the production in the Court and also preparing DDR to this effect and the same process is to be undergone when the case property after its production in the Court is taken back and deposited in the malkhana. There has to be entry in the malkhana register when it is re-deposited and DDR is also prepared. The production of the case property in the Court is mandatory. There is doubt whether the case property which was produced in the Court was the same which was recovered from the accused and sent to FSL, Junga in the absence of any corresponding entries made at the time of taking it and re-deposit in the malkhana register. It has caused serious prejudice to the accused. The nabbing of the accused, recovery and sealing is doubtful, since the case of the prosecution has not been supported by the independent witnesses. The accused has not been told specifically that he has legal right to be searched before the Executive Magistrate or the Gazetted Officer. The case property when produced in the Court, there is no reference who brought the case property to the Court from malkhana and by whom it was taken back.

18. Their lordships of the Hon'ble Supreme Court, in a recent decision in the case of ***Makhan Singh vrs. State of Haryana,*** reported in ***JT 2015 (4) SC 222,*** have held that it is well settled that conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In that case, it was not as if independent witnesses were not available. Independent witness PW1 and another independent witness examined as DW-2 had spoken in one voice that the accused person was taken from his residence. In such circumstances, their lordships have held that the High Court ought not to have overlooked the testimony of independent witnesses, especially when it casts doubt on the recovery and the genuineness of the prosecution version. Their lordships have held as under:

> "10. For recording the conviction, the Sessions Court as well as the High Court mainly relied on the testimony of official witnesses who made the recovery, i.e. H.C. Suraj Mal-PW2 and Inspector Raghbir Singh-PW6, and found them sufficiently strengthening the recovery of the possession from the appellant. In our considered view, the manner in which the alleged recovery has been made does not inspire confidence and undue credence has been given to the testimony of official witnesses, who are generally interested in securing the conviction. In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places at all times. Independent witnesses who live in the same village or nearby villages of the

accused are at times afraid to come and depose in favour of the prosecution. Though it is well-settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In the present case, it is not as if independent witnesses were not available. Independent witnesses PW1 and another independent witness examined as DW2 has spoken in one voice that the accused person was taken from his residence. In such circumstances, in our view, the High Court ought not to have overlooked the testimony of independent witnesses, especially when it casts doubt on the recovery and the genuineness of the prosecution version."

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 Section 20 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 26.3.2012, rendered by the learned Special Judge-II, Kinnaur at Rampur, H.P., in RBT No. 33-AR-3 of 2010/2011, is set aside. Accused is acquitted of the charges framed against him by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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

Smt. Seema Mehta …… Petitioner
Vs.
Chairman-cum-Deputy Commissioner and another ….. Respondents

CWP No. 5318 of 2013
Date of decision: 8.5.2015.

Constitution of India, 1950- Article 226- Petitioner was appointed as clerk-cum-typist in Indian Red Cross Society- she claimed regularization of her services- claim was denied by the Labour Court on the ground that Red Cross Society is not a State and the petitioner is not an employee of the State Government- held, that Red Cross Society falls within the definition of State under Article 12 of the Constitution of India- it cannot deny regularization to its employee for 26 years, whereas employees in the State Government are regularized after 7 years – petition allowed and the respondent directed to consider the case of the petitioner for regular appointment. (Para-8 to 16)

Cases referred:

Pant Raj Sachdev vs. The Indian Red Cross Society and others, 1986 (1) SLR 675

The District Red Cross Society, Sirsa vs. Radha Kishan Rajpal and another, 2005 (1) SLR, 781
Om Parkash Sharma vs. Indian Red Cross Society, Punjab and another, 2005 (3) PLR, 271
Swaran Sharma vs. State of Haryana, 2007 (4) PLR, 526

For the petitioner	:	Mr. Deepak Kaushal, Advocate.
For the respondents	:	Mr. Virender Kumar Verma, Ms. Meenakshi Sharma and Mr. Rupinder Singh, Additional Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner is aggrieved by the award passed by the learned Industrial Tribunal-cum-Labour Court, Shimla (for short 'Tribunal') dated 28.3.2013 whereby her claim for regular appointment to the post of PBX Clerk has been denied and has therefore, filed this writ petition seeking the following substantive relief:

> *"That the award dated 28.03.2013 (Annexure P-2) may kindly be quashed and set aside and same may kindly be declared illegal and the respondents may kindly be directed to give regular appointment to the petitioner in the post of PBX Clerk on regular basis as per the policy of the State."*

2. On 10.1.1989 the petitioner was appointed in Indian Red Cross Society (for short 'Society') as Clerk-cum-Typist. This appointment was given by the Deputy Commissioner, Solan in the capacity of the Chairman of the Society and the emoluments of the petitioner were fixed at Rs.750/- per month.

3. Indisputably, the petitioner has been working in the said capacity till date. The petitioner had earlier approached the Tribunal for regularization of her services and reference was decided in her favour vide award dated 16.1.2007. However, the said award was challenged by the respondents by medium of CWP No. 259 of 2007 and the matter was remitted back to the Tribunal for considering two communications annexed as Annexures R-6 and R-7, respectively. The Tribunal below vide its award dated 28.3.2013 rejected the claim of the petitioner on the ground that she is an employee of Red Cross Society, and therefore, her services cannot be regularized.

4. The petitioner has challenged this award on the ground that after having worked w.e.f. 10.1.1989, it was legitimate that her services to be regularized even if they had been rendered with the Indian Red Cross Society of which the Deputy Commissioner is the Chairman.

5. In response to the petition, the respondents in their reply have raised preliminary objection regarding maintainability of the petition and on merits, the factual averments have not been denied and the only ground to deny the claim of the petitioner is that she has never been on the pay role of the State.

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

7. The only reason which outweigh all other considerations before the Tribunal to deny the benefit of regularisation to the petitioner was that the petitioner was not an employee of the State Government and, therefore, her services could not be regularised. Even before this Court, the only contention raised by the respondents to defeat the legitimate claim of the petitioner is that respondent No.1 i.e. the Indian Red Cross Society is not the State within the meaning of Article 12 of the Constitution of India and thus is not amenable to the writ jurisdiction of this Court.

8. The issue regarding the Indian Red Cross Society being a State and amenable to writ jurisdiction is no longer *res-integra* in view of the judgment of the learned Single Judge of Punjab and Haryana High Court in ***Pant Raj Sachdev*** *vs.* ***The Indian Red Cross Society and others, 1986 (1) SLR 675,*** which in turn has been affirmed by a Division Bench of Punjab and Haryana High Court in ***The District Red Cross Society, Sirsa*** vs***. Radha Kishan Rajpal and another, 2005 (1) SLR, 781***, ***Om Parkash Sharma*** vs***. Indian Red Cross Society, Punjab and another, 2005 (3) PLR, 271***, ***Swaran Sharma*** vs***. State of Haryana, 2007 (4) PLR, 526*** and Division Bench judgment in ***Alka Ghai*** vs. ***J.R.Verma and others, LPA No. 176 of 2008,*** decided on 16.4.2009.

9. In view of the exposition of law laid down by the Punjab and Haryana High Court, it can conveniently be held that respondent No.1 is amenable to the writ jurisdiction of this Court and if that be so, it cannot shirk from its responsibility and liability for ensuring that a fair and reasonable treatment be meted out to the petitioner.

10. Indisputably, insofar as the State Government and other Boards/Corporations of the State are concerned, a decision to regularise the services of all daily waged employees after completion of seven years of service, is already in vogue, but then can the petitioner, who has rendered nearly 26 years of service be denied her legitimate claim of regularisation? Can the Red Cross Society headed by the Deputy Commissioner, indulge in exploitation on the sheer strength of its unequal bargaining power?

11. A learned Division Bench of this Court in ***LPA No. 132 of 2014*** titled ***Dr. Lok Pal vs. State of H.P.,*** decided on 18.12.2014 was seized of a similar matter where the appointment of the person was though on a consolidated salary of Rs.43000/- per month but after his appointment he was actually paid Rs.21000/- per month and the learned Division Bench held this to be exploitation on the sheer strength of the unequal bargaining power and it was held as under:

> "7. This case reflects a sorry state of affairs where the respondents on the sheer strength of its bargaining power have taken advantage of their position and imposed wholly un-equitable and unreasonable condition of employment on their prospective employees, who did not have any other choice but to accept the employment on the terms and conditions offered by the respondents. This action of the respondents is violative of Article 14 of the Constitution. Here it is apt to reproduce relevant observations of the Hon'ble Supreme Court in the celebrated decision of **Central Inland Water Transport Corporation Ltd. Vs. Brojo Nath Ganguly and another, (1986) 3 SCC 156**, which reads as under:-
>
> > "88. As seen above, apart from judicial decisions, the United States and the United Kingdom have statutorily recognized, at least in certain areas of the law of contracts, that there can be

unreasonableness (or lack of fairness, if one prefers that phrase) in a contract or a clause in a contract where there is inequality of bargaining power between the parties although arising out of circumstances not within their control or as a result of situations not of their creation. Other legal systems also permit judicial review of a contractual transaction entered into in similar circumstances. For example, section 138(2) of the German Civil Code provides that a transaction is void "when a person" exploits "the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of pecuniary advantages........which are obviously disproportionate to the performance given in return." The position according to the French law is very much the same.

89. Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth-century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample under-foot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Art. 14. This principle is that, the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the

> bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its, own facts and circumstances."

In terms of the aforesaid exposition of law, it is clear that this Court has the jurisdiction and power to strike or set aside the unfavourable term of contract of employment which purports to give effect to unreasonable bargain violating Article 14 of the Constitution.

8. The undertaking obtained from the appellant is so unfair and unreasonable that it shocks the conscious of this Court. It reflects the inequality of the bargaining power between the appellant and the respondents which emanates from the great disparity in the economic strength between the job seeker and job giver.

9. The appellant was compelled by circumstances to accept the offer made by the respondents, but then the mere acceptance of this offer would not give it a stamp of approval regarding its validity. It is an age old maxim that "*necessity knows no law*" and a person sometimes may have to succumb to pressure of the other party to bargain who is in stronger position. Although, it may not be strictly in place, but the Court cannot shut its eyes to this ground reality.

10. At this stage, it shall be apt to quote the following observations of the Hon'ble Supreme Court in ***Chairman and MD NTPC Ltd. Vs. Rashmi Construction Builders and Contractors (2004) 2 SCC 663***:-

> "28. Further, necessitas non habet legem is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position."

11. Notably the respondents herein are none other than the functionaries of the State who are expected to function like a model employer. A model employer is under an obligation to conduct itself with high probity and expected candour and the employer, who is duty bound to act as a model employer has social obligation to treat an employee in an appropriate manner so that an employee is not condemned to feel totally subservient to the situation. A model employer should not exploit its employees and take advantage of their helplessness and misery. The conduct of the respondents falls short of expectation of a model employer.

12. The Hon'ble Supreme Court in its decision in ***Bhupendra Nath Hazarika and another Vs. State of Assam and others, (2013) 2 SCC 516*** has succinctly explained this position in the following terms:-

> "61. Before parting with the case, we are compelled to reiterate the oft stated principle that the State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it. But in the present case, the State has atrophied the rules. Hence, the need for hammering the concept.
>
> 62. Almost a quarter century back, this Court in Balram Gupta V. Union of India 1987 Supp SCC 228 had observed thus: (SCC p. 236, para 13)
>
> > "13…. As a model employer the Government must conduct itself with high probity and candour with its employees."
>
> In State of Haryana V. Piara Singh (1992) 4 SCC 118 the Court had clearly stated: (SCC p. 134, para 21).
>
> > "21….The main concern of the court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16."
>
> 63. In State of Karnataka V. Umadevi (3) (2006) 4 SCC 1 (SCC P. 18, para 6) the Constitution Bench, while discussing the role of State in recruitment procedure, stated that if rules have been made under Article 3089 of the Constitution, then the Government can make appointments only in accordance with the rules, for the State is meant to be a model employer.
>
> 64. In Mehar Chand Polytechnic V. Anu Lamba (2006) 7 SCC 161 (SCC p. 166, para 16) the Court observed that public employment is a facet of right to equality envisaged under Article 16 of the Constitution of India and that the recruitment rules are framed with a view to give equal opportunity to al the citizens of India entitled for being considered for recruitment in the vacant posts.
>
> 65. We have stated the role of the State as a model employer with the fond hope that in future a deliberate disregard is not taken recourse to and deviancy of such magnitude is not adopted to frustrate the claims of the employees. It should always be borne in mind that legitimate aspirations of the employees are not guillotined and a situation is not created where hopes end in despair. Hope for everyone is gloriously precious and a model employer should not convert it to be deceitful and treacherous by playing a game of chess with their seniority. A sense of calm sensibility and concerned sincerity should be reflected in every step. An atmosphere of trust has to prevail and when the employees are absolutely sure that their trust shall not be betrayed and they shall be treated with dignified fairness then only the concept of good governance can be concretised. We say no more."

12. In view of the aforesaid decision which otherwise is binding on this Court, it can conveniently be concluded that only on account of unequal bargaining power, the

petitioner cannot be exploited. The respondent-society cannot be permitted to act with a total lack of sensitivity and indulge in 'begar', which is specifically prohibited under Article 23 of the Constitution of India.

13. Once the Deputy Commissioner is heading the Indian Red Cross Society, then there is a flavour of public element and duty attached to the office. It, therefore, is expected to be function like a model employer, who is under an obligation to conduct itself with high probity and expected candour and the employer, who is duty bound to act as a model employer has social obligation to treat an employee in an appropriate manner so that an employee is not condemned to feel totally subservient to the situation.

14. It has to be borne in mind that it is not even the case of the respondents that the petitioner has not been discharging her duties diligently, honestly and faithfully. It is also not the case of the respondents that the petitioner is lacking any qualification or has any blemished record during her employment of more than two and half decades. Rather, the Deputy Commissioner himself had sought the permission of the Government for regularizing the services of the petitioner vide communication Ex.R-7, which reads:

> *"To*
>
> *The F.C.-cum-Secretary(Revenue) to the*
> *Government of Himachal Pradesh.*
>
> *Subject: Representation regarding regularisation of services of the employees of the Red Cross Society Distt. Branch, Solan, Distt. Solan, in accordance with the policy of the State Govt. and in the light of the decisions Court of India.*
>
> *Sir,*
>
> *Kindly refer to your office letter No. Rev.A(B)1- 12/2002(SLN) dated 10.2.2003 on the above cited subject.*
>
> *In this connection, I have the honour to say that reply in this regard has already been sent to your office vide this office letter No. Estt./4-4/72 dated 27.10.2001, (Copy enclosed) further it is intimated that Smt. Seema Devi was appointed as Clerk on 10.1.89 by the Indian Red Cross Society, Solan Branch @ Rs.750/- now which has been increased @ Rs.3000/- per month. She is continuing her service in this society since 10.1.89 but she has not been regularised by the said Society till date.*
>
> *You are, therefore, requested to consider her case sympathetically for regularisation of her service. At present 14 posts of Clerks are lying vacant in this office and this office has no objection if her service are regularised against the vacant post of Clerk.*
>
> *Sd/-*
> *For Deputy Commissioner,*
> *Solan."*

15. Once the Deputy Commissioner, Solan, being the Chairman of respondent No.1-Society, himself has recommended the case of the petitioner for regularisation, it does not stand to reason that now he can turn around and oppose the same.

16. In view of the aforesaid discussion, I find merit in this petition and accordingly the award passed by the learned Tribunal below dated 28.3.2013 is quashed and set-aside and the respondents are directed to consider the case of the petitioner for regular appointment to the post of PBX Clerk on the pattern of State Government with all actual consequential benefits. The parties are left to bear their own costs.

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

Smt. Shankari Devi …… Petitioner
Vs.
State of H.P. & ors. ….. Respondents

CWP No. 2074 of 2008
Date of decision: 8.5.2015.

Constitution of India, 1950- Article 226- Petitioner was appointed as Part Time Water Carrier- her services were terminated- petitioner claimed that no notice was served upon her prior to the termination of her services – respondent stated that date of birth of the petitioner was recorded as 1940 in the family register- therefore, she had attained the age of superannuation even prior to her appointment- when this fact came to the notice of the respondent, petitioner was retired from the services- held, that order retiring the services of the petitioner involved civil consequences, therefore, a notice was required to be served upon the petitioner prior to the passing of the order- since no notice was served upon the petitioner, therefore, petition allowed and the order passed by the respondent set aside.
(Para-6 to 10)

Case referred:
P.D. Dinakran (1) vs. Judges Inquiry Committee and others (2011) 8 SCC 380

For the petitioner	:	Mr. Dalip K. Sharma, Advocate.
For the respondents	:	Mr. Virender Kumar Verma, Ms. Meenakshi Sharma and Mr. Rupinder Singh, Additional Advocate Generals.

The following judgment of the Court was delivered:

<u>Tarlok Singh Chauhan, Judge (Oral).</u>

The petitioner is aggrieved by the order dated 26.9.2008 whereby her services came to be terminated and has filed the present writ petition claiming therein the following substantive reliefs:

(a) That a writ of certiorari may be issued for quashing and setting aside the impugned order dated 26.9.2008 whereby the services of the petitioner has been terminated without any notice/reasons/show cause, in the interest of justice and fair play.

(b) That writ of mandamus may be issued directing the respondent to allow the petitioner to perform her duties Govt. Primary School, Kuftoo, Tehsil Kandaghat, District Solan, H.P.

2. The facts lie in narrow campus. The petitioner applied for the post of Part Time Water Carrier and on 19.5.2000 was appointed in Govt. Primary School, Kuftoo. She joined her services on 22.5.2000. However, her services came to be terminated on 26.9.2008. The precise grievance of the petitioner is that before terminating her services, no notice/reasons/show cause notice was issued to her and she is not even aware as to why and on what basis her services came to be terminated.

3. The respondents in their reply have stated that as per the information received from the Block Primary Education Officer, Kandaghat, the petitioner's date of birth in the family register was entered as 1940 and, therefore, she had attained the age of superannuation even prior to her appointment and when this fact came to the notice of the department, the petitioner was retired from service on 26.9.2008.

4. When the matter came up for consideration on 27.10.2008, it passed the following orders:

> "**<u>CWP No. 2074 of 2008</u>**
>
> *Heard Mr. Dalip Kumar Sharma, learned counsel for the petitioner . Issue notice. Notice on behalf of respondents No. 1 to 5 is being accepted by learned Advocate General. Necessary instructions have to be obtained by learned Advocate General by 3.11.2008 to apprise this Court whether notice before termination in terms of the conditions of appointment letter was given to the petitioner or not. Liberty is also given to file short reply by the learned Advocate General."*

5. In compliance to the above directions, respondents filed affidavit, the copy whereof is though not available on the record but however, learned counsel for the petitioner has made available a copy thereof which shall now form part and parcel of the records of this case. Para-2 of the reply affidavit reads thus:

> *"That in this regard it is submitted that as per the information received from the Block Elementary Education Officer, Kandaghat, i.e. respondent No.4, the petitioner Smt. Shankari Devi was working as part time water carrier in Govt. Primary School, Kuftoo, as per entry of the family register of Gram Panchayat, Podhana, her date of birth is entered 1940, therefore, she was retired on 26.09.2008 on superannuation. This fact is also clear from Annexure P/7, wherein word retired in Hindi is also written. So there was no need to issue notice to her."*

6. The moot question which arises for consideration is as to whether the services of the petitioner could have been terminated/ retired from service in the manner aforesaid? Has not the impugned order visited her with civil and evil consequences? Was not the petitioner required to be afforded atleast a reasonable opportunity of being heard before the impugned order could have been passed?

7. The natural justice is a branch of public law. It is a formidable weapon which can be wielded to secure justice to citizens. Rules of natural Justice are 'basic Values' which a man has cherished throughout the ages. Principles of natural justice control all actions of

public authorities by applying rules relating to reasonableness, good faith and justice, equity and good conscience. Natural justice is a part of law which relates to administration of justice. Rules of natural justice are indeed great assurances of justice and fairness. The underline object of rules of natural justice is to ensure fundamental liabilities and rights of citizens. They thus served public interest. The golden rule which stand firmly established is the doctrine of natural justice is not only to secure justice but to prevent miscarriage of justice.

8. Treaties on the subject is the judgment of the Hon'ble Supreme Court in ***P.D. Dinakran (1)*** *vs*. ***Judges Inquiry Committee and others (2011) 8 SCC 380,*** wherein the Hon'ble Supreme Court held as under:

> *"32. The traditional English Law recognised the following two principles of natural justice:*
>
> > *"(a) "Nemo debet esse judex in propria causa: No man shall be a judge in his own cause, or no man can act as both at the one and the same time - a party or a suitor and also as a judge, or the deciding authority must be impartial and without bias; and*
> >
> > *(b) Audi alteram partem: Hear the other side, or both the sides must be heard, or no man should be condemned unheard, or that there must be fairness on the part of the deciding authority."*
>
> *However, over the years, the Courts through out the world have discovered new facets of the rules of natural justice and applied them to judicial, quasi-judicial and even administrative actions/decisions. At the same time, the Courts have repeatedly emphasized that the rules of natural justice are flexible and their application depends upon the facts of a given case and the statutory provisions, if any, applicable, nature of the right which may be affected and the consequences which may follow due to violation of the rules of natural justice.*
>
> *33. In Russel v. Duke of Norfolk (1949) 1 All ER 109, (CA), Tucker, L.J. observed: (All ER p.118 D-E)*
>
> > *"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."*
>
> *34. In Byrne v. Kinematograph Renters Society Limited (1958) 2 All ER 579, Lord Harman made the following observations: (WLR p. 784)*
>
> > *"What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more."*

35. *In Union of India v. P.K. Roy AIR 1968 SC 850, Ramaswami, J. observed: (AIR p.858, para 11)*

> *" 11. ….The extent and application of the doctrine of natural justice cannot be imprisoned within the strait-jacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case."*

36. In Suresh Koshy George v. University of Kerala AIR 1969 SC 198, K.S. Hegde, J. observed: (AIR p.201, para 7)

> *"7. …….The rules of natural justice are not embodied rules. The question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point, the constitution of the Tribunal and the rules under which it functions."*

37. A.K. Kraipak v. Union of India (1969) 2 SCC 262 represents an important milestone in the field of administrative law. The question which came up for consideration by the Constitution Bench was whether Naqishbund who was a candidate seeking selection for appointment to the All India Forest Service was disqualified from being a member of the selection board. One of the issues considered by the Court was whether the rules of natural justice were applicable to purely administrative action. After noticing some precedents on the subject, the Court held: (SCC pp. 268-69, para 13)

> *" 13. The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the rule of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi- judicial power."*

38. The Court then considered whether the rules of natural justice were applicable to a case involving selection for appointment to a particular service. The learned Attorney General argued that the rules of natural justice were not applicable to the process of selection. The Constitution Bench referred to the judgments of the Queen's Bench in re H.K. (An infant) (1967) 2 QB 617 and of this Court in State of Orissa v. Dr.(Miss) Binapani Dei (1967) 2 SCR 625 and observed: (A.K. Kraipak case, SCC pp. 272-73, para 20)

> *"20. The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely: (1) no one shall be a judge in his own case (Nemo debet esse judex propria causa) and (2) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem) . Ver y soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi- judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi- judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in Suresh Koshy George v. University of Kerala the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case." (emphasis supplied)*

39. In Maneka Gandhi v. Union of India (supra), a larger Bench of seven Judges considered whether passport of the petitioner could be impounded without giving her notice and opportunity of hearing. Bhagwati, J, speaking for himself and for Untwalia and Fazal Ali, JJ, gave a new dimension to the rule of audi alteram partem and declared that an action taken in violation of

that rule is arbitrary and violative of Articles 14 and 21 of the Constitution. The learned Judge referred to Ridge v. Baldwin (1964) AC 40, State of Orissa v. Dr.(Miss) Binapani Dei (supra), In re H.K.(An Infant) (supra) and A.K. Kraipak v. Union of India (supra) and observed: (Maneka Gandhi case, SCC pp. 291-92, para 14)

> *"14. ....The audi alteram partem rule is intended to inject justice into the law and it cannot be applied to defeat the ends of justice, or to make the law "lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation". Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the audi alteram partem rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands. But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excluded. The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. .....A fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice and a provision requiring giving of such opportunity to the person concerned can and should be read by implication in the Passports Act, 1967. If such a provision were held to be incorporated in the Passports Act, 1967 by necessary implication, as we hold it must be, the procedure prescribed by the Act for impounding a passport would be right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness. We must, therefore, hold that the procedure "established" by the Passports Act, 1967 for impounding a passport is in conformity with the requirement of Article 21 and does not fall foul of that article."*

40. In Olga Tellis v. Bombay Municipal Corporation (1985) 3 SCC 545, the Constitution Bench dealt with the question whether pavement and slum dwellers could be evicted without being heard. After adverting to various

precedents on the subject, Chandrachud, C.J. observed: (SCC pp. 577-78, para 40)

> *"40. Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right, in this case the right to life, must conform to the norms of justice and fairplay. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: the action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it. Sir Raymond Evershed says that, "from the point of view of the ordinary citizen, it is the procedure that will most strongly weigh with him. He will tend to form his judgment of the excellence or otherwise of the legal system from his personal knowledge and experience in seeing the legal machine at work". Therefore, 'He that takes the procedural sword shall perish with the sword.' "*

9. In view of the aforesaid exposition of law, the impugned action/order of the respondents cannot be sustained as the same is not only violative of principles of natural justice but also fair play. The least which was expected from the respondents was to serve a show cause notice upon the petitioner calling for her explanation and it was only after hearing the petitioner that her services could have been terminated that too if so warranted. Therefore, this Court has no option but to quash and set-aside the order dated 26.9.2008.

10. Accordingly, the writ petition is allowed and the order dated 26.9.2008 whereby the petitioner was ordered to be retired is quashed and set-aside. The petitioner shall be deemed to continue in service on the basis of her date of birth as reflected in the medical certificate of fitness (Annexure P-6) or till such time when the respondents hold an inquiry and establish the date of birth of the petitioner to be at variance to what is reflected in Annexure P-6. Since the petitioner's services have been illegally retired, she shall be entitled to all consequential benefits including arrears which shall be paid to her within a period of eight weeks, failing which, the respondents shall also be liable to pay interest on this amount at the rate of 9% per annum.

11. The writ petition is disposed of in the aforesaid terms, so also the pending application(s), if any.

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

Shashi Kant. ....Petitioner
Versus
State of H.P. ....Non-petitioner.

Cr.MMO No. 116 of 2015
Decided on: 8.5.2015.

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition against the anticipatory bail order passed by Sessions Judge, Shimla- Additional Advocate General submitted that he has no objection in case the word 'H.P. State' mentioned in para-5 of the order is deleted and the word 'India' is ordered to be incorporated- therefore, the word 'H.P. State' mentioned in the order be deleted and word 'India' be incorporated.

For the petitioner : Mr. Vishal Aggarwal & Sanjay Sharma, Advocates.
For the non-petitioner : Mr. M.L. Chauhan Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Petition filed under Section 482 Cr.P.C. against the anticipatory bail order passed by the learned Sessions Judge Shimla H.P. on 4.5.2015 in Criminal Bail Application No. 59-8/22 of 2015. Notice. At this stage learned Additional Advocate General appears and waives service of notice on behalf of the respondent. Learned Additional Advocate General submitted that he does not want to file any reply and he has no objection if the word H.P. State mentioned in para-5 of order dated 4.5.2015 is deleted and word India is incorporated. In view of the above stated facts and in view of the express provision mentioned under Section 438 (2) (iii) Cr.P.C. petition filed under Section 482 Cr.P.C. is allowed in the ends of justice and word H.P. State mentioned at Sr. No. (iv) of para-5 of the order dated 4.5.2015 is ordered to be deleted and word India is ordered to be incorporated. Order passed by the learned Sessions Judge Shimla dated 4.5.2015 in Criminal Bail Application No. 59-8/22 of 2015 is modified to this extent only. Petition disposed of. Pending applications if any also disposed of. Dasti copy.

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

Lashkari Ram ...... Petitioner.
Vs.
State of H.P. & anr. ..... Respondents

Cr.MMO No. 56 of 2015.
Judgement reserved on: 7.5.2015.
Date of decision: 11.5.2015.

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition for quashing the FIR registered against him- respondent contended that final report has been presented before the Court; therefore, petition is not maintainable- petitioner contended that the dispute is essentially of a civil nature and is given a cloak of a criminal case, therefore, Court has jurisdiction to quash the criminal proceedings- held, that complaint can be quashed where a dispute is predominately of a civil nature and not when the allegation against the petitioner constitutes a criminal offence - these principles cannot be made applicable when a prima facie case is made out against the petitioner, which has culminated into a charge-sheet- only the Court where the charge-sheet has been filed should be left to deal with the same- petition dismissed. (Para- 3 to 11)

Case referred:

Nancy Bhatt & another Vs. State of H.P. and another, ILR, H.P. Volume XLV- II, 2015, Page 550

Paramjeet Batra vs. State of Uttarakhand and others (2013) 11 SCC 673

For the petitioner	:	Mr. Subhash Sharma, Advocate.
For the respondents :		Mr. Virender Kumar Verma, Ms. Meenakshi Sharma and Mr. Rupinder Singh, Addl. A.Gs. for respondent No. 1. Mr. Ashok Verma, Advocate, for respondent No.2. Mr. Pyare Lal, HC No. 21, Police Station, Bharari, Distt. Bilaspur.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioner has prayed for quashing of FIR No. 61/2014 dated 9.6.2014, under sections 354, 451, 506 IPC registered against him at Police Station, Bharari, District Bilaspur, H.P.

2. It is contended that because of a civil dispute, inter se, the parties, a false case has been filed against the petitioner.

3. A preliminary objection has been raised by the respondent regarding the very maintainability of this petition in view of final report having been presented before the Magistrate. In support of his contention, the respondent has relied upon a judgement of this court in **Cr.MMO No. 183 of 2014** titled **Nancy Bhatt & another** vs. **State of H.P. decided on 6.4.2015**, where like in the present case the final report had been presented and this court held as follows:-

> "2. A preliminary objection has been raised by the respondents that once the FIR has culminated in charge-sheet, the present petition has been rendered infructuous, because it is not the FIR but the chargesheet which forms the basis of criminal trial.
>
> 3. I have heard learned counsel for the parties and gone through the records of the case carefully.

4. In ***State of Punjab vs. Dharam Vir Singh Jethi 1994 SCC (Cri.) 500***, the Hon'ble Supreme Court held that when the chargesheet was submitted, quashing of FIR is not permissible since it would be open to the Court to refuse to frame charge. It was observed as under:

> *"2. Heard learned counsel for the State as well as the contesting respondent. We are afraid that the High Court was not right in quashing the First Information Report on the plea that the said respondent had no role to play and was never the custodian of the paddy in question. In fact it was averred in the counter-affidavit filed in the High Court that the said respondent had acted in collusion with Kashmira Singh resulting in the latter misappropriating the paddy in question. At the relevant point of time the respondent concerned, it is alleged, was in overall charge of the Government Seed Farm, Trehan. This allegation forms the basis of the involvement of the respondent concerned. The High Court was, therefore, wrong in saying that the respondent concerned had no role to play. A specific role is assigned to him, it may be proved or may fail. In any case, pursuant to the First Information Report the investigation was undertaken and a charge sheet or a police report under Section 173(2) of the Code of Criminal Procedure was filed in the court. If the investigation papers annexed to the charge sheet do not disclose the commission of any crime by the respondent concerned, it would be open to the court to refuse to frame a charge, but quashing of the First Information Report was not permissible.*

5. In ***Vineet Narain and others*** vs. ***Union of India and another (1996) 2 SCC 199,*** the Supreme Court after refusing to quash the FIR, held that when a chargesheet was filed in the competent Court, it is that Court alone which will then deal with the case on merits, in accordance with law.

6. This legal position has been reiterated in number of cases. (See: ***Anukul Chandra Pradhan vs. Union of India and others (1996) 6 SCC 354*** and ***Jakia Nasim Ahesan and another vs. State of Gujarat and others (2011) 12 SCC 302).***

7. Admittedly the FIR is not a substantive piece of evidence. It is information of a cognizable offence given under Section 154 of the Code of Criminal Procedure (for short 'Code'). The legislature in its wisdom under the provisions of the Code has given limited/restrictive power to the Court to intervene at the stage of investigation by the police. Investigation is the exclusive domain of the police. Ordinarily, it is only when the charge sheet is filed that the Court is empowered either to take cognizance and to frame charge or to refuse to do the same.

8. The FIR is the sheet anchor on the basis of which the investigation ensues. However, once the FIR on the basis of which the investigation was initiated has culminated into a chargesheet, the FIR does not remain the sheet anchor because the same alone then cannot be read and has to be read along with the material gathered by the investigating agency during the course of the investigation.

> 9. It would, therefore, not be permissible for this Court to quash the FIR or else that would amount to annihilating a still born prosecution by going into the merits on the plea of proof of the prima facie case. Further, adverting to those facts and giving findings on merits would otherwise result in the grossest error of law because this Court in exercise of its jurisdiction under Section 482 of the Code cannot undertake pre-trial of a criminal case."

4. On the other hand, the learned counsel for the petitioner would argue that once the dispute is essentially of a civil nature and is given a cloak of a criminal offence, then court has every jurisdiction to quash the criminal proceedings irrespective of its stage. In support of his submission, the learned counsel has relied upon the judgement of the Hon'ble Supreme Court in **Paramjeet Batra** vs. **State of Uttarakhand and others (2013) 11 SCC 673,** wherein it was held as follows:-

> "12. While exercising its jurisdiction under Section 482 of the Code the High Court has to be cautious. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any court or otherwise to secure ends of justice. Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High Court. A complaint disclosing civil transactions may also have a criminal texture. But the High Court must see whether a dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted as has happened in this case, the High Court should not hesitate to quash criminal proceedings to prevent abuse of process of court."

5. There is no quarrel with the proposition as canvassed by Sh. Subhash Sharma, learned counsel for the petitioner but the same will only apply in case the dispute would have been predominately of a civil nature, but then the allegations constituting the offence, under sections 354, 451 and 506 IPC can by no stretch of imagination be termed to be constituting an offence of civil nature.

6. The Hon'ble Supreme Court in **Paramjeet Batra's** case (supra) was seized of the matter which involved monetary consideration and a civil suit making similar grievance had already been filed and was pending adjudication. It is in this background that the observations as reproduced hereinabove were made by the Hon'ble Supreme Court. Whereas in the present case there are specific allegations against the petitioner which when taken on the face value, constitute an offence punishable under law.

7. The prosecutrix in her statement under section 154 Cr.P.C. has specifically stated that on 9.6.2014 at about 11 a.m. when she was all alone in the courtyard and washing clothes then the petitioner came there and threatened her that she should advise her husband not to set his eyes on the land or else he alongwith his son would kill him. Thereafter with the bad intention he caught hold of the prosecutrix and pushed her because of which she sustained injuries on her left leg as the same struck against the stairs resulting in further injuries to her knee. This statement of the prosecutrix is further corroborated by the Medico Legal Certificates (MLCs).

8. Though the learned counsel for the petitioner would argue that because the prosecutrix is a Staff Nurse, therefore, she has manipulated the MLCs and it was on the basis of such false documents that petitioner is sought to be involved in the present case.

9. The mere fact that prosecutrix is working as Staff Nurse would not in itself establish that MLCs are in any way false, however, these are the matters which are required to be considered during the course of the trial and at present the court is only required to consider the allegations as contained in the First Information Report and the final report, which as observed earlier, prima-facie, indicate and make out the commission of offence for which the petitioner has been charged.

10. In addition to the aforesaid, it would be noticed that after the investigation, the petitioner has not been charged with for lesser offence, but has been charged with this very offence for which he had been booked at the time of registration of FIR. That apart, the petitioner cannot take any advantage of the pendency of civil proceedings, because admittedly the civil proceedings were instituted after the registration of the FIR, that too, at the instance of the opposite party. The FIR in question was registered on 9.6.2014 while the civil suit came to be filed exactly after one month on 8.7.2014.

11. Having said so, I find no merit in this petition and the same is dismissed.

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

Nek Ram ...Petitioner
Versus
Financial Commissioner (Appeals) and others ...Respondents

CWP No. 2763 of 2014
Date of decision: 11.5.2015

Code of Civil Procedure, 1908 - Order 9 Rule 9- Petitioner was ordered to be ejected by Assistant Collector 1st Grade, Mandi- he filed an appeal, which was dismissed in default for non-appearance- an application for restoration of appeal was filed, which was dismissed on the ground that it was filed after two years and three months - this order was challenged unsuccessfully in appeal and revision- held, that length of delay is not a decisive factor for condonation for delay, but sufficiency of satisfactory explanation is a material factor- petitioner had hired an advocate and he cannot be penalized for non-appearance of the advocate- authorities had not gone into the sufficiency of the explanation offered by the petitioner- further, application for restoration was decided after 10 years- hence, petition allowed and case remanded with a direction to decide the same afresh after giving reasons.

(Para-3 to 11)

Cases referred:

State of Punjab Vs. Shamlal Murari, AIR 1976 S.C. 1177
Sital Prasad Saxena Vs. Union of India and others, AIR 1985 SC 1
Collector, Land Acquisition Anantnag Vs. Katiji, AIR 1987 SC 1353
Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (dead) by LRS and others, (2008) 8 SCC 321

For the Petitioner: Mr. Surinder Saklani, Advocate.
For the Respondents: Mr.Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (Oral).

Facts in brief, as are necessary for the adjudication of this writ petition are that, proceeding under Section 163 of the H.P. Land Revenue Act were initiated against the petitioner by Assistant Collector Ist Grade, Mandi and vide order dated 5.1.1993, the petitioner was ordered to be evicted. This order was challenged by the petitioner before the Sub Divisional Collector, Sadar, Mandi on various grounds, however, before the appeal could be heard on merits, the same was dismissed in default on 3.10.2000. Application for restoration came to be filed on 27.1.2003. However, the matter remained pending before respondent No. 3 and ultimately vide order dated 20.1.2012, this application for restoration was rejected. The petitioner filed appeal before the Divisional Commissioner, Mandi, who too dismissed the same and left with no other option he approached the Financial Commissioner, who too dismissed the Revision Petition. It is these orders, which have been challenged by the petitioner before this Court on the grounds that the authorities below should not have dismissed the appeal on mere technicalities and should have decide the case on merits.

2. In response to the petition, the respondents in their reply supported the impugned orders and have further contended that the petitioner for his lapses cannot blame the respondents. It is further contended that ample opportunity was afforded to the petitioner for being heard and sufficient time had been granted to him to defend the matter in the Courts below and the present petition has been filed only to prolong the eviction proceedings.

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

3. A perusal of the impugned orders would show that all the authorities below have been influenced by the fact that the application for restoration had been moved after more than two years and three months, little realizing that the decisive factor in condonation of delay, is not the length of delay, but sufficiency of satisfactory explanation. The legislature has conferred the power to condone delay to enable the authorities to do substantial justice to the parties by disposing of the mattes on merits. The authorities below appear to be oblivious and were expected to bear in mind that ordinarily the applicant applying for condonation of delay does not stand to benefit by lodging his claim late. Refusing to condone delay can result in meritorious matters to be thrown out at the very thresh hold and cause of justice being defeated.

4. It also cannot be lost site that a party, who as per the present adversary legal system, has selected his advocate, briefed him and paid his fee can remain supremely confident that his lawyer will look after his interest and such an innocent party who has done everything in his power has expected of him, should not suffer for the inaction, omission or misdemeanor of his counsel.

5. The procedural rules have to be liberally construed, and care must be taken, that so strict interpretation be not placed thereon, whereby, technicality may tend to

triumph over justice. It has to be kept in mind, that an overly strict construction of procedural provisions, may result in the stifling the best case of a party, even if, for adequate reasons, which may be beyond its control.

6. It has to be remembered that procedural law is not an obstruction, but an aid to justice. Procedural prescriptions are the hand-maid and not the mistress, a lubricant, not a resistant, in the administration of justice. If the breach can be corrected, without injury to the just disposal of a case, regulatory requirement should not be enthroned into a dominant desideratum. Above all, it has to be remembered that the object of Courts and Tribunals is to dispense justice, and not to wreck the end result, on technicalities.

7. In ***State of Punjab Vs. Shamlal Murari,*** *AIR 1976 S.C. 1177,* it was laid down by the Hon'ble Supreme Court as follows:-

> *"Procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the hand-maid and not the mistress, a lubricant, not a resistant in the administrations of justice.... After all, Courts are to do justice, not to wreck this end product on technicalities."*

In ***Sital Prasad Saxena Vs. Union of India and others,*** *AIR 1985 SC 1,* while dealing the question of abatement under Order XXII of the Code and allowing substitution at the Supreme Court state, it was laid down as follows:

> *"Let it be recalled what has been said umpteen times that rules of procedure are designed to advance justice and should be so interpreted and not to make them penal statutes for punishing erring parties."*

In ***Collector, Land Acquisition Anantnag Vs. Katiji,*** *AIR 1987 SC 1353,* the Hon'ble Supreme Court has observed as follows:-

> *"When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested rights in injustice being done because of a non-deliberate delay."*
>
> *xxxxxxx "It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."*

8. In ***Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (dead) by LRS and others,*** *(2008) 8 SCC 321*, the Hon'ble Supreme Court taking into consideration the law on the subject and laid down the following principles:-

> *"**13.** The principles applicable in considering applications for setting aside abatement may thus be summarized as follows:*
>
> *(i) The word "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words "sufficient cause" in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory*

tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refilling the appeal after rectification of defects.

(v) Want of "diligence" or "inaction" can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an application is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal."

9. In view of the aforesaid exposition of law, it can be conveniently held that the expression "sufficient cause" has to be liberally interpreted and there is no presumption that the delay is occasioned deliberately or on account of culpable negligence or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. In such circumstances, the approach of the authorities should be justice-oriented so as to advance the cause of justice and mere delay should not defeat the cause of justice. It is well settled that in matters of condonation of delay highly pedantic approach should be eschewed and justice-oriented approach should be adopted. Every endeavor has to be made to ensure that a party is not made to suffer on account of technicalities.

10. As already observed earlier, none of the authorities have gone into the sufficiency of the explanation offered by the petitioner and have been much influenced by the so called "inordinate delay" in filing of the application for restoration of appeal.

11. There is yet another disturbing feature of this case. The appeal was filed before the Sub Divisional Collector on 4.3.2010 and was dismissed in default on 3.10.2000. The application for restoration was filed on 27.1.2003, but then it took the Sub Divisional Collector nearly ten years i.e. 20.1.2012 to decide the same, that too by rendering self contradictory observations, inasmuch as in the earlier part of the order it appears that the

application for restoration was accepted and allowed, while in the next paragraph he rejects the application, that too by holding that the petitioner had not appeared intentionally. The relevant portion of the order is quoted below:-

> *"Feeling aggrieved and dissatisfied with the order of AC 1st Grade Tehsil Sadar the appellant preferred appeal before this court alleging therein that the Kanungo as well as the AC Ist Grade have not inspected the spot in the presence of the appellant. He also alleged that he has not been afforded an opportunity of being heard. Moreover the appellant has not been allowed to lead the evidence in order to establish his case and as such the learned court below has passed wrong and illegal order which is liable to be set aside. The appeal was dismissed in default on 3.10.2000 and the appellant has filed an application under order 9 rule 9(1) read with section 151 C.P.C. for restoration of appeal which was accepted and allowed.*
>
> *I have heard the ld. counsel for appellant and also gone through the lower court record and also record file of this court carefully. It has been found that the ld. counsel for the appellant appeared in the court regularly. The ld. counsel was given last opportunity to put forward his arguments on dated 29.03.2000. But inspite this fact, he did not appear intentionally on the said date. Hence application is rejected. A copy of this order be sent to the AC Ist Grade Tehsil Sadar Mandi District Mandi for compliance. Case file along with original file be consigned to GRR after due completion."*

That apart, it is also not understood as to from where the Collector has concluded that the petitioner had not appeared intentionally on 3.10.2000 when the case had been dismissed in default. Before arriving at such a conclusion, it was incumbent upon the Collector to have recorded reasons for the same.

12. In view of the detailed discussion above, I find merit in this petition and the same is accordingly allowed and the orders as contained in Annexures P-1 to P-4 are quashed and set aside and the matter is remanded to the Sub Divisional Collector, Sadar, District Mandi for decision afresh. Since these proceedings are pending for more than two decades, the Sub Divisional Collector is directed to decide the proceedings as expeditiously as possible and in no event later then **15th July, 2015**. The parties are left to bear their costs.

****

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

Hardeep Singh ……Appellant.

Versus

State of H.P. …….Respondent.

Cr. Appeal No. 396 of 2012
Reserved on: May 08, 2015.
Decided on: May 12, 2015.

N.D.P.S. Act, 1985- Section 15- 138.500 kg of poppy husk was found in the vehicle of accused - PW-1 to PW-3 did not support the prosecution version- all the seals were not

found intact in the Court- no entry was made regarding taking out of the case property from Malkhana and depositing it - held, that in these circumstances, prosecution had failed to prove that contraband was recovered from exclusive and conscious possession of the accused- accused acquitted. (Para-23 to 26)

Case referred:

Makhan Singh vrs. State of Haryana, JT 2015 (4) SC 222

For the appellant:	Mr. Vivek Sharma, Advocate, vice Mr. Satyen Vaidya, Advocate.
For the respondent:	Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 16.7.2012, rendered by the learned Special Judge, FTC, Una, H.P, in Sessions Case No. 12-VII-2011, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs. 1,00,000/- and in default of payment of fine, he was further ordered to undergo rigorous imprisonment for six months.

2. The case of the prosecution, in a nut shell, is that on 16.1.2011 at about 4:20 AM, the police officials, namely, SI Shakti Singh alongwith ASI Sewa Singh and others were on patrolling in Govt. vehicle No. HP -20-C-0507. It was driven by Const. Rakesh Kumar from Haroli to Tahliwal side. HC Sanjay Kumar met the police party and got his statement Ext. PW-7/A recorded with SHO to the effect that when he was present at Tahliwal near Haroli road Chowk at about 4:10 AM, he received telephonic information about the indulgence of accused Hardeep Singh in illegal business of selling poppy husk and he has gone towards Hoshiarpur in his Car No. PB-08W-4849 for bringing contraband and accused often use Nhai Da Mour to Palkwah road for bringing the contraband and if naka is laid at Nichla road, he can be caught red handed. The information was well founded and trustworthy. Accordingly, the statement of HC Sanjay Kumar was sent to PS on the basis of which FIR Ext. PW-7/B was registered. Report Ext. PW-8/A under Section 42 (1)(ii) was prepared and sent to SP, Una through Const. Sanjay Kumar. Naka was laid near Nichla Palkwah road to Bhai da Mour and at about 5:30 AM, a car bearing No. PB-08W-4849 came from Bhai da mour side which was stopped. Accused was found in the vehicle. He disclosed his name as Hardeep Singh and consent memo Ext. PW-5/A under Section 50 was prepared and HC Sanjay Kumar was sent to bring the Pradhan of the Gram Panchayat. In the presence of the accused, vehicle was searched leading to recovery of four plastic sacks from its dicky. No independent witness was available on the spot and local witnesses were arranged. In the morning at about 7:40 AM, after arranging the electronic weighing scale, the sacks were checked and on smelling sacks were found to be containing poppy husk. The contraband was weighed in the presence of witnesses Heera Devi and Sandeep Kumar. Sack No. 1 contained 33.620 kg, 2nd sack contained 34.970 kg, 3rd sack contained 35.110 kg and 4th sack contained 38.800 kg. The total weight of the contraband was found to be

138.500 kgs. All the sacks were made homogeneous and four samples of 1 kg each Ext. SB-1 to SB-4 were taken. The samples and bulks were sealed with seal impression “J” and sample seal was separately drawn as Ext. PW-2/A on a piece of cloth. The IO filled in column Nos. 1 to 8 of the NCB forms. The seal was entrusted to witnesses Heera Devi and sack were marked as B-1 to B-4. Sacks, samples, vehicle, NCB forms and sample seal were taken into possession vide memo Ext. PW-2/B. The IO prepared the spot map. The accused was arrested and searched. The contraband was produced before SI Baldev Ram, who resealed the case property with seal “K”. Special report was sent to the SP, Una. On 26.2.2011, IO moved an application Ext. PW-15/A before the learned JMIC, who prepared inventory Ext. PW-15/C. Samples were sent to chemical analysis and report was obtained. 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 21 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case and has pleaded ignorance. The learned trial Court convicted the accused, as noticed hereinabove.

4. Mr. Vivek 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. Ramesh Thakur, Asstt. AG, for the State has supported the judgment of the learned trial Court dated 16.7.2012.

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

6. PW-1 Satnam Singh, deposed that he did not remain associated with the investigation of this case nor any RC and insurance of Car was taken into possession by the police in his presence. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he denied that recovery memo Ext. PW-1/A was prepared in his presence. He volunteered that the police obtained his signatures on blank papers. He admitted that RC Ext. PA and insurance Ext. PB are the same which he had seen in the Police Station. He admitted that he put his signatures on memo Ext. PW-1/A after reading and understanding its contents.

7. PW-2 Heera Devi, deposed that she saw the accused inside the vehicle. Nothing has happened in her presence. She saw four sacks kept outside the vehicle lying on the road. She was declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination, she denied that accused had told his name in her presence to the police. Volunteered that accusedmay have told his name as Hardeep alias Sonu to the police before she reached at the spot. She denied that the police told her that they wanted vehicle to be searched in her presence. She denied that boy named Sandeep Kumar was also present at the spot. Volunteered that many people had gathered on the spot at that time. She denied that Sandeep Kumar and ASI Sewa Singh were associated in the investigation as witnesses. She denied that Dicky of the car was opened by the accused in her presence and four plastic sacks containing contraband were recovered. She denied that the police checked the sacks. Volunteered that one police official put his hand in the sack to check the material contained therein. She admitted that the police told her that contraband was poppy husk. She denied that the police got weighing scale and weighed the contraband in her presence. She admitted that the contraband was weighed by police in her presence. Volunteered that she did not notice the exact weight of the sacks and she saw the

police weighing one sack only. She denied that the police had taken out the samples of contraband from each bag weighing 1 kg each. She deposed that samples were already prepared by the police in cloth parcel. She also denied that the police marked sacks with marks B-1 to B-4 in her presence. She also denied that cloth parcels containing samples of contraband were marked as mark SB-1 to SB-4. She did not know if sealed parcels containing samples of contraband were sealed with seal "J". She denied that the police has filled in NCB forms in her presence and put sample seal on the same and thereafter the seal was given to her. She denied that the police took into possession Ceilo Car PB-08-W-4849 alongwith four sacks of contraband, samples, NCB forms vide memo Ext. PW-2/B. Volunteered that the police obtained her signatures on the already prepared memo. She identified her signatures on memo Ext. PW-2/A. When her statement was recorded, the prosecution has produced four cloth parcels containing samples of contraband duly sealed by FSL and seal impression J. Each parcel bore her signatures. The sacks were opened. The seal was not readable.

8. PW-3 Sandeep Kumar, deposed that the police told him that a sikh gentleman sitting inside the Ceilo car was found possessing contraband. The police requested him to be a witness. The President of the Gram Panchayat reached on the spot after two hours. The police opened the dicky of the Car in his presence and four plastic sacks were taken out of it. The plastic sacks were weighed by the police in his presence. The police after checking told him that the contraband was poppy husk. The police mixed the contraband with their hands. Each bag was 30-35 kg. each. The police took out the samples from each sack. The police obtained his signatures on parcels containing samples and on plastic sacks B-1 to B-4, now Ext. P-1 to P-4. He did not remember sealed parcels containing samples of contraband were sealed by police with seal impression "J" in his presence. Volunteered that the same bears his signatures. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied that the police sealed cloth parcels containing samples with seal and he did not remember that plastic sacks P-1 to P-4 were sealed with seal "J". Volunteered that Ext. PW-2/A bears his signatures encircled red. The total weight of the sacks was between 130-140 kgs. approximately. He admitted that Ceilo Car along with Key, contraband sacks Ext. P-1 to P-4 and samples Ext. P-5 to P-8 were taken into possession by the police vide memo Ext. PW-2/B in his presence and the memo bears his signatures encircled red. He identified his signatures upon that. He denied that the police got weighing scale on the spot in a vehicle. Volunteered that it was already in the police vehicle.

9. PW-4 Shiv Kumar, deposed that he was registered owner of vehicle No. PB-08W-4849, as per RC Ext. PA. He sold this vehicle to accused.

10. PW-5 Const. Rakesh Kumar, deposed that the statement of HC Sanjay Kumar was recorded in the vehicle in his presence. It was sent to the Police Station. It was also sent to the S.P. Una. The naka was laid at Palkwah Nichla road near cause way. HC Sanjay Kumar was sent to village Kante to arrange independent witnesses. After about 10-20 minutes from laying naka, Ceilo Car No. PB-08W-4849 came from Bhai Ka Mour side. The vehicle was stopped. The SHO told the accused that police wanted to search his vehicle and also to conduct his personal search. The SHO further told the accused whether he wanted to be searched by the police or gazetted officer or Magistrate. The accused consented to be searched by the police and memo Ext. PW-5/a was prepared. Nothing was found in the personal search of the police officials except govt. documents. Thereafter, SHO directed him and HC Santosh Kumar to bring weighing scale from village Samnal in the

government vehicle. Satnam Singh provided electric weighing scale which they brought to the spot. When they reached back at the spot Pradhan Heera and Sandeep Kumar were present.

11. PW-6 HHC Harmesh Kumar, deposed the manner in which the accused was apprehended, vehicle was searched and the contraband was recovered. The contraband was weighed. It was sealed. he also clicked the photographs with digital camera.

12. PW-7 Const. Ashok Kumar deposed that HC Sanjay Kumar signaled police party to stop and driver of govt. vehicle Rakesh Kumar stopped the vehicle. He talked with the SHO Pathania and got his statement under Section 154 Cr.P.C. recorded in the police vehicle vide Ext. PW-7/A.

13. PW-8 Const. Sanjay Kumar also deposed the manner in which the accused was apprehended and the contraband was recovered, search and sealing process was completed on the spot. His statement u/s 154 Cr.P.C. was reduced into writing vide Ext. PW-7/A. SHO prepared the information report u/s 42(2) of the ND & PS Act.

14. PW-10 ASI Sewa Singh, deposed the manner in which the vehicle was signaled, stopped and codal formalities were completed on the spot, including search and sealing of the contraband. The contraband was opened while recording his statement in the Court. He has seen the samples and sacks. He identified his signatures. Seals J, K, FSL on parcel were intact. The Court made the following observations:

> "**COURT OBSERVATIONS:**
>
> Parcel SB-1 contains three seals intact of FSL and one broken. This parcel also contains four intact seals. Two intact seals are having seal impression K. Two seals are partly broken. Mark on two seals are not visible.
>
> Parcel SB-2 contains four intact seals of FSl and six other seals. The mark K is only visible in one seal.
>
> Parcel SB-3 contains three seals of FSL and six other seals. Two seals are containing visible seal impression of seal K and one seal impression J. Other seals are not visible.
>
> Parcel SB-4 contains four seals of FSL, another two seals of impression J and one seal of impression K."

15. PW-11 SI Baldev Ram, deposed that at about 5:10 AM, he received rukka of HC Sanjay Kumar from Const. Ashok Kumar Ext. PW-7/A, on the basis of which FIR Ext. PW-7/B was recorded. At about 11:40 AM, HC Sanjay Kumar alongwith the police party came to PS and deposited case property four sacks weighing total 138.500 kgs. poppy husk, sealed each sack with seal J, sample seal, four samples one kg sealed with seal J bearing three seals on each sample, NCB form in triplicate. He reasealed the sacks Ext. P-1 to P-4 with seal impression K. Thereafter, the case property was handed over to MHC of PS Harolli.

16. PW-12 Const. Gurmail Singh, has taken the contraband to FSL Junga and returned RC to MHC Vipan Kumar on 20.1.2011.

17. PW-13 Const. Jasbir Singh, deposed that on 1.3.2011, MHC Vipan Kumar handed over to him four sealed parcels sealed with court seal (SJ), vide RC No. 62/2011.

The parcels were marked as S-1 to S-4 weighing 500 gms each which he deposited at FSL Junga the same day and returned RC to the MHC.

18. PW-14 HC Vipan Kumar, deposed that on 16.1.2011, SI Baldev Ram, SHO, PS Haroli deposited with him four plastic sacks Ext. P-1 to P-4 sealed with one seal J, resealed with one seal K, marked as B-1 to B-4, containing poppy husk. He entered the case property vide entry No. 507/11 in register No. 19 of Malkhana, Haroli. He filled in the NCB forms in triplicate. The samples alongwith the sample seals J and K, NCB forms in triplicate were sent to FSL, Junga vide RC No. 12/2011 dated 18.1.2011 through Const. Gurmail Singh. He proved copy of register No. 19 as Ext. PW-14/B. On 26.2.2011, four sacks of poppy husk were taken out alongwith the sample seals J and K by SI/SHO Shakti Singh for inventory and produced before the learned JMIC, Court No. 2, Una. The same day, four sacks and four homogeneous samples mark S-1 to S-4 sealed with court seal, alongwith sample seals J and K and sample seal of Court were again deposited with him in the malkhana by SHO. On 1.3.2011, homogeneous samples taken by the Court were sent to chemical test vide RC No. 62/2011 to FSL, Junga through Const. Jasbir Singh. On 11.3.2011, homogeneous samples sent to FSL Junga were received back through HHC Dharam Pal No. 314 alongwith the result. The result Ext. PW-14/E was given to SHO. He admitted in his cross-examination that there was no entry in register about date and returning RC to him. Volunteered that such entries are often made in DDR Register as per procedure. The first result was received on 26.1.2011 and only NCB form was received with result. He admitted that DDR No. are not mentioned when samples are sent to FSL. Volunteered that at the time of sending sample to FSL, separate RC is issued. He also admitted that as per record, number of impression of FSL seals is not mentioned. The entry regarding DD No. 22 dated 26.2.2011 mentioned in the register did not depict time. The case property was taken out of malkhana with the order of SHO, who may be having such order.

19. PW-15 Yajuvender Singh, JMIC, Court No. 2, Una, deposed that on 26.2.2011, SHO PS Haroli Shakti Singh Pathania moved an application Ext. PW-15/A in case FIR No. 16/2011 under Section 52 of the ND & PS Act, seeking certification of inventory and for drawing representative samples. He allowed the application and order is Ext. PW-15/B and certificate is Ext. PW-15/D.

20. PW-20 HC Sanjay Kumar, deposed that he went towards the area of PS Haroli in his private car in connection with detection of ND & PS Act and excise cases. At about 4:10 AM, on 16.1.2011, he reached at Tahliwal Haroli mod. He received secret information that accused Hardeep Singh was indulging in the sale of poppy husk and on that date he had gone to Hoshiarpur (Punjab) in his private vehicle PB-08W-4849, to bring it. He used to go by road Bhai ka mod to Pakwah road to bring the contraband. He came to the conclusion that if naka is laid at Nichla road, accused could be caught red handed. The secret information was well founded and trustworthy. He was going to PS Haroli when SI Shakti Singh Pathania met him at village Palakwah near Nichla Mod. He got recorded his statement u/s 154 Cr.P.C. vide Ext. PW-7/A. Naka was laid down. HC Santosh Kumar was sent by SHO to arrange for independent witnesses of the village. On the asking of SHO this witness told him that he could not arrange the witnesses. In the meanwhile a vehicle came from Bhaida mod side towards Palkwah. SHO signaled that vehicle to stop with the help of torch light. Driver stopped the vehicle. The accused was asked whether he wanted his vehicle to be searched by Magistrate or Gazetted Officer. Accused gave in writing his willingness to get his vehicle searched by the police officer. The President of Gram

Panchayat Palkwah was called on the spot. Another witness Sandeep Kumar was also standing on the spot. The contraband was recovered. It was weighed. NCB forms were filled up. The sacks were marked as B-1 to B-4. Samples were marked as SB-1 to SB-4.

21. PW-21 SI Shakti Singh Pathania, testified the manner in which the vehicle was stopped, accused was nabbed and contraband was recovered. The sampling process was completed on the spot including filling up of NCB forms. He also moved application Ext. PW-15/A before the JMIC, Una under Section 52-A of the Act. Inventory was prepared. In his cross-examination, he deposed that naka was laid at about 5:10/5:20 AM.

22. The case of the prosecution, precisely is that naka was laid down. Accused came in his car. He was apprehended. He was asked about his right to be searched by the Gazetted Officer or Executive Magistrate. The contraband was recovered from the dicky. It was weighed. Sampling process was completed on the spot including filling up of NCB forms. The case property was sealed with seal 'J" and thereafter it was produced before the SI Baldev Kumar. He resealed the same vide P-1 to P-4 with seal impression "K". The case property was sent for chemical analysis. The parcel was taken by Gurmail Singh to FSL Junga on 18.1.2011 and thereafter by PW-13 Jasbir Singh on 1.3.2011.

23. The case of the prosecution has not been supported in entirety by PW-1 Satnam Singh, PW-2 Hira Devi and PW-3 Sandeep Kumar, though they have identified their signatures on the memos. The contraband was deposited by PW-11 SI Baldev Ram before the MHC, PS Haroli after resealing the same with seal impression "K". PW-14 HC Vipan Kumar, has proved copy of malkhana register Ext. PW-14/B. There is entry when the case property was deposited with him and it was sent for chemical analysis through Const. Gurmail Singh. There is entry about the receipt of first report of FSL. The samples were taken out vide DD No. 22 for making inventory by the JMIC, Una. It was received back as per the entry made in the malkhana register vide Ext. PW-14/B. These samples were sealed with the court seal. DD was also prepared. The case property was produced in the court at the time of recording the statement of PW-10 ASI Seva Singh. According to PW-10 ASI Seva Singh, seals J, K, FSL on parcels were intact, however, as per the Court observation in parcel SB-1 only three seals of FSL were intact and one broken. The parcel contained four intact seals. Two intact seals were having seal impression K and two seals were partly broken. Mark on two seals were not visible. Parcel SB-2 contained four intact seals of FSL and six other seals. The mark K was only visible in one seal. Parcel SB-3 contained three seals of FSL and six other seals. Two seals were containing visible seal impression of seal K and one seal impression J. Other seals were not visible. Parcel SB-4 contained four seals of FSL, another two seals of impression J and one seal of impression K.

24. The contraband was sent for chemical analysis on two occasions. One by Gurmail Singh and another through Jasbir Singh. The report of FSL was received as per Ext. PW-14/B. However, there is no corresponding entry when the contraband was taken out from the malkhana to be sent to FSL Junga second time, though the report is Ext. PW-14/E. The case property is required mandatorily to be produced before the Court. There is a detailed procedure, the manner in which the case property is to be taken out from the malkhana after making corresponding entry in malkhana register and also by preparing DDR. The case property is sent through Constable to be placed before the Court. Similarly, the case property after its production in the Court is received back and entered in the malkhana by preparing separate DDR. In case the case property has been taken out from the malkhana, it was produced in the Court, there should have been the entry in the malkhana register when it was taken out and when it was re-deposited. The person who

has produced the contraband in the Court has not been produced. There is neither any entry in the malkhana register nor any DDR to this effect has been prepared. Thus, it cannot be said conclusively that it was the same case property which was recovered from the accused and sent for FSL examination twice and produced before the Court. Moreover, the case of the prosecution has also not been supported by the independent witnesses. PW-2 Heera Devi has denied that the dicky was opened in her presence and four plastic sacks were recovered. She has denied that the police weighed the contraband. She has also denied that the sampling and sealing process was completed on the spot including filling up of NCB forms. There is breach of mandatory provisions regarding deposit and re-deposit of the contraband in the malkhana register at the time of production and when it is sent back to malkhana.

25. Their lordships of the Hon'ble Supreme Court, in a recent decision in the case of ***Makhan Singh vrs. State of Haryana,*** reported in ***JT 2015 (4) SC 222,*** have held that it is well settled that conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In that case, it was not as if independent witnesses were not available. Independent witness PW1 and another independent witness examined as DW-2 had spoken in one voice that the accused person was taken from his residence. In such circumstances, their lordships have held that the High Court ought not to have overlooked the testimony of independent witnesses, especially when it casts doubt on the recovery and the genuineness of the prosecution version. Their lordships have held as under:

> "10. For recording the conviction, the Sessions Court as well as the High Court mainly relied on the testimony of official witnesses who made the recovery, i.e. H.C. Suraj Mal-PW2 and Inspector Raghbir Singh-PW6, and found them sufficiently strengthening the recovery of the possession from the appellant. In our considered view, the manner in which the alleged recovery has been made does not inspire confidence and undue credence has been given to the testimony of official witnesses, who are generally interested in securing the conviction. In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places at all times. Independent witnesses who live in the same village or nearby villages of the accused are at times afraid to come and depose in favour of the prosecution. Though it is well-settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In the present case, it is not as if independent witnesses were not available. Independent witnesses PW1 and another independent witness examined as DW2 has spoken in one voice that the accused person was taken from his residence. In such circumstances, in our view, the High Court ought not to have overlooked the testimony of independent witnesses, especially when it casts doubt on the recovery and the genuineness of the prosecution version."

26. The prosecution has failed to prove that the contraband was recovered from the exclusive and conscious possession of the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt for the commission of offence under Section 15 of the N.D & P.S., Act.

27. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 16.7.2012, rendered by the

learned Special Judge, FTC, Una, H.P., in Sessions Case No. 12-VII of 2011, is set aside. Accused is acquitted of the charges framed against him by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

****

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

Tripta Devi widow of Shri Jagdish & others. ....Appellants/Defendants

Versus

Krishan Chand (died) through LRs. Kadshi Devi and others ......Respondents/Plaintiffs.

RSA No. 235 of 2003
Order reserved on 30th April, 2015
Date of order of limited remand 13th May, 2015

Code of Civil Procedure, 1908- Order 22- Plaintiff No. 1 died during the pendency of the suit- no application was filed for bringing on record his legal representatives **–** however, the suit has been filed by many plaintiffs- plaintiff No. 8 was recorded to be owner of 1/3rd share- therefore, cause of action relating to plaintiff No. 8 was severable and the suit will abate qua him and not in its entirety. (Para-11)

Hindu Adoption and Maintenance Act 1956- Section 12– An adopted son gets transplanted into adoptive family with the same right as a natural born son, however, he continues to have his share in the coparcenary property of his natural father as he had acquired share in the property at the time of birth and would not be divested by subsequent adoption. (Para-13)

Cases referred:

Budh Ram and others vs. Bansi and others, 2010)11 SCC 476
Daya Singh and another vs. Gurdev Singh (dead) by LRs and others, (2010)2 SCC 194

For the Appellants: Mr. Ramakant Sharma, Advocate.
For the Respondents: Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Order of limited remand under Section 107 of CPC

Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure 1908 by the appellants against the judgment and decree dated 31.3.2003 passed by learned Additional District Judge Solan in Civil Appeal No. 63-NL/13 of 1996 titled Tripta Devi and others vs. Krishan Chand and others.

2. Brief facts of the case as pleaded are that Sita Ram and others filed a suit for declaration with consequential relief of injunction pleaded therein that Majlashi predecessor-in-interest of parties had four sons namely Kali Dass, Shivia, Mansha Ram and Manu. It is pleaded that Manu had three sons namely Lajjya Ram @ Lajjya, Jhaiyan and Basu. It is pleaded that Mansha Ram had no issue and he was survived by his widow namely Phullman. It is pleaded that Shivia had two sons namely Ganu and Ganeshu. It is further pleaded that Kali Dass and his brothers were Hindu Brahmins and Kali Dass had adopted Basu as his son and Basu transplanted in the family of Kali Dass. It is pleaded that Phullman Devi widow of Mansha Ram was owner of land measuring 26 bighas 16 biswas and she died intestate leaving behind no legal heirs and after her death dispute arose between Lajjya Ram @ Lajjya, Jhaiyan and Basu on one hand and Ganu and Ganeshu sons of Shivia on the other hand. It is pleaded that thereafter Lajjya Ram @ Lajjya and others filed civil suit No. 41 titled Lajjya and others vs. Ganeshu and others in the Court of Civil Judge and civil suit No. 41 was decreed whereby $1/3^{rd}$ share of estate of Phullman was mutated as per decree of Civil Court. It is pleaded that Basu was adopted by Kali Dass and he had no right title or interest in the estate of natural father Mr. Manu because Basu stood transplanted in the family of Kali Dass. It is pleaded that name of Basu was illegally recorded in the revenue record as legal heir of Manu. It is pleaded that Basu always represented himself to be adopted son of Kali Dass. It is pleaded that only Lajjya Ram @ Lajjya and Jhaiyan were legal heirs of estate of deceased Manu. It is pleaded that in case Lajjya Ram @ Lajjya and Jhaiyan predecessor-in-interest of plaintiffs are not held or proved to be only legal heirs of Manu and if Basu is not held to be adopted son of Kali Dass even then they have acquired the right of adverse possession qua share of Basu openly, continuously and uninterruptedly since 20.9.1979 BK. It is pleaded that consolidation proceedings started in the village and deceased defendant illegally claimed $1/3^{rd}$ share in suit land on the basis of wrong and illegal revenue entries. It is pleaded that deceased defendant could not claim $1/3^{rd}$ share in the suit land. It is pleaded that question of title was raised before consolidation officer for not effecting the partition of suit land on the basis of illegal revenue entries in revenue record. It is pleaded that plaintiff also requested the deceased defendant to admit the claim of plaintiffs but deceased defendant refused to admit the claim of plaintiff. Prayer for decree the suit as mentioned in relief clause of plaint sought.

3. Per contra written statement filed on behalf of deceased defendant pleaded therein that suit is barred by time and plaintiffs are estopped to file the present suit due to their act conduct and acquiescence. It is pleaded that suit is barred by res-judicata and suit of plaintiffs is not maintainable and plaintiffs have no locus standi and cause of action to file the present suit. It is admitted that Manu had three sons namely Lajjya Ram @ Lajja, Jhaiyan and Basu. It is also admitted that Mansha Ram had no son and he was survived by his widow Phullma and Shivia had two sons namely Ganu and Ganeshu. It is also admitted that Kali Dass and his brothers are Brahmins. It is denied that Kali Dass had adopted Basu as his son. It is pleaded that transplantation of Basu in the family of Kali Dass does not arise. It is pleaded that Manu was father of Basu. It is pleaded that from Basu Swanu was born and from Swanu deceased defendant was born. It is pleaded that deceased defendant has inherited the suit property to the extent of his share in accordance with law. It is pleaded that civil suit No. 196 was decided on dated 7.10.1989 BK filed by predecessors-in-interest of deceased defendant against Puran, Lajjaya Ram, and Sita Ram etc and same was decreed in favour of Swanu and thereafter share of Kali Dass went to Swanu. It is pleaded that Kali Dass also executed gift deed qua his share in the name of predecessors-in-interest of deceased defendant. It is pleaded that Basu was not adopted by Kali Dass at any point of time. It is pleaded that Basu had legally inherited the share of Manu along with Lajjya Ram

and Jhaiyan. It is pleaded that suit property was devolved upon Swanu Ram and from Swanu it was devolved upon Jagdish deceased defendant. It is pleaded that after death of Manu his all three sons namely Lajjya Ram, Jhaiyan and Basu have inherited the suit property to the extent of 1/3rd share each and further pleaded that plaintiffs did not acquire the title in suit property by way of right of adverse possession. It is pleaded that plaintiffs could not challenge the entries of 80 years old revenue record and further pleaded that contesting deceased defendant was legally entitled to file partition proceedings before consolidation officer and contesting deceased defendant was also legally entitled to get his share separated from the plaintiffs. Prayer for dismissal of suit sought.

4. Plaintiffs also filed replication and re-asserted the allegations mentioned in plaint. As per the pleadings of parties learned trial Court framed following issues on dated 25.8.1992:-

1. Whether Kali Dass formerly adopted one Basu as his son as alleged if so its effect? OPP
2. Whether Shri Manu the predecessor-in-interest of plaintiffs was owner in possession of the land in lieu of which suit land was earmarked and carved out in consequence of first settlement as alleged? OPP
3. Whether there were any decree dated 26.9.1989 B.K. passed in civil suit No. 41 titled Lajja Ram and others vs. Ganeshu and others whereby 1/3rd share of estate of Phullmu (26bighas and 16 biswas) was mutated having been inherited by aforesaid Basu, as alleged? .....OPP
4. Whether entries in the revenue record qua the suit land previously showing Basu and thereafter the successor Sawanu and presently Jagdish were and are null and void as alleged in para No. 7 of the plaint? OPP
5. Whether Lajja Ram and Jhaiyan the predecessors of plaintiffs being the only heirs of Manu exclusively entered into possession of the whole estate of Manu as alleged? OPP
6. In case issue No. 5 is not proved in affirmative whether the plaintiffs have become owners in possession of 1/3rd share of the suit land by way of adverse possession through their predecessors as alleged? OPP
7. Whether suit is barred by limitation as alleged ?OPD
8. Whether plaintiffs are estopped to file the suit for their act and conduct as alleged? OPD
9. Whether suit is barred by res judicata, as alleged? OPD
10. Whether suit is not maintainable as alleged? OPD
11 Whether plaintiffs have no locus standi to file the suit, as alleged? OPD
12 Whether plaintiffs have no cause of action, as alleged? OPD
13 Whether plaintiffs have not affixed the proper court fee, as alleged? OPD
14 Relief.

5. Learned trial Court decided issue Nos. 1 to 5 in favour of the plaintiffs. Learned trial Court held issue No. 6 as redundant and learned trial Court decided issue Nos. 7 to 13 against contesting deceased defendant. Learned trial Court decreed the suit and also granted consequential relief of injunction as prayed for in favour of plaintiffs and against contesting deceased defendant Jagdish.

6. Feeling aggrieved against the judgment and decree passed by learned trial Court Tripta Devi and others (Legal heirs of deceased contesting defendant) filed Civil Appeal

No. 63-NL/13 of 1996 titled Tripata Devi and others vs. Krishan Chand and others. Learned Additional District Judge on dated 31.3.2003 dismissed the appeal filed by appellants.

7. Thereafter feeling aggrieved against the judgment and decree passed by learned first Appellate Court in Civil Appeal No. 63-NL-13 of 1996 Tripata Devi and others (Legal representatives of deceased contesting defendant) filed RSA No. 235 of 2003 which was admitted by Hon'ble High Court on dated 22.8.2003 on the following substantial question of law:-

1. Whether learned lower Appellate Court is right in not recording any findings with respect to the question of abatement of a suit as a whole especially when one of the plaintiff had died during the pendency of the appeal before the learned lower Appellate Court?

Court take judicial notice of pleadings and oral and documentary evidence placed on record and framed additional substantial question of law under proviso of Section 100 of Code of Civil Procedure 1908 because Court is satisfied that RSA involves additional substantial question of law:-

(2) Whether adopted son could inherit coparcenary property of natural father as per Section 12(b) of Hindu Adoption and Maintenance Act 1956?

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

9. Parties examined following oral witnesses in supported of their case:-

Sr. No.	Name of witness
PW1	Bansi Ram
PW2	Madan Lal
PW3	Chet Ram
PW4	Chajju Ram
PW5	Devi Ram
PW6	Dwarka
PW7	Sunder Singh
PW8	Chhotu Ram
DW1	Jagdish

<u>10. Oral evidence adduced by the parties:-</u>

10.1 PW1 Bansi Ram has stated that Moti was his father and he died 54 years ago. He has stated that he has seen the suit property and further stated that Sita Ram had cultivated the suit land. He has stated that Sita Ram etc. are in settled possession of suit property and deceased defendant did not possess the suit land at any point of time. He has stated that his village is situated at a distance of ½ K.m. from suit property. He has admitted that Sita Ram and deceased Jagdish belonged to same family. He has stated that Sita Ram is in possession of his own land and deceased Jagdish was in possession of his own land. He has denied suggestion that he has deposed falsely at the instance of plaintiffs.

10.2 PW2 Madan Lal has stated that Fakiriya was his great grandfather who had died and he has further stated that his father had also died. He has stated that he has seen the suit property and same is in possession of Sita Ram and further stated that deceased

Jagdish did not remain in possession of suit property. He has admitted that parties are Hindu by religion and belong to same family. He has stated that he does not know whether partition took place inter se the parties or not. He has admitted that Sita Ram and deceased Jagdish remained in settled possession of property as per their shares.

10.3 PW3 Chet Ram has stated that his maternal grandfather Ganga Ram had died who was resident of Dhar village.

10.4 PW4 Chajju record keeper, record room Nalagarh has tendered the record.

10.5 PW5 Devi Lal has stated that he had seen the suit property. He has stated that Sita Ram is in settled possession of suit land and deceased defendant Jagdish did not remain in possession of suit land. He has stated that Girdawari is conducted which is verified by Tehsildar and he has further stated that no objection was raised relating to preparation of jamabandis and Girdawari. He has stated that he does not know that deceased Jagdish remained co-owner of suit property.

10.6 PW6 Dwarka has stated that he had seen the suit property and further stated that Majlashi was owner of suit property. He has stated that Majlashi was Hindu by religion and was having four sons namely Kali Dass, Shivia, Mansha Ram and Manu. He has stated that Manu had three sons namely Lajjya Ram, Jhaiyan and Basu. He has stated that Basu was adopted by Kali Dass and further stated that factum of adoption was informed to him by Ganu and Ganeshu. He has stated that after adoption of Basu by Kali Dass the title of Basu extinguished in the share of his natural father Manu. He has stated that Phulma was widow of Mansha Ram. He has stated that civil suit relating to share of Pulma was filed. He has stated that share of Kali Dass was inherited by Basu on the basis of adoption. He has stated that share of Manu remained in possession of plaintiffs and further stated that deceased defendant Jagdish did not inherit rights over the share of Manu. He has stated that he does not know that how the property of Manu was devolved after his death. He has stated that no objection relating to preparation of revenue record was raised. He has stated that Basu, Lajjya and Jhaiyan used to live jointly earlier and thereafter Basu separated himself. He has stated that Kali Dass had died prior to his birth. He has stated that he could not state the date and month when Basu was adopted by Kali Dass. He has admitted that Khasra Girdawari and jamabandis are prepared after verification by Tehsildar. He has stated that no objection was raised relating to preparation of revenue record.

10.7 PW7 Sunder Singh has stated that he had translated the documents in Hindu language which are Ext.PW7/A-1, Ext.PW7/B-1, Ext.PW7/C-1, Ext.PW7/D-1, Ext.PW7/E-1, Ext.PW7/F-1, Ext.PW7/G-1, Ext.PW7/H-1, Ext.PW7/J-1, Ext.PW7/K-1, Ext.PW7/L-1 & Ext.PW7/M-1 correctly. He has stated that he has translated the documents as per direction of Krishan. He has stated that documents Ext.PW7/A-1 to Ext.PW7/M-1 have been prepared from revenue record.

10.8 PW8 Chhotu Ram has stated that he is general attorney of Sita Ram copy of which is Ext.PW8/A. He has stated that Majlashi was ancestor of the parties. He has stated that parties are Hindu Brahmins by religion. He has stated that Majlashi had four sons namely Kali Dass, Shivia, Mansha Ram and Manu. He has stated that Mansha Ram had no issue and Phullma was his widow. He has stated that Manu had three sons namely Lajjya, Jhaiyan and Basu and Shivia had two sons namely Ganu and Ganeshu and further stated that Kali Dass was issueless and he adopted Basu as his adopted son. He has stated that Manu and his wife had given Basu in adoption to Kali Dass according to religious customs.

He has stated that thereafter Basu became the adopted son of Kali Dass. He has stated that after the death of Phullma civil litigation started which was decided on dated 29.9.1989. He has stated that contesting deceased defendant Jagdish was wrongly recorded in revenue record and he did not remain in possession of suit property. He has stated that entries of contesting deceased defendant Jagdish to the extent of 1/3rd share was illegally recorded in revenue record. He has stated that Jagdish threatened to dispossess the plaintiffs and thereafter plaintiffs filed the present suit. He has stated that his father remained sick for a long time. He has stated that after death of Majlashi his property was devolved between Manu, Shivia, Mansha Ram and Kali Dass. He has stated that he had not seen Manu, Shivia and Kali Dass. He has stated that initially they used to reside jointly and thereafter they separated. He has stated that he does not know when they separated. He has stated that he does not know when Manu had died. He has stated that property of Manu was devolved upon Lajjya and Jhaiyan. He has stated that Lajjya and Jhaiyan did not file any suit against Basu. He has stated that after death of Manu his property was devolved upon his legal heirs. He has stated that property of Shivia was devolved upon Ganu and Ganeshu and property of Mansha Ram was devolved upon Phullma. He has stated that he does not know when Kali Dass died. He has stated that no document of adoption of Basu was prepared. He has stated that property of Kali Dass was devolved upon Basu. He has admitted that Lajjya, Jhaiyan, Ganu, Ganeshu, Basu have inherited the ancestral property. He has stated that no objection was raised when Girdawari was prepared. He has stated that suit property has not been partitioned and remained joint property.

10.9 DW1 Jagdish has stated that Manu was son of Majlashi. He has stated that Manu had three sons namely Lajjya, Jhaiyan and Basu. He has stated that property of Manu was devolved upon his three sons namely Lajjya, Jhaiyan and Basu. He has stated that thereafter share of Basu was devolved upon Sawanu and thereafter share of Sawanu was devolved upon deceased defendant Jagdish. He has stated that Sita Ram and Asha Ram were born from Jhaiyan. He has stated that Basu had inherited 1/3rd share of Manu. He has stated that he is in settled possession of suit property as co-sharer. He has stated that share of Kali Dass was devolved upon Basu on the basis of gift deed. He has stated that Ganu and Ganeshu have filed a suit against Kali Dass and Basu had died during pendency of civil suit. He has stated that Basu was his great grandfather. He has stated that parties are Hindu Brahmins by religion and Lajjya and Jhaiyan and Basu are three sons of Manu. He has stated that he does not know whether Phullma was widow of Mansha Ram. He has stated that he does not know that Ganu and Ganeshu were sons of Shivia. He has denied suggestion that Basu was adopted by Kali Dass according to religious customs. He has denied suggestion that Basu was adopted son of Kali Dass. He has denied suggestion that Basu had inherited the property of Kali Dass as adoptee son. He has stated that property of Kali Dass was inherited by Basu on the basis of gift deed. He has denied suggestion that Basu was not legally entitled to inherit share of Manu because he was transplanted in the family of Kali Dass as adoptee son. He has denied suggestion that defendants are not in settled possession of suit property and further denied suggestion that wrong revenue record was prepared.

Findings on Point Nos. 1 and 2 of Substantial questions of law

11. Submission of learned Advocate appearing on behalf of the appellants that co-plaintiff No. 8 Brahma Nand son of Phipharu son of Lajjya Ram died during the pendency of appeal and his legal representatives were not brought on record and suit filed by plaintiffs be abated as a whole due to death of Brahma Nand co-plaintiff No. 8 is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that on dated

13.12.1996 Tripta Devi filed application under Order 22 Rule 4 read with Rule 9 of CPC for dismissing the suit on the ground of abatement. Tripta Devi pleaded in application that Process Server reported that plaintiff Brahma Nand co-plaintiff No. 8 was dead at the time of passing the decree and during the continuation of trial the other co-plaintiffs did not file any application under Order 22 Rule 3 CPC to implead his LRs and proceedings in the trial Court continued against a dead person and decree was passed by learned trial Court against a dead person which is nullity in law. It is also proved on record that thereafter reply was filed on behalf of contesting plaintiffs and it is admitted that Brahma Nand co-plaintiff died. It is pleaded that Brahma Nand had joined the company of saint on account of religious feelings and his whereabouts were not known to contesting plaintiffs. It is pleaded that share of Brahma Nand co-plaintiff No. 8 was severable and it is denied that contesting plaintiffs have no independent and distinct cause of action to maintain and continue the suit. It is also proved on record that thereafter learned first Appellate Court on dated 16.10.1997 framed following issues:-

1. Whether suit has abated due to death of Shri Brahma Nand plaintiff No. 8 as alleged? …OPA
2. Whether Shri Brahma Nand had become Saint renounced the world as alleged, if so its effect?OPA

   ….Corrected as Non-OPA(Corrected by High Court suo motu being clerical mistake in nature).
3. Relief.

It is also proved on record that thereafter first Appellate Court recorded the statement of Ramesh Kumar and Chhotu Ram. It is also proved on record that on dated 19.5.2000 Shri Kashmiri Lal learned Advocate appeared on behalf of respondents/plaintiffs had stated in Court that he relinquished the claim qua share of deceased Brahma Nand and he has also given the statement that qua share of Brahma Nand suit be abated. It is also proved on record that thereafter Shri H.R. Sharma Advocate who appeared on behalf of the appellants/defendants has also given statement on dated 19.5.2000 that he heard statement of Shri Kashmiri Lal Advocate and same is correct and according to statement given by Shri Kashmiri Lal Advocate application filed under Order 22 Rule 4 be decided. It is also proved on record that thereafter learned first Appellate Court passed a consent order on dated 19.5.2000 which is quoted in toto:-

"19.5.2000

Present:- Sh. H.R. Sharma, Ld. Adv. for appellants.

Sh. Kashmiri Lal, Ld. Adv.for respondents.

At this stage, learned counsel for respondents-plaintiffs stated at Bar that he abandoned the claim of share of plaintiff Brahma Nand. Learned counsel for appellants has admitted the statement of Sh. Kashmiri Lal, Advocate. Separate statements of learned counsel for both the parties to this effect recorded which are placed on record. In view of above statements of learned counsel for the parties, it is ordered that the suit qua the share of plaintiff Brahma Nand son of Sh. Phipharu is abated. Argument in the main appeal heard today. Now it be listed for final orders at Solan on 30.5.2000.

Sd/-

Addl.District Judge, Solan
Camp at Nalagarh."

It is proved on record that learned Appellate Court in view of statements of learned Advocates abated the suit qua share of Brahma Nand only. Court has also perused latest jamabandi for the year 1992-93 Ext.P8 placed on record qua the suit property. In jamabandi for the year 1992-93 it has been specifically mentioned that Brahma Nand was recorded as owner of 1/3rd share, Sita Ram was recorded as owner of 1/3rd share and Jagdish was recorded as owner of 1/3rd share in the suit property. It is proved on record that shares of Brahma Nand, Sita Ram and Jagdish have been specifically defined. In view of the fact that shares of Brahma Nand, Sita Ram& Jagdish have been separately mentioned as 1/3rd each and in view of the fact that cause of action relating to Brahma Nand is severable hence it is held that learned first Appellate Court has rightly abated the suit qua share of Brahma Nand only as per statements of learned Advocates. It is well settled law that abatement depends upon facts and circumstances of an individual case. It is well settled law that where one of the parties has an independent and distinct right of his own not interdependent upon one or other then appeal would be abated only qua the deceased. ***(See (2010)11 SCC 476 titled Budh Ram and others vs. Bansi and others)*** Hence in present case Brahma Nand, Sita Ram and Jagdish have independent and distinct rights of their own in suit property and right of deceased Brahma Nand was not interdependent upon Sita Ram and Jagdish. It is held that Brahma Nand was having independent ownership right of 1/3rd share in the suit property.

12. Another submission of learned Advocate appearing on behalf of the appellants that present suit is barred by limitation because plaintiffs have challenged the revenue record which is in existence for long period is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that plaintiffs have filed the present suit when deceased defendant threatened to dispossess the plaintiff from suit land during consolidation operation and when deceased defendant filed application for partition of suit land before consolidation authorities. It is held that cause of action accrued to the plaintiffs to file the present suit when deceased defendant moved the consolidation authorities for partition of suit land. It is held that cause of action accrued to plaintiffs to file the present suit when deceased defendant namely Jagdish filed partition proceedings before the consolidation authorities and when deceased defendant threatened to dispossess the plaintiffs from suit land. It is well settled law that limitation starts from date of cause of action. ***(See (2010)2 SCC 194 titled Daya Singh and another vs. Gurdev Singh (dead) by LRs and others)***

13. Another submission of learned Advocate appearing on behalf of the appellants that in para No. 5 of written statement it was pleaded by deceased defendant in positive manner that suit property was inherited by Lajjya Ram, Jhaiyan and Basu from Manu and Manu had inherited the property from Majlashi and suit land is coparcenary property and learned Advocate appearing on behalf of appellants further submitted that in coparcenary property person has right by birth and even after adoption the adoptee son could not be divested his interest in coparcenary property of natural father as per Section 12 of Hindu Adoption and Maintenance Act 1956 is accepted for the reasons hereinafter mentioned. It is well settled law that on adoption adoptee gets transplanted into adopting family with the same right as that of natural born son. It is well settled law that after adoption adoptee is deemed to be child of adoptive father and mother for all purposes with effect from the date of adoption. It is also well settled law that adopted son continued to have his share in coparcenary property of his natural father and it is well settled law that on adoption the adopted son is not divested from his share in the coparcenary property of his natural father. It is well settled law that share of adopted son in coparcenary property

continued to vest in favour of the adopted son even after adoption. As per Section 12 of Hindu Adoption and Maintenance Act 1956 any property which vested in the adopted child before adoption shall continue to vest in such person subject to obligation if any attaching to the ownership of such property including the obligation to maintain relatives in the family of his birth. It is well settled law that person acquired share in the coparcenary property by birth in the natural family. Hence it is held that share of adopted son in coparcenary property could not be divested after adoption in view of Section 12 of Hindu Adoption and Maintenance Act 1956. Section 12 of Hindu Adoption and Maintenance Act 1956 is quoted in toto:-

> "12.**Effects of adoption**-An adopted child shall be deemd to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:
>
> Provided that-
>
> (a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;
>
> (b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;
>
> (c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption."

14. Submission of learned Advocate appearing on behalf of the respondents that learned trial Court and learned first Appellate Court have held that Basu was adopted by Kali Dass and his relations in natural family were severed and Basu was not legally entitled to inherit the property from Manu because he was already adopted by Kali Dass and in view of concurrent findings of adoption by learned trial Court appeal filed by appellants be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that learned trial Court and learned first Appellate Court have not decided the material issue involved inter se the parties whether Basu was legally entitled to inherit the coparcenary property owned by Manu. Even learned trial Court did not frame any issue whether suit property was coparcenary property between Lajjya Ram, Jhaiyan and Basu despite specific pleading in written statement that suit property was initially owned by Majlashi and thereafter same was inherited by Kali Dass, Shivia, Mansha Ram and and Manu and thereafter share of Manu was inherited by Lajjya Ram, Jhaiyan and Basu in equal shares. It is well settled law that under Order XIV Rule 5 of the Code of Civil Procedure, 1908 Court can at any time before passing of decree could amend the issue or frame the additional issue as it deems fit for determining the matter in controversy between the parties. It is held that framing of additional issue is necessary for determining the controversy between the parties as per provisions of Order XIV Rule 5 of Code of Civil Procedure 1908. In view of above stated facts following additional issue No. 13A is framed by High Court in order to decide the case properly and effectively and in order to impart substantial justice inter se the parties and in the ends of justice.

Additional Issue No. 13-A framed by High Court of H.P.

13A. Whether suit land was coparcenary property between Lajjya Ram, Jhaiyan and Basu and whether Basu had inherited the coparcenary property

by birth and whether right of Basu did not divest in coparcenary property as per Section 12 of Hindu Adoption and Maintenance Act 1956 even after adoption by Kali Dass? OPD

15. In view of above stated facts judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court are reversed and case is remanded back to learned trial Court under Section 107 of Code of Civil Procedure 1908 for limited purpose only. It is held that limited retrial is necessary in the ends of justice. Learned trial Court will re-admit the suit under its original number in the register of civil suits. Observations will not effect merits of case in any manner. Learned trial Court after giving due opportunity to both the parties to lead evidence in support of additional issue No. 13-A framed by High Court will decide the case afresh in accordance with law within two months after receiving the file because present civil suit is pending since 1990 and require expeditious disposal. Evidence recorded during original trial shall subject to all just exceptions be evidence during trial after remand. Observations will not effect merits of case in any manner. Parties are left to bear their own costs. Memo of costs be prepared by the Registrar (Judicial) and thereafter file of learned trial Court and file of learned first Appellate Court along with certified copy of this order and memo of costs will be transmitted forthwith. Appeal stands disposed of. Pending application(s) if any also stands disposed of.

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

Kamal Dev Verma son of Sh. R.C.Verma & others ....Petitioners
Versus
H.P. University & others ....Non-petitioners

CWP No. 5767 of 2014
Order Reserved on 8th May 2015
Date of Order 14th May, 2015

Constitution of India, 1950- Article 226- Petitioner pleaded that more than 50% of the paper was out of syllabus –Registrar, H.P. University submitted a report that some questions were out of syllabus- held, that students should not suffer for the fault of the university- University directed to award marks regarding the questions set out of syllabus to the students. (Para-5 to 7)

For the Petitioner: Mr. Suneet Goel, Advocate.
For Non-petitioners 1,3 and 4: Mr. J.L. Bhardwaj, Advocate.
For Non-petitioner No.2: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Article 226 of the Constitution of India pleaded therein that on dated 22.4.2014 examination of BCA 3rd year Database Management System (BCA 303) paper was held. It is pleaded that question paper was not in

conformity with the prescribed syllabus and questions having 64 marks were out of prescribed syllabus. It is pleaded that more than 50% of the question paper was out of prescribed syllabus. It is further pleaded that petitioner immediately filed a complaint with regard to the aforesaid act with the request to look into the matter and factum of 50% of question paper being out of syllabus was admitted by Principals of various colleges as per the report. It is pleaded that petitioners among other students represented to respondent No. 3 to award them appropriate grace marks in order to enable them to take admission in MCA course. It is pleaded that matter was also taken up with Vice Chancellor of H.P. University with request to award grace marks as they were not able to attempt more than 50% questions which were out of prescribed syllabus and further pleaded that thereafter decision was taken to give five percent grace marks to students and thereafter H.P. University declared the result after giving five percent grace marks to students. It is pleaded that due to acts of omission and commission on the part of respondents the career of petitioners is at stake and entire year would be wasted. Prayer for acceptance of writ petition sought.

2. Per contra response filed on behalf of non-petitioners Nos. 1, 3 and 4 pleaded therein that on receipt of complaint the concerned Chairman was requested to look into the complaint and submitted his comments/recommendations in the matter. It is pleaded that papers setter was also requested to give his comments. It is pleaded that in the meantime decision was taken not to declare the result and University received the reply from paper setter on dated 4.6.2014 wherein it was stated that no question was set out of syllabus. It is pleaded that Chairman of the department pointed out that few questions were out of syllabus and he opined that five percent grace marks be given to students. It is pleaded that out of 1485 students 1184 students have cleared the paper of BCA-303 (Data Base Management System) and maximum marks obtained by candidates were 70 out of 80. It is pleaded that opinion given by Chairman to award five percent grace marks was approved by Vice Chancellor of University on dated 24.7.2007 and consequently result was declared. It is pleaded that decision taken by Vice Chancellor of University was in consonance with recommendations submitted by Chairman of the department. It is pleaded that all petitioners have cleared all other papers except BCA-III year (Data Base Management System) held in April 2014. Prayer for dismissal of petition sought.

3. Court heard learned Advocate appearing on behalf of the petitioners and learned Advocate appearing on behalf of non-petitioners Nos. 1, 3 and 4 and learned Additional Advocate General appearing on behalf of the non-petitioner No.2 and Court also perused the entire record carefully.

4. Following points arise for determination in this civil writ petition:-

1. Whether petitioners are legally entitled for full marks in questions Nos. 3 and 4 of Unit II, question Nos. 7 and 8 of Unit IV and questions Nos. vii, viii, ix and x of Sub Paper of Unit V relating to examination of BCA III year (Database Management System) BCA-303?
2. Final Order.

Findings on point No.1

5. Submission of learned Advocate appearing for the petitioners that petitioners are students and their career is involved and they should not be suffered for their no fault is accepted for the reasons hereinafter mentioned. On dated 16.4.2015 Court directed the respondents to file an affidavit that how many percentages of questions were out of syllabus

in order to dispose of the petition properly and effectively and to impart substantial justice inter se the parties. In compliance of order dated 16.4.2015 respondents filed affidavit placed on record. Respondents did not mention in affidavit how much percentage of questions were out of syllabus despite positive direction of Court and respondents have intentionally concealed the percentage of questions which were out of syllabus in affidavit. There is recital in affidavit filed by learned Registrar H.P. University that Chairman/Subject expert had submitted report that questions Nos. 3 and 4 of Unit II, questions Nos. 7 and 8 of Unit IV and questions Nos. vii, viii, ix and x of sub part of Unit V were out of syllabus. It is well settled law that question setter was under legal obligation to set questions in question paper strictly as per syllabus prescribed to students. Court is of the opinion that students cannot be allowed to suffer for fault of question paper setter.

6. Submission of learned Advocate appearing on behalf of respondents that five percent grace marks were given to students and on this ground civil writ petition filed by petitioners be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that decision to give five percent grace marks to students is not reasonable in view of the fact that respondents did not mention the percentage of questions which were out of syllabus and in view of admission of learned Registrar H.P. University in affidavit placed on record verified on dated 29th April 2015 that as per report of Chairman/subject expert questions Nos. 3 and 4 of Unit II, question Nos. 7 and 8 of Unit No. IV and questions Nos. vii, viii, ix and x of Sub part of Unit V were out of syllabus. It would be expedient in the ends of justice that full marks of these questions should be awarded to petitioners which were out of syllabus. Point No. 1 is decided accordingly.

Point No.2 (Final Order)

7. In view of findings on point No. 1 it is held that co-respondents Nos. 1, 3 and 4 will award whole marks to petitioners qua questions Nos. 3 and 4 of Unit II, questions Nos. 7 and 8 of Unit IV and questions Nos. vii, viii, ix and x of sub part of Unit V which were out of syllabus and thereafter co-respondents Nos. 1,3,4 and 5 will declare the result of petitioners forthwith. It is further ordered that if the petitioners would qualify the BCA 3rd year Course BCA-303 (Data Base Management System) then petitioners would be deemed to be admitted in MCA Course commencing as of today with all consequential legal benefits. Order passed in ends of justice keeping in view that petitioners are students and their future is involved. No order as to costs. Petition stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

State of Himachal Pradesh. .....Appellant.
Vs.
Nomu Ram and others. ....Respondents.

Cr. Appeal No.483 of 2009.
Judgment reserved on: 5.5.2015
Date of Decision: May 14, 2015.

Indian Penal Code, 1860- Sections 302 and 201 read with Section 34- Marriage of the deceased was settled with the daughter of co-accused 'N'- deceased had given Rs. 50,000/-

to 'N' as marriage consideration amount- the daughter of 'N' stayed with deceased at Kullu-Manali for about 10-12 days – 'N' brought back his daughter from Manali and got her married somewhere else- deceased use to demand money from 'N'- accused use to quarrel with deceased- deceased went to the house of 'N' for demanding money but did not return-his dead body was found in the water of a dam – accused were arrested- clothes and stick were recovered at their instance- Medical Officer opined that deceased could have died by infliction of injury with a stick- case of the prosecution is based upon circumstantial evidence- dead body was found in a dam and the possibility of the involvement of 3rd person could not be ruled out- co-accused had sustained injuries which were not explained by the prosecution, which means that prosecution has concealed the genesis of the incident-witnesses to the disclosure statement did not support the prosecution version- blood group of the blood detected on the clothes was not determined and, therefore, it is not sufficient to connect the accused with the commission of crime- suspicion howsoever strong cannot take place of proof – held, that in these circumstances, acquittal of the accused was justified.

Cases referred:
Prakash vs. State of Rajasthan (Apex Court DB), 2013 Cri.L.J. 2040
Sakharam Vs. State of Madhya Pradesh, AIR 1992 SC 2045
Ashish Batham Vs. State of Madhya Pradesh, AIR 2002 SC 3206
Musheer Khan and another Vs. State of Madhya Pradesh, AIR 2010 SC 762
State of Maharashtra Vs. Annappa Bandu Kavatage, AIR 1979 SC 1410
S.P.Bhatnagar and another Vs. The State of Maharashtra, AIR 1979 SC 826
Ashok Kumar Chatterjee Vs. State of Madhya Pradesh, AIR 1989 SC 1890
Sakharam Vs. State of Madhya Pradesh, AIR 1992 SC 758
State of Maharashtra Vs. Champalal Punjaji Shah, AIR 1981 SC 1675
Dharm Das Wadhwani Vs. The State of Uttar Pradesh, AIR 1975 SC 241
Bhagat Ram Vs. State of Punjab, AIR 1954 SC 621
Anjlus Dungdung Vs. State of Jharkhand, (2005) 9 SCC 765
Nanhar Vs. State of Haryana, (2010) 11 SCC 423
Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116
Charan Singh Vs. The State of Uttar Pradesh, AIR 1967 SC 520
Gian Mahtani Vs. State of Maharashtra AIR 1971 SC 1898
State (Delhi Administration) Vs. Gulzarilal Tandon AIR 1979 SC 1382
Bhugdomal Gangaram and others Vs. The State of Gujarat, AIR 1983 SC 906
State of UP Vs. Sukhbasi and others, AIR 1985 SC 1224
Mookkiah and another Vs. State, (2013) 2 SCC 89
State of Rajashthan Vs. Talevar and another, 2011 (11) SCC 666
Surendra Vs. State of Rajasthan, AIR 2012 SC (Supp) 78
State of Rajasthan Vs. Shera Ram @ Vishnu Dutt, 2012 (1) SCC 602
Balak Ram and another Vs. State of UP, AIR 1974 SC 2165
Allarakha K. Mansuri Vs. State of Gujarat, (2002) 3 SCC 57
Raghunath Vs. State of Haryana, (2003) 1 SCC 398
State of U.P Vs. Ram Veer Singh and others, AIR 2007 SC 3075
S.Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others, (2008) 11 SCC 186
Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, AIR 2008 SC 2066,
Arulvelu and another Vs. State, (2009) 10 SCC 206

Perla Somasekhara Reddy and others Vs. State of A.P., (2009) 16 SCC 98
Ram Singh @ Chhaju Vs. State of Himachal Pradesh, (2010) 2 SCC 445

For the appellant: Mr. Ashok Chaudhary and Mr.V.S.Chauhan, Addl. Advocate Generals and Mr.J.S.Guleria, Assistant Advocate General.
For the respondents: Mr.Anup Chitkara, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment passed by learned Additional Sessions Judge Sirmour District at Nahan in Sessions trial No.1-N/7 of 2008 titled State of HP Vs. Nomu Ram and others.

BRIEF FACTS OF THE PROSECUTION CASE:

2. It is alleged by prosecution that deceased Sadhu Ram son of Smt. Kamla Devi and brother of Puran was labourer. It is further alleged by prosecution that marriage of deceased Sadhu Ram was settled with the daughter of co-accused Nomu Ram and deceased Sadhu Ram had given Rs.50,000/- (Fifty thousand) to co-accused Nomu Ram as marriage consideration amount. It is further alleged by prosecution that Reena Devi daughter of co-accused Nomu Ram stayed with deceased Sadhu Ram at Kullu/Manali for about 10/12 days. It is further alleged by prosecution that after some time co-accused Nomu Ram brought back his daughter Reena Devi from Manali and got her married somewhere else due to which the relation between co-accused Nomu Ram and deceased Sadhu Ram became strained. It is further alleged by prosecution that whenever deceased Sadhu Ram used to demand back his money then accused persons used to quarrel with deceased and also used to threaten deceased to kill him. It is further alleged by prosecution that on dated 18.9.2007 at about 9 PM deceased Sadhu Ram came to the house of co-accused Nomu Ram for demand of his money and thereafter deceased Sadhu Ram did not return to his house. It is further alleged by prosecution that on dated 19.9.2007 at about 11.25 AM co-accused Jogi Ram filed a criminal complaint in Police Station Shillai regarding quarrel which took place in the evening on dated 18.9.2007 with deceased Sadhu Ram on the basis of which rapat in daily diary Ext PW10/A was recorded by PW10 Constable Tapender. It is further alleged by prosecution that thereafter medical examination of co-accused Jogi Ram was also conducted by PW12 Dr.Rajeev Chauhan the then Medical Officer CHC Shillai on dated 19.9.2007 and he was found to have sustained three injuries which were simple in nature caused with blunt weapon regarding which MLC Ext PW12/A was issued. It is further alleged by prosecution that on dated 23.9.2007 a telephonic message was received at about 4 PM by PW1 Inspector Narveer Singh that a dead body was seen in the water of Echadi dam and thereafter rapat in the daily diary Ext PW16/A was recorded. It is further alleged by prosecution that thereafter on receipt of information PW19 HC Arjun Singh went to the spot along with police officials and found that a dead body was floating in the water which was fully decomposed. It is further alleged by prosecution that both legs and one hand of the body was tied with the help of a rope. It is further alleged by prosecution that thereafter photographs of dead body were obtained which are Ext PW19/C-1 to Ext PW19/C-10 and inquest report Ext PW19/A and Ext PW19/B were prepared and the dead body was brought

to Civil Hospital Paonta Sahib for post mortem examination. It is further alleged by prosecution that thereafter PW1 Inspector Narveer Singh also examined dead body and on examination of dead body it appears to be a case of murder and thereafter rukka Ext PW1/A was prepared which was forwarded to Police Station. It is further alleged by prosecution that body of deceased Sadhu Ram was fully decomposed and thereafter same was sent for post mortem examination. It is further alleged by prosecution that on dated 25.9.2007 PW2 Kamla Devi came to know regarding recovery of dead body and identified the dead body of deceased. It is further alleged by prosecution that as per post mortem report deceased had died due to antemortem head injury and duration between death and injury was instantaneous and between death and post mortem was 7 to 10 days. It is further alleged by prosecution that post mortem report is Ext PW21/A. It is further alleged by prosecution that viscera of the deceased along with clothes were handed over to police for chemical examination and as per report of chemical examiner Ext PA no poison was detected in the viscera. It is further alleged by prosecution that as per report of chemical examiner Ext PX human blood was detected on the vest, trouser and T-shirt of deceased Sadhu Ram. It is further alleged by prosecution that thereafter dead body was handed over to PW3 Puran vide memo Ext PW3/A. It is further alleged by prosecution that thereafter PW2 Smt Kamla Devi expressed suspicion for the commission of murder of deceased Sadhu Ram upon co-accused Nomu Ram and co-accused Jogi Ram. It is further alleged by prosecution that co-accused Nomu Ram and co-accused Jogi Ram were arrested on dated 27.9.2007. It is further alleged by prosecution that FIR Ext PW17/A was recorded. It is further alleged by prosecution that disclosure statement of accused persons were recorded and as per disclosure statement clothes which were worn at the time of incident and stick were recovered. It is further alleged by prosecution that trouser Ext P2 and shirt Ext P3 were also took into possession vide memo Ext PW7/C. It is further alleged by prosecution that stick Ext P1 was also took into possession vide memo Ext PW7/B. It is further alleged by prosecution that as per chemical examination report Ext PX human blood was found on the trouser. It is further alleged by prosecution that akas tatima Ext PW5/A and copy of Jamabandi Ext PW5/D were also took into possession and copy of family register Ext PW6/A was also took into possession. It is further alleged by prosecution that as per opinion of PW21 Dr.Piyush Kapila the injury sustained by deceased on his head could be caused with stick Ext P9 which was sufficient to cause death. Learned Additional Sessions Judge Nahan framed charge against accused persons under Sections 302 and 201 read with Section 34 IPC. Accused persons did not plead guilty and claimed trial.

3. Prosecution examined as many as twenty one witnesses in support of its case.

Sr.No.	Name of Witness
PW1	Inspector Narveer singh
PW2	Smt. Kamla Devi
PW3	Puran @ Pardeep
PW4	Jati Ram
PW5	Dinesh Sharma
PW6	Surat Singh
PW7	Kalyan Singh
PW8	Balbir Singh
PW9	Kalyan Singh

PW10	Constable Tapender
PW11	Dhani Ram
PW12	Dr. Rajeev Chauhan
PW13	Veer Singh
PW14	Kanwar Singh
PW15	Constable Surender Tomar
PW16	Constable Dinesh Kumar
PW17	SI Balak Ram
PW18	Gulasher Ahmed
PW19	HC Arjun Singh
PW20	Inspector Shyam Lal
PW21	Dr. Piyush Kapila

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

Sr.No.	*Description.*
Ext. PW1/A	*Rukka*
Ext. PW1/B	*Statement of Smt. Kamla Devi*
Ext. PW1/C	*Statement of Somani*
Ext. PW1/D	*Statement of Sant Ram*
Ext. PW1/E	*Statement of Puran.*
Ext. PW1/F	*Letter*
Ext. PW3/A	*Memo*
Ext. PW4/A	*Memo regarding place of occurrence.*
Ext. PW4/B	*Memo regarding recovery of stick and clothes etc.*
Ext. PW5/A	*Akas Tatima*
Ext. PW5/B	*Memo of demarcation*
Ext. PW5/C	*Memo regarding throwing of dead body in Tons river.*
Ext. PW5/D	*Jamabandi of the spot.*
Ext. PW6/A	*Copy of family register*
Ext. PW7/A	*Memo regarding recovery of stick.*
Ext. PW7/B	*Recovery memo of stick*
Ext. PW7/C	*Recovery memo of trouser and shirt.*
Ext. PW7/D	*Recovery memo of clothes.*
Ext. PW7/E&F	*Recovery memo of trouser, shirt and stick.*
Ext. PW7/G	*Recovery memo of under shirt and trouser of Jogi Ram.*
Ext. PW10/A&B	*Rapat No.10 and 18 respectively*
Ext. PW12/A	*MLC of Jogi Ram*

Ext. PW13/A	*Memo regarding recovery of stick, Shirt and trouser.*
Ext. PW15/A	*Rapat*
Ext. PW16/A	*Copy of rapat No.9 Dated 23-9-2007*
*Ext.*PW16/B&C	*Copy of rapat No. 20 dated 24-9-2007. and rapat No.7 dated 28-9-2007*
Ext. PW17/A	*FIR*
Ext. PW17/B	*Endorsement on the back of Ext.* PW1/F
Ext. PW19/ A&B	*Inquest reports*
Ext. PA	*Rapat*
Ext. PW20/A	*Site plan*
Ext. PW20/B	*Site plan*
Ext. PW20/C	*Statement of Balbir Singh*
Ext. PW20/D&E	*Statements of kanwar singh & Veer Singh.*
Ext. PW21/A	*Post mortem report*
Ext. PW21/B	*Final opinion*
Ext. PX	*Report of chemical examiner*
Ext. P1	*Stick.*
Ext. P2	*Trouser*
Ext. P3	*Shirt*
Ext. P4	*Trouser*
Ext. P5	*Shirt*
Ext. P6	*Stick*
Ext. P7	*Undershirt.*
Ext. P8	*Trouser*
Ext. P9	*Stick.*

5. Statement of accused persons also recorded under Section 313 Cr.PC. Accused persons did not lead any defence evidence. Learned trial Court acquitted all accused persons.

6. Feeling aggrieved against the judgment passed by learned Additional Sessions Judge Sirmour District at Nahan State of HP filed present appeal.

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

8. Point for determination in the present appeal is whether learned trial Court did not properly appreciate the oral as well as documentary evidence adduced by the parties and caused miscarriage of justice to the appellant.

9. ORAL EVIDENCE ADDUCED BY PROSECUTION:

9.1. PW1 Inspector Narveer Singh has stated that during the year 2007 he was posted as Investigating Officer at Police Station Paonta Sahib. He has stated that on dated

23.9.2007 at about 4.00 PM a telephonic message was received in Police Station Paonta Sahib that a dead body of unknown person was floating in the water of Echadi dam and he informed incharge Police Post Rajban and directed him to visit at spot. He has stated that HC Arjun was sent by Incharge Police Post Rajban to visit at the spot who brought dead body to Civil Hospital Paonta Sahib for conducting post mortem. He has stated that dead body was brought to hospital by HC Arjun Singh on dated 24.9.2007 in the evening. He has stated that he personally examined dead body in the mortuary house and dead body had started decomposing. He has stated that deceased was having injury mark on his forehead. He has stated that deceased was wearing green colour T-shirt and grey jeans trouser and deceased was naked from hip portion. He has stated that feet and left hand of deceased Sadhu Ram were tied with rope. He has stated that after examination of dead body it appears to be a case of murder and thereafter he wrote rukka for registration of case at Police Station Paonta Sahib. He has stated that rukka Ext PW1/A was sent through Constable Hira Singh. He has stated that dead body was identified by the relatives of deceased Sadhu Ram. He has stated that he also obtained photographs of the dead body. He has stated that he recorded statements of Smt. Kamla Devi, Smt. Shimani, Sant Ram and Puran which are Ext PW1/B to Ext PW1/E. He has stated that since the case pertains to Police Station Shillai the case was handed over to Police Station Shillai vide letter Ext PW1/F for further investigation. He has stated that on dated 27.9.2007 he arrested co-accused Nomu Ram and co-accused Jogi Ram. He has stated that on dated 28.9.2007 the file was handed over to Police Station Shillai. He has stated that thereafter co-accused Nomu Ram and co-accused Jogi Ram were brought from their house. He has stated that on inspection of dead body only one injury was found on the forehead of deceased Sadhu Ram.

9.2. PW2 Smt. Kamla Devi has stated that deceased Sadhu Ram was her son. She has stated that deceased performed labour work. She has stated that some time deceased went to Kullu/Manali in connection with labour work and co-accused Nomu Ram also used to accompany with deceased Sadhu Ram to Manali. She has stated that there was proposal of marriage of Reena Devi daughter of co-accused Nomu Ram with her son deceased Sadhu Ram. She has stated that Reena Devi daughter of co-accused Nomu Ram had also visited at Manali and stayed at Manali for about 10/12 days with her son deceased Sadhu Ram. She has stated that thereafter co-accused Nomu Ram married his daughter somewhere else in Haryana and relation between deceased Sadhu Ram and co-accused Nomu Ram became strained after the marriage of Reena Devi. She has stated that her son deceased Sadhu Ram had given Rs.50,000/- (Fifty thousand) to co-accused Nomu Ram. She has stated that on dated 18.9.2007 deceased Sadhu Ram went to the house of co-accused Nomu Ram to demand his money at about 9.00 PM and thereafter deceased Sadhu Ram did not return. She has stated that she inquired from her relatives but no information was received regarding her son deceased Sadhu Ram. She has stated that thereafter she thought that her son deceased Sadhu Ram might have gone to Kullu/Manali in connection with labour work. She has stated that whenever her son deceased Sadhu Ram went to the house of co-accused Nomu Ram to demand his money co-accused Nomu Ram and his family members used to threat deceased Sadhu Ram. She has stated that thereafter on dated 25.9.2007 she came to know that police official had recovered a dead body in Echadi dam on dated 24.9.2007. She has stated that thereafter she along with her son and relatives went to the mortuary house at Paonta Sahib and identified the dead body. She has stated that the feet and one hand of deceased Sadhu Ram was tied with rope and she expressed suspicion on co-accused Nomu Ram and co-accused Jogi Ram for the commission of murder of her son deceased Sadhu Ram. She has stated that the age of deceased Sadhu Ram was 19 years. She has stated that she has four sons and three daughters. She has stated that

deceased Sadhu Ram was the eldest son. She has stated that her deceased son Sadhu Ram came to village from Manali on dated 24.9.2007 and brought Rs.50,000/- (Fifty thousand) with him. She has stated that deceased Sadhu Ram had given amount to the tune of Rs.50,000/- (Fifty thousand) to co-accused Nomu Ram at the house co-accused Nomu Ram. She has stated that deceased Sadhu Ram only used to bear expenses of entire family as there was no other earning member in her family. She has stated that deceased Sadhu Ram had gone to Manali in connection with labour work in the month of July 2007. She has stated that co-accused Nomu Ram had also gone with deceased Sadhu Ram. She has stated that deceased Sadhu Ram had given Rs.50,000/- (Fifty thousand) to co-accused Nomu Ram as consideration amount for marriage of Reena Devi with her deceased son Sadhu Ram. She has stated that her house is situated at a distance of about 7 Kms. from the house of co-accused Nomu Ram. She has stated that co-accused Nomu Ram did not visit at her house prior to the death of deceased Sadhu Ram. She has stated that when deceased Sadhu Ram did not return back from the house of co-accused Nomu Ram thereafter she went to the house of co-accused Nomu Ram to inquire about deceased Sadhu Ram. She has stated that co-accused Bhagat is the brother of co-accused Nomu Ram. She has denied suggestion that Reena Devi daughter of co-accused Nomu Ram had not visited at Manali. She also denied suggestion that Reena Devi daughter of co-accused Nomu Ram had not stayed with deceased Sadhu Ram at Manali. She has denied suggestion that co-accused Nomu Ram had not promised to marry his daughter with deceased Sadhu Ram. She has denied suggestion that deceased Sadhu Ram did not pay Rs.50,000/- (Fifty thousand) to co-accused Nomu Ram.

9.3 PW3 Puran has stated that deceased Sadhu Ram was his brother. He has stated that deceased Sadhu Ram used to perform labour work and some time deceased used to visit Kullu/Manali in connection with labour work. He has stated that marriage of deceased Sadhu Ram was settled with the daughter of co-accused Nomu Ram. He has stated that his brother deceased Sadhu Ram had given Rs.40,000/- to Rs.50,000/- to co-accused Nomu Ram as marriage consideration amount. He has stated that Reena Devi daughter of co-accused Nomu Ram stayed at Kullu/Manali for about 10/12 days. He has stated that after some time co-accused Nomu Ram brought back his daughter from Manali. He has stated that on dated 18.9.2007 deceased Sadhu Ram went to the house of co-accused Nomu Ram at about 9 PM to bring back money from co-accused Nomu Ram. He has stated that co-accused Nomu Ram had married his daughter in Haryana with some other person. He has stated that his brother deceased Sadhu Ram did not return home from the house of co-accused Nomu Ram. He has stated that whenever deceased Sadhu Ram used to demand back his money co-accused Jogi Ram, co-accused Nomu Ram, co-accused Shupa Ram and co-accused Bhagtu Ram used to quarrel with deceased Sadhu Ram and used to threaten deceased Sadhu Ram to kill him. He has stated that on dated 25.9.2007 he came to know that police had recovered a dead body from Echadi dam which was kept in Civil hospital Paonta Sahib. He has stated that he along with his mother and relatives visited at civil hospital and identified the dead body of his brother deceased Sadhu Ram. He has stated that after post mortem dead body was handed over to him and memo Ext PW3/A was prepared which bears his signature. He has stated that photographs of dead body are marked A1 to A9. He has stated that his brother deceased Sadhu Ram had not given an amount of Rs. 40,000/- (Forty thousand) to co-accused Nomu Ram in his presence. He has stated that he did not visit the house of co-accused Nomu Ram to inquire about his brother deceased Sadhu Ram. He has denied suggestion that Reena Devi did not remain with his brother deceased Sadhu Ram at Manali. He has denied suggestion that no amount was given by his brother deceased Sadhu Ram to co-accused Nomu Ram.

9.4. PW4 Jati Ram has stated that he was associated by the police in the investigation. He has stated that on dated 29.9.2007 co-accused Nomu Ram had given a disclosure statement to the police that he could locate the place where the incident took place. He has stated that memo Ext.PW4/A was prepared by him which bears his signature. He has stated that on dated 3.10.2007 co-accused Bhagtu disclosed to the police that he could locate the place where the dead body of deceased Sadhu Ram was thrown in Tons river. He has stated that co-accused Bhagtu had also given disclosure statement that he could produce stick used in the incident and clothes which were worn by him at the time of incident. He has stated that memo Ext PW4/B was prepared which was signed by him and Chattar Singh. He has stated that co-accused Nomu Ram had also given disclosure statement that he could produce the stick used in the incident. He has stated that he could not tell who wrote disclosure statement. He has denied suggestion that no disclosure statement was given by co-accused Nomu Ram and co-accused Bhagat Ram.

9.5. PW5 Dinesh Sharma has stated that on dated 29.9.2007 on the direction of Tehsildar Shillai he went to village Mohrad to prepare tatima. He has stated that co-accused Nomu Ram located the place of incident and he prepared Akas Tatima Ext PW5/A. He has stated that co-accused Nomu Ram had also shown place where the dead body was thrown in Tons river and memo Ext PW5/C was prepared. He has stated that incident took place in khasra No.1412/601 and he also prepared jamabandi Ext. PW5/D. He has stated that Tons river is situated at a distance of 3 Kms. from the house of co-accused Nomu Ram. He has stated that there was no evidence of throwing of dead body near Tons river. He has stated that police officials have inquired from co-accused Nomu Ram in his court yard about the place of incident.

9.6. PW6 Surat Singh has stated that he was working as Panchayat Assistant Secretary Gram Panchayat Balikoti and on the request of police officials he prepared copy of family register which is Ext PW6/A. He has denied suggestion that he had not given copy of birth register because in the birth register the age of co-accused Jogi Ram was less then 18 years.

9.7. PW7 Kalyan Singh has stated that on dated 29.9.2007 he remained associated in the investigation. He has stated that in his presence co-accused Nomu Ram has produced one stick and one trouser and shirt to police officials. He has stated that he does not know whether any seal was placed on the parcel or not. Witness was declared hostile. He has stated that on dated 29.9.2007 co-accused Nomu Ram had disclosed to police that he could recover stick from his house and thereafter memo Ext PW7/A was prepared. He has admitted that co-accused Nomu Ram produced one stick Ext P1 from his house which was took into possession by investigating agency. He has admitted that recovery memo of stick Ext PW7/B was prepared by police. He has admitted that co-accused Nomu Ram had produced one trouser and shirt to the investigating agency which were kept in a parcel by police. He has stated that trouser Ext P2 and shirt Ext P3 are the same which were took into possession by investigating agency from co-accused Nomu Ram. He has stated that memo Ext PW7/C was prepared at the spot. He has stated that co-accused Shupa Ram had given disclosure statement that he could produce clothes which he had worn at the time of incident and memo Ext PW7/D was prepared. He has stated that thereafter co-accused Shupa Ram had handed over his shirt and trouser to the investigating agency. He has stated that a parcel of clothes was also prepared by investigating agency. He has stated that trouser of co-accused Shupa Ram Ext P4 and shirt Ext P5 were took into possession by the investigating agency. He has stated that co-accused Jogi Ram had also

handed over his clothes to the investigating agency. He has stated that all the proceedings had taken place in the court yard of co-accused Nomu Ram. He has stated that undershirt of co-accused Jogi Ram is Ext P7 and trouser is Ext P8. He has stated that he was sent by police officials to his house to bring tea for them and when he came back from his house the parcels were already prepared. He has stated that when he came back his signatures were obtained on various papers already written by police officials.

9.8. PW8 Balbir Singh has stated that co-accused Nomu Ram had not given any disclosure statement in his presence. Witness was declared hostile by the prosecution. He has denied suggestion that on dated 29.9.2007 co-accused Nomu Ram had given disclosure statement that he could recover stick and clothes kept by him in his house. He has denied suggestion that police officials prepared memo Ext PW7/A in his presence. He has admitted that co-accused Nomu Ram had brought one stick from his house and in this regard seizure memo Ext PW1/B was prepared. He has admitted that co-accused Nomu Ram handed over his trouser Ext P2 and shirt Ext P3 to police officials. He has denied suggestion that police officials had sealed the clothes in a parcel. He denied suggestion that co-accused Shupa Ram disclosed to the police that he could recover clothes which were worn by him at the time of incident. He has admitted that co-accused Shupa Ram handed over stick Ext P6 to police which was took into possession vide seizure memo Ext PW7/F. He has denied suggestion that police officials had sealed articles in his presence. He has admitted that co-accused Nomu Ram is his real maternal uncle and co-accused Shupa Ram and co-accused Jogi Ram are his brother-in-law. He denied suggestion that in order to save accused persons he resiled from his earlier statement.

9.9. PW9 Kalyan Singh has stated that he remained posted as MHC at Police Station Shillai from 2006 to May 2007. He has stated that on dated 29.9.2007 SI Shayam Lal had handed over him three parcels sealed with seal impression 'ADS' and two sticks sealed with seal impression 'ADS'. He has stated that again on dated 3.10.2007 SI Shayam Lal had handed over a parcel sealed with seal impression 'P' and a bamboo stick along with seal impression 'P'. He has stated that on dated 5.10.2007 HC Chattar Singh handed over viscera in a Jar and entries were recorded in the register. He has stated that thereafter he sent articles through Constable Dhani Ram to FSL Junga for chemical analysis vide RC No.50 of 2007. He has stated that case property remained intact in his custody.

9.10. PW10 Constable Tapender Singh has stated that he remained posted as MC at Police Station Shillai w.e.f 2005 to March 2008. He has stated that on dated 19.9.2007 he was present at Police Station along with SI Jeet Singh at about 11.25 AM. He has stated that one co-accused Jogi Ram came to Police Station and lodged a criminal complaint regarding quarrel with deceased Sadhu Ram. He has stated that he recorded entry in daily diary at serial No.10 copy of which is Ext PW10/A which was written by him. He has stated that thereafter complainant Jogi Ram was sent for medical examination at CHC Shillai. He has stated that all injuries sustained by co-accused Jogi Ram were simple in nature. He has stated that thereafter on dated 28.9.2007 SHO Paonta Sahib sent to rukka for registration of case against accused persons and thereafter FIR No.56 of 2007 dated 28.9.2007 was registered at Police Station Shillai.

9.11. PW11 Constable Dhani Ram has stated that he was posted at Police Station Shillai since 2006. He has stated that on dated 7.10.2007 MHC Kalyan Singh Police Station Shillai handed over five parcels sealed with seal impression 'SDA'. He has stated that he deposited all parcels at FSL Junga vide RC No.50 of 2007. He has stated that case property remained intact in his custody.

9.12. PW12 Dr. Rajeev Chauhan has stated that he was posted as Medical Officer at CHC Shillar from 2006. He has stated that on dated 19.9.2007 co-accused Jogi Ram son of Nomu Ram was brought by police for medico legal examination with the alleged history of assault. He has stated that on examination he observed that lacerated wound on upper part of left pinna measuring 3 cm in length involving whole thickness clotted blood was present. He has stated that contusion of size 3 cm x 1 cm obliquely placed on left mallor region red in colour with clear interming space skin was abbreted and contusion of size 2 cm x 1 reddish blue in colour on left lower eye lid was present. He has stated that injuries were simple caused by blunt object. He has stated that he issued MLC Ext PW12/A which bears his signature. He has stated that injuries mentioned in MLC Ext PW12/A could be caused within duration of 15 hours. He has stated that injury No.1 was located on a delicate part of body and it could cause contusion and ultimately caused in unconsciousness. He has stated that weapon was used by force. He has stated that injuries No. 1 to 3 could be caused with stick blows.

9.13. PW13 Veer Singh has stated that he was up-Pradhan Gram Panchayat Balikoti. He has stated that on dated 3.10.2007 he along with Sh Kanwar Singh Pardhan Gram Panchayat Balikoti were associated by the police and a stick was shown by police officials of Police Station Shillai. He has stated that he does not know from where the sticks were recovered. He has stated that accused persons are known to him who are resident of Gram Panchayat Balikoti. He has stated that accused persons are not related to him. He has stated that he is Rajput by caste and accused persons are Harijon by caste. He has denied suggestion that on dated 3.10.2007 he along with Kanwar Singh and co-accused Bhagtu were associated by police and sticks were recovered at the instance of co-accused Bhagtu. He denied suggestion that on the same day co-accused Bhagtu has produced one shirt and trouser from his house and told that he was wearing the aforesaid clothes on dated 18.9.2007 at the time of incident. He denied suggestion that co-accused Bhagtu had told that injury was caused upon deceased Sadhu Ram by a stick. He denied suggestion that he resiled from his earlier statement in order to save accused persons. He has stated that he signed memo Ext PW13/A at Police Station Shillai.

9.14 PW14 Kanwar Singh has stated that he was Pardhan Gram Panchayat Balikoti since 2005 and he was called on dated 3.10.2007 by police at Police Station Shillai and was shown to him a shirt, stick and trouser. He has stated that he does not know anything about the case and the same was not recovered in his presence. Witness was declared hostile. He has stated that co-accused Bhagtu is known to him. He has denied suggestion that on dated 3.10.2007 co-accused Bhagtu took police officials to his house and trouser, shirt and sticks were recovered at his instance. He denied suggestion that co-accused Bhagtu had also given disclosure statement that stick was used in beating deceased Sadhu Ram. He denied suggestion that he resiled from his earlier statement in order to save accused persons.

9.15 PW15 Constable Surender Tomar has stated that he remained posted at Police Station Paonta Sahib from September 2006 to September 2008. He has stated that on dated 24.9.2009 he was performing duty at about 8.15 PM and HC Arjun Singh came from Police Post Rajban and lodged rapat Ext PW15/A.

9.16 PW16 Constable Dinesh Kumar has stated that he was posted as MC at Police Post Rajban from April 2006. He has stated that on dated 23.9.2007 on telephonic message received from Station House Officer Paonta Sahib regarding presence of dead body in Echhadi dam he recorded entry in daily diary at serial No.9 and again recorded entry in

rapat No.20 on dated 24.9.2007 regarding departure of HC Arjun Singh along with other staff towards Echhadi dam. He has stated that on dated 28.9.2007 a rapat No.7 was entered in daily diary register about arrival of HC Arjun Singh and other police officials. He has stated that copy of rapat No.9 is Ext PW16/A, copy of rapat No.20 is Ext PW16/B and copy of rapat No.7 is Ext PW16/C which are true according to original record.

9.17 PW17 SI Balak Ram has stated that he remained posted at Police Station Shillai from 2006 to 2007. He has stated that on dated 28.9.2007 Constable Hira Singh Police Station Paonta Sahib brought a rukka Ext PW1/A and he registered FIR No. 56 of 2007 Ext PW17/A and endorsement is Ext PW1/F.

9.18 PW18 Gul Sher Ahmad has stated that he is running photographs shop at Paonta Sahib. He has stated that on dated 25.9.2007 he went to mortuary house and clicked photographs of dead body of deceased Sadhu Ram. He has stated that thereafter he handed over photographs along with negatives to police officials.

9.19 PW19 HC Arjun Singh has stated that he was posted at Police Post Rajban from 2007. He has stated that on dated 24.9.2007 information was received that a dead body was floating in Echadi dam. He has stated that he along with police officials went at the spot and found that dead body was floating in the water. He has stated that dead body was brought with the help of boat. He has stated that after inspection of dead body it was observed that dead body was a male person and same was fully decomposed. He has stated that both legs and one hand were tied with the help of rope. He has stated that photograph of dead body was obtained. He has stated that dead body was brought in a private vehicle at Civil Hospital Paonta Sahib. He has stated that dead body was placed in the mortuary house for post mortem. He has stated that Medical Officer posted at civil hospital Paonta Sahib advised for the conduct of post mortem from IGMC Shimla because the body was fully decomposed. He has stated that on dated 26.9.2007 brother of deceased Pardeep Kumar and mother Amla Devi came there and identified dead body of deceased Sadhu Ram. He has stated that thereafter dead body was brought to IGMC Shimla for post mortem and post mortem was conducted in IGMC Shimla. He has stated that after post mortem dead body was handed over to the relative of deceased and receipt Ext PW3/A was prepared. He has stated that photographs are Ext PW19/C-1 to Ext PW19/C-10 and negatives are Ext PW19/C-11. He has stated that he noticed only one injury upon the dead body above the ear.

9.20. PW20 Inspector Shayam Lal has stated that in the year 2007 he remained posted as Station House Officer at Police Station Shillai. He has stated that investigation of the case was conducted by him. He has stated that case was registered in Police Station Paonta Sahib. He has stated that later on it was observed that occurrence took place in the jurisdiction of Police Station Shillai and thereafter case was referred to Police Station Shillai. He has stated that co-accused Nomu Ram was arrested by police officials posted at Police Station Paonta Sahib. He has stated that on dated 29.9.2007 co-accused Nomu Ram had given disclosure statement that he could identify the place of incident where the dead body was thrown in the river. He has stated that disclosure statement of co-accused Nomu Ram was recorded. He has stated that thereafter co-accused Nomu Ram took police officials and witnesses to the place of incident and identify the place where the deceased was thrown in the river. He has stated that he also prepared site plan Ext PW20/A and Ext PW20/B. He has stated that co-accused Nomu Ram had also given disclosure statement that he had concealed sticks in his house and thereafter sticks were recovered from the house of co-accused Nomu Ram. He has stated that stick is Ext P1. He has stated that co-accused

Shupa Ram and co-accused Jogi Ram were arrested by him on dated 29.9.2007. He has stated that clothes were also took into possession as per disclosure statement of co-accused Shupa Ram. He has stated that stick Ext P9, Shirt Ext P7 and trouser Ext P8 were recovered as per disclosure statement given by co-accused Bhagtu. He has stated that Akas Tatima Ext PW5/A was got prepared from Halqua Patwari. He has stated that medical of co-accused Jogi Ram was also got conducted in Civil Hospital Shillai and MLC Ext PW12/A was obtained. He has stated that he recorded the statements of the prosecution witnesses as per their versions and nothing was added or deleted by him. He has stated that co-accused Nomu Ram given disclosure statement and located the place of incident where the dead body of deceased Sadhu Ram was thrown. He has denied suggestion that no disclosure statement was given by accused persons. He denied suggestion that accused persons did not locate the place. He denied suggestion that co-accused Bhagtu and co-accused Nomu Ram were not present and they have gone outside for performing labour work.

9.21. PW21 Dr. Piyush Kapila has stated that he was posted in the department of Forensic Medicine IGMC Shimla since September 1998. He has stated that on dated 27.9.2007 a dead body of Sadhu Ram was brought for post mortem examination along with inquest papers. He has stated that dead body was identified by Pardeep Kumar and Shupa Ram. He has stated that dead body was recovered from Echhadi dam in District Sirmour. He has stated that after examination of dead body of deceased Sadhu Ram he observed that height of dead body was 5 feet 5 inches and hands from left side on both legs were tied with a plastic rope and the body was in decomposed condition and maggots all over the body were present. He has stated that skin slippage and ligature marks were present on legs and hands which were parchmentised. He has stated that multiple folds of the rope were kept on the body. He has stated that he observed following anti mortem injuries 3x2 cm. laceration was present on left side of forehead. He has further stated that he also observed following antemortem injuries 5 cm back to left eyebrow and supraorbital ridge, bone deep, radiating fracture directing from the point on frontal bone, parietal bone reaching up to temporal bone with separation of sagittal suture, with vital line of hemorrhage. He has stated that there was gross extradural hemorrhage at the site of fracture however rest of brain tissue was decomposed below the dural space. He has further stated that he also observed parchmentisation of ligature mark on the legs and left hand were ante mortem in nature. He has stated that deceased had died as a result of ante mortem head injury. He has stated that probable time between injury and death was instantaneous. He has stated that clothes of the deceased were preserved, sealed and handed over to police officials. He has stated that he issued post mortem report Ext PW21/A which bears his signature. He has stated that post mortem report contains four leaves and five pages. He has stated that after receiving chemical examiner report Ext PA he issued final opinion report Ext PW21/B. He has stated that the cause of death remained same. He has stated that injury observed by him at the time of post mortem upon the head of deceased could be caused with stick Ext P9. He has stated that sole injury was sufficient to cause death.

10. Submission of learned Additional Advocate General appearing on behalf of the State that it is proved on record beyond reasonable doubt that accused persons have motive to eliminate deceased Sadhu Ram in order to escape repayment of Rs.50,000/- (Fifty thousand) and on this ground appeal filed by State of HP be accepted is rejected being devoid of any force for the reason hereinafter mentioned. It is held that prosecution is under legal obligation to prove whether accused persons have committed murder of deceased Sadhu Ram on dated 18.9.2007 as alleged by prosecution. Case of the prosecution is not based upon oral eye witness but is based upon circumstantial evidence only. It is well

settled law that in circumstantial evidence the chain of circumstances should be completed in order to connect accused persons with the commission of criminal offence. The mere fact that deceased Sadhu Ram had given Rs.50,000/- (Fifty thousand) to co-accused Nomu Ram in lieu of marriage of his daughter with deceased Sadhu Ram is not sole sufficient fact to hold that accused persons have committed murder of deceased Sadhu Ram.

11. Another submission of learned Additional Advocate General appearing on behalf of the State that it is proved on record that deceased on dated 18.9.2007 went to the house of co-accused Nomu Ram in order to bring back Rs.50,000/- (Fifty thousand) which he had advanced as marriage consideration amount to co-accused Nomu Ram and in view of the fact that rapat No.10 Ext PW10/A was recorded at the instance of co-accused Jogi Ram wherein co-accused Jogi Ram son of Nomu Ram had specifically admitted that on dated 18.9.2007 at about 9 PM deceased Sadhu Ram came to the house of co-accused Nomu Ram and thereafter quarrel took place and thereafter dead body of the deceased was found floating in Echhadi dam on dated 24.9.2007 and on this ground appeal filed by the State be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It is not the case of the prosecution that dead body of deceased was found in the residential house of accused persons. On the contrary it is the case of the prosecution that dead body of deceased Sadhu Ram was found in Echhadi dam on dated 24.9.2007 which was in floating condition.In the present case the dead body was found in Echhadi dam in a floating manner in open public place and possibility of access of third person could not be ruled out beyond reasonable doubt. It is well settled law that last seen theory comes into play only when time gap between the point of time when accused persons and deceased were last seen together and when deceased was found dead was so small that possibility of any person other then accused being author of the crime becomes impossible.In the present case in view of the fact that deceased went to the house of co-accused Nomu Ram on dated 18.9.2007 during night period at 9 PM and in view of the fact that dead body of the deceased was found on dated 24.9.2007 in Echhadi dam in a floating manner in an open place the possibility of any person other then the accused being author of the crime could not be ruled out. See AIR 2008 SC 2819 titled Kusuma Ankama Rao Vs. State of A.P.

12. Another submission of learned Additional Advocate General appearing on behalf of the State that it is proved on record that deceased Sadhu Ram had gone to residential house of co-accused Nomu Ram on dated 18.9.2007 at 9 PM and it is proved on record that thereafter quarrel took place and rapat No.10 Ext PW10/A was lodged by co-accused Jogi Ram and co-accused Jogi Ram had also sustained three injuries and on this ground appeal filed by State be allowed is also rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that rapat No.10 Ext PW10/A was recorded by co-accused Jogi Ram and there is recital in rapat No.10 Ext PW10/A that deceased came in the residential house of co-accused Jogi Ram on dated 18.9.2007 at about 9 PM and quarrel took place and thereafter co-accused Jogi Ram had sustained injuries. It is proved on record that co-accused Jogi Ram was examined by Medical Officer posted in Civil Hospital Shillai on dated 19.9.2007 at 11.45 AM and it is proved on record that co-accused Jogi Ram had sustained three injuries i.e. lacerated wound on upper part of left pinna measuring 3 cm in length involving whole thickness clotted blood. It is proved on record that co-accused Jogi Ram had also sustained contusion injuries of 3 cm x 1 cm size obliquely placed on left mallor region red in colour with clear interming space. It is also proved on record that co-accused Jogi Ram had also sustained contusion of 2 cm x 1 cm reddish blue in colour on left lower eye lid. As per medical examination report all the injuries were simple caused with blunt object during 24 hours. Prosecution has not explained

contusion injuries sustained by co-accused Jogi Ram and prosecution has concealed genesis of the present case. No explanation has been given by the prosecution as to how co-accused Jogi Ram had sustained three injuries i.e. lacerated and contusion injuries. It is held that simply filing of rapat No.10 Ext.PW10/A did not prove the case of the prosecution that accused persons have caused murder of deceased Sadhu Ram with sticks.

13. Another submission of learned Additional Advocate General appearing on behalf of the State that on the basis of disclosure statement given by accused persons the appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. PW8 Balbir Singh member Gram Panchayat when appeared in witness box has specifically stated that co-accused Nomu Ram did not give any disclosure statement in his presence. Similarly PW13 Veer Singh Up-Pradhan Gram Panchayat has also stated in positive manner that co-accused Bhagtu had not given any disclosure statement in his presence. PW14 Kanwar Singh Pradhan Gram Panchayat has also stated in positive manner that co-accused Bhagtu did not give any disclosure statement in his presence. The independent witness of the disclosure statement relied by the prosecution did not support the prosecution story in the present case which creates doubts in the mind of court.

14. Another submission of learned Additional Advocate General appearing on behalf of the State that accused persons after committing murder of deceased Sadhu Ram threw the dead body of deceased in Tons river which was situated at a distance of about 3 Km. from the house of accused persons and thereafter dead body was recovered from Echhadi dam on dated 24.9.2007 wherein two legs, left hand and waist of deceased Sadhu Ram were tied with plastic rope and on this ground appeal filed by the State be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It is the case of the prosecution that Tons river is situated at a distance of 3 Km. from the house of accused persons and there is no evidence in order to prove on record that in what manner accused persons took the dead body of deceased Sadhu Ram to a distance of 3 Km. from their house to Tons river. Even there is no finger prints or feet prints of accused persons collected by the prosecution in order to connect the accused persons with place Tons river and in order to connect accused persons with weapon of attack i.e. stick.

15. Another submission of learned Additional Advocate General appearing on behalf of State that conduct of accused persons is covered under Section 8 of the Evidence Act and on this ground appeal filed by State be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that suspicion is not sufficient to convict the accused persons in criminal case. It is well settled law that in circumstantial evidence offence against accused persons should be proved by prosecution beyond reasonable doubt and there should be completion of chain of criminal offence.

16. Another submission of learned Additional Advocate General appearing on behalf of the State that in view of criminal analyst report placed on record appeal filed by State be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused chemical analyst report placed on record. As per chemical analyst report Ext PX and PA placed on record no poison was detected in the stomach and small intestine of the deceased and no poison was detected in the liver, spleen and kidney of the deceased Sadhu Ram. Even as per chemical analyst report Ext PX placed on record that though human blood was detected on exhibit 4a waist of deceased Sadhu Ram, exhibit 5b, exhibit 7a lower trouser of co-accused Jogi Ram and exhibit 8a shirt of co-accused Bhagtu but the blood grouping results on these exhibits were found inconclusive. It is well settled law that in order to connect accused persons with the commission of

criminal offence blood group of accused persons or deceased should be proved on exhibits 4a, 5b, 7a and 8a. It is held that simply on the ground that human blood was detected it is not sufficient to convict the accused persons in the absence of blood group of accused persons and deceased upon the exhibits connecting accused persons with the commission of criminal offence. Even as per chemical analyst report blood was not detected on Ext 5a shirt, exhibit 6a trouser of co-accused Nomu Ram, exhibit 6b shirt of co-accused Nomu Ram, exhibit 7b T-shirt of co-accused Jogi Ram and exhibit 8b trouser of co-accused Bhagtu. Even as per chemical analyst report blood was detected on exhibit 4b T-shirt of deceased Sadhu Ram and exhibit 4c pant of deceased Sadhu Ram which was disintegrated for further examination. It is held that chemical analyst report did not connect accused persons in the commission of crime in the absence of blood group of accused persons or deceased Sadhu Ran upon exhibits. In the present case it is proved on record that dead body of deceased Sadhu Ram was not recovered as per prior disclosure statement given by accused persons. On the contrary dead body of deceased as per prosecution story was recovered on dated 24.9.2007 in Echhadi dam and disclosure statements of accused persons under Section 27 of Indian Evidence Act 1872 were recorded on dated 29.9.2007 and 3.10.2007 after the recovery of dead body of deceased Sadhu Ram on dated 24.9.2007 from Echhadi dam. It is also well settled law that in order to convict the accused in circumstantial evidence five golden principles should be proved (i) That circumstances from which the conclusion of guilt is to be drawn should be fully established and the accused must be and not merely may be guilty (ii) That facts so established should be consistent only with guilt of the accused (iii) That circumstances should be of a conclusive nature. (iv) That chain of evidence should be complete (v) That innocence of accused should be ruled out. *(See 2013 Cri.L.J. 2040, titled Prakash vs. State of Rajasthan (Apex Court DB).* It is well settled law that circumstantial evidence means combination of facts creating a network through which accused could not escape**.** See AIR 1992 SC 2045 titled Sakharam Vs. State of Madhya Pradesh, also see AIR 2002 SC 3206 titled Ashish Batham Vs. State of Madhya Pradesh, also see AIR 2010 SC 762 titled Musheer Khan and another Vs. State of Madhya Pradesh, also see AIR 1979 SC 1410 titled State of Maharashtra Vs. Annappa Bandu Kavatage, also see AIR 1979 SC 826 titled S.P.Bhatnagar and another Vs. The State of Maharashtra, also see AIR 1989 SC 1890 titled Ashok Kumar Chatterjee Vs. State of Madhya Pradesh, also see AIR 1992 SC 758 titled Sakharam Vs. State of Madhya Pradesh, also see AIR 1981 SC 1675 titled State of Maharashtra Vs. Champalal Punjaji Shah, AIR 1975 SC 241 titled Dharm Das Wadhwani Vs. The State of Uttar Pradesh, Also see AIR 1954 SC 621 titled Bhagat Ram Vs. State of Punjab.

17. It is well settled law that circumstantial evidence under Section 27 of the Evidence Act is not substantive evidence it is only corroborative evidence. In the present case weapon of attack i.e. sticks were not sent by prosecution for chemical examination in order to prove that deceased had sustained head injury through sticks Ext P9. It is not proved on record beyond reasonable doubt that blood group of deceased was found upon sticks Ext P9 in order to connect the accused persons with the commission of crime as alleged by the prosecution. It was held in case reported (2005) 9 SCC 765 titled Anjlus Dungdung Vs. State of Jharkhand that suspicion however strong cannot take place of proof. It was held in case reported in (2010) 11 SCC 423 titled Nanhar Vs. State of Haryana that prosecution must stand or fall on its own leg and it cannot derive any strength from the weakness of the defense. Also See: (1984) 4 SCC 116 Sharad Birdhichand Sarda Vs. State of Maharashtra. It is well settled law that conjecture or suspicion cannot take place of legal proof. See: AIR 1967 SC 520 Charan Singh Vs. The State of Uttar Pradesh. *Also See:* AIR 1971 SC 1898 Gian Mahtani Vs. State of Maharashtra. It was held in case reported in AIR

1979 SC 1382 State (Delhi Administration) Vs. Gulzarilal Tandon that even where the circumstances raise a serious suspicion against the accused it cannot take the place of legal proof. Also See: AIR 1983 SC 906 titled Bhugdomal Gangaram and others Vs. The State of Gujarat See: AIR 1985 SC 1224 titled State of UP Vs. Sukhbasi and others**.** It is well settled principle of law that vested right accrued in favour of the accused with the judgment of acquittal by learned Sessions Court. (See (2013) 2 SCC 89 titled Mookkiah and another Vs. State. See 2011 (11) SCC 666 titled State of Rajashthan Vs. Talevar and another. See AIR 2012 SC (Supp) 78 titled Surendra Vs. State of Rajasthan. See 2012 (1) SCC 602 titled State of Rajasthan Vs. Shera Ram @ Vishnu Dutt). It is well settled principle of law (i) That appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible though the view of the appellate Court may be more probable. (ii) That while dealing with a judgment of acquittal the appellate Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned Courts below are perverse or otherwise unsustainable (iii) That appellate Court is entitled to consider whether in arriving at a finding of fact, learned Courts below failed to take into consideration any admissible fact (iv) That learned courts below took into consideration evidence brought on record contrary to law. (See AIR 1974 SC 2165 titled Balak Ram and another Vs. State of UP, See (2002) 3 SCC 57 titled Allarakha K. Mansuri Vs. State of Gujarat, See (2003) 1 SCC 398 titled Raghunath Vs. State of Haryana, See AIR 2007 SC 3075 State of U.P Vs. Ram Veer Singh and others, See AIR 2008 SC 2066, (2008) 11 SCC 186 S.Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others. Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, See (2009) 10 SCC 206 titled Arulvelu and another Vs. State, See (2009) 16 SCC 98 titled Perla Somasekhara Reddy and others Vs. State of A.P. See: (2010) 2 SCC 445 titled Ram Singh @ Chhaju Vs. State of Himachal Pradesh).

18. In view of the above stated facts it is held that learned trial Court had properly appreciated oral as well as documentary evidence placed on record and it is held that learned trial Court did not cause miscarriage of justice to the appellant. Appeal filed by the State is dismissed and judgment passed by learned trial Court is affirmed. Benefit of doubt is given to accused persons. Case property will be confiscated to the State of Himachal Pradesh after expiry of period of limitation for filing further proceedings. Records of learned trial Court along with certified copy of judgment be sent back forthwith. Appeal is disposed of. Pending application(s) if any are also disposed of.

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

Anupam Kumar …Appellant.

Versus

Harmeet Singh Ghai & others …Respondents.

FAO No. 458 of 2007

Decided on: 15.05.2015

Motor Vehicle Act, 1988- Section 169- First petition was consigned to record room- it was contended that second petition is not maintainable- held, that even if first petition had been dismissed in default, second petition is maintainable. (Para-5 and 6)

For the appellant: Mr. Dinesh Bhanot, Advocate.

For the respondents: Nemo for respondent No. 1.

Mr. B.M. Chauhan, Advocate, for respondent No. 2.
Mr. Ashwani Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

There is no representation on behalf of respondent No. 1 despite service. Hence, he is set ex-parte.

2. Challenge in this appeal is to the judgment and award, dated 19.09.2007, made by the Motor Accident Claims Tribunal (III), Shimla, (for short "the Tribunal") in MACT No. 36-S/2 of 2006/99, titled as Sh. Anupam Kumar versus Harmeet Singh Ghai and others, whereby the claim petition filed by the appellant-claimant came to be dismissed (for short "the impugned award").

3. The Tribunal has dismissed the claim petition on the grounds that the claimant-injured has failed to satisfactorily prove that the accident was outcome of the rash and negligent driving of the offending vehicle by its driver and that the first claim petition filed by the claimant-injured was consigned to records and second claim petition was not maintainable.

4. Heard.

5. It is apt to record herein that the first claim petition filed by the appellant-claimant-injured has not even dismissed in default and was simply consigned to records. The appellant-claimant-injured was well within his rights to file second claim petition or to lay a motion for calling the file of the first claim petition from the records.

6. In a case titled as **Jagdish versus Rahul Bus Service & others,** being **FAO No. 524 of 2007,** decided on 15.05.2015, this Court has discussed the issue and held that the second claim petition is maintainable in case the first claim petition came to be dismissed in default. While applying the ratio to the instant case, second claim petition was maintainable.

7. Having said so, the findings recorded by the Tribunal on issue No. 5 are set aside and it is held that the second claim petition is maintainable.

8. Coming to issue No. 1, it appears that the Tribunal has not discussed the entire evidence and the pleadings of the parties. While going through the record, it , *prima facie,* appears that the Tribunal has fallen in an error in holding that there was no satisfactory evidence on record suggesting that the appellant-claimant-injured had suffered injuries because of rash and negligent driving of the offending vehicle by its driver, without even discussing the entire evidence.

9. Accordingly, the appeal merits to be allowed and the impugned award is to be set aside.

10. However, keeping in view the fact that the accident has taken place in the year 1994 and the appellant-claimant-injured has been dragged from pillar to post and post to pillar and is litigating right from the year 1999, has not even received interim award under 'No Fault Liability' in terms of the provisions of Section 140 of the Motor Vehicles Act,

1988 (for short "the MV Act"), I deem it proper to conclude the lis here by awarding Rs. 25,000/- under 'No Fault Liability' with interest @ 7.5% per annum from the date of the impugned judgment and award till its realization in favour of the appellant-claimant-injured and against the insurer-respondent No. 2.

11. Insurer-respondent No. 2 is directed to deposit the awarded amount before this Registry within three weeks. On deposit, the said amount be released in favour of the appellant-claimant-injured after proper identification.

12. Accordingly, the appeal is allowed, the impugned award is set aside and the claim petition is granted, as indicated hereinabove.

13. Send down the record after placing copy of the judgment on Tribunal's file.

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

Balkar Singh & others …Appellants.
Versus
Ram Pal alias Sanju & others …Respondents.

FAO No. 153 of 2007
Decided on: 15.05.2015

Motor Vehicle Act, 1988- Section 166- Deceased was drawing salary of Rs.13,315/-- Tribunal had wrongly assessed his monthly income as Rs.12,455/-- amount of 50% was wrongly deducted towards his personal expenses, whereas 1/3rd amount was to be deducted towards personal expenses- compensation enhanced to Rs.14,02,800/-. (Para-9 to 13)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellants: Mr. R.K. Gautam, Senior Advocate, with Mr. Gaurav Gautam, Advocate.

For the respondents: Mr. T.S. Chauhan, Advocate, for respondents No. 1 and 2.
Mr. G.D. Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award, dated 28.02.2007, made by the Motor Accident Claims Tribunal, Una, Himachal Pradesh, (for short "the Tribunal") in M.A.C. Petition No. 9 of 2006, titled as Balkar Singh and others versus Ram Pal alias Sanju and others, whereby compensation to the tune of Rs. 9,06,760/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in

favour of the appellants-claimants (for short "the impugned award"), on the grounds taken in the memo of appeal.

Brief facts:

2. Smt. Kashmir Kaur became the victim of a vehicular accident, which was allegedly caused by the driver, namely Shri Ram Pal alias Sanju, who had driven Mohindra Pick-up, bearing registration No. HP-36-4320, rashly and negligently on 21.01.2006, at about 6.40 p.m., near Arniala Bazar, Una, hit the scooter, bearing registration No. HP-20 A-8077, on which Smt. Kashmir Kaur was a pillion rider. She sustained injuries and succumbed to the injuries on the spot.

3. Deceased-Kashmir Kaur left behind her husband, namely Shri Balkar Singh, and two minor sons, namely Khushpaul Singh and Tarunjeet Singh, who invoked the jurisdiction of the Tribunal for grant of compensation to the tune of Rs.20,00,000/-, as per the break-ups given in the claim petition.

4. The respondents, i.e. the owner-insured, the driver and the insurer, contested the claim petition on the grounds taken in the respective memo of objections.

5. Following issues came to be framed by the Tribunal on 02.06.2006:

> *"1. Whether Kashmir Kaur died in a motor accident caused by rash and negligent driving of a Jeep (No. HP-36-4320) by Ram Pal (respondent 1) on January 21, 2006? OPP*
>
> *2. Whether petitioners are entitled to compensation. If so, to what amount and from whom? OPP*
>
> *3. Whether the accident was attributable to rashness and negligence of the scooterist (deceased Kanta Devi). If so, to what effect? OPP*
>
> *4. Whether the petition is bad for non-joinder of the owner and the insurer of the scooter (No. HP-20A-8077)? OPR*
>
> *5. Whether the respondent No. 1 was not holding a valid and effective driving licence at the time of accident? OPR-3*
>
> *6. Whether the jeep in question was being driven in violation of the terms and conditions of the insurance policy? OPR*
>
> *6. Relief."*

6. Parties led evidence and the Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that the driver, namely Shri Ram Pal alias Sanju, had driven the offending vehicle rashly and negligently on 21.01.2006, at about 6.40 p.m., near Arniala Bazar, caused the accident, in which Smt. Kashmir Kaur sustained injuries and succumbed to the injuries. All the issues were decided in favour of the claimants and against the respondents.

7. The respondents, i.e. the owner-insured, the driver and the insurer, have not questioned the findings recorded by the Tribunal on any count. Neither they have filed any appeal nor cross-objections. Accordingly, the impugned award has attained finality, so far it relates to them.

8. The appellants-claimants have questioned the impugned award only on the ground of adequacy of compensation.

9. Admittedly, the age of the deceased was 41 years at the time of the accident, as her date of birth has been recorded as 31.05.1965 in her matriculation certificate, Mark-X. She was a government employee and was drawing salary to the tune of Rs. 13,315/- in terms of salary certificate, Ext. PW-2/A. The Tribunal has fallen in an error in holding that the monthly income of the deceased was Rs.12,455/-.

10. Keeping in view the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "the MV Act") read with the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120,** multiplier of '13' is applicable. Viewed thus, the Tribunal has fallen in an error while applying the multiplier of '12'.

11. It appears that the Tribunal has adopted the novel procedure in assessing the salary of the deceased. By guess, it can be safely said that deceased would have been spending one third towards her personal expenses. The Tribunal has wrongly deducted 50% towards her personal expenses. At best, one third was to be deducted towards the personal expenses of the deceased while keeping in view the principles laid down by the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra).**

12. In view of the above, it is held that the claimants have lost source of income/dependency to the tune of Rs.8800/- per month, i.e. Rs.8800/- x 12 = Rs.1,05,600/- per annum. Thus, the claimants are entitled to compensation to the tune of Rs.1,05,600/- x 13 = Rs.13,72,800/-. The claimants are also held entitled to Rs.10,000/- under the head 'funeral expenses', Rs.10,000/- under the head 'loss of consortium' and Rs.10,000/- under the head 'loss of estate'.

13. Having glance of the above discussions, the claimants are held entitled to compensation to the tune of Rs.13,72,800/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.14,02,800/- with interest @ 7.5% per annum from the date of the claim petition till its finalization.

14. The insurer is directed to deposit the enhanced awarded amount before the Registry within six weeks from today. On deposition, the entire awarded amount be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award.

15. The appeal is disposed of accordingly. The impugned award is modified, as indicated hereinabove.

16. Send down the record after placing copy of the judgment on Tribunal's file.

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

Jagdish …Appellant.
Versus
Rahul Bus Service & others …Respondents.

FAO No. 524 of 2007
Reserved on: 01.05.2015
Decided on: 15.05.2015

Motor Vehicle Act, 1988- Section 169- It was contended that claimant had not lodged FIR and therefore, claim petition is not maintainable- held, that lodging of FIR, dismissal of criminal case or acquittal cannot be ground to deny compensation. (Para- 42 to 50)

Motor Vehicle Act, 1988- Section 166- Claim petition was dismissed on the ground that claimant had earlier filed a claim petition which was dismissed in default- held, that provisions of Code of Civil Procedure are not applicable to MACT- procedural technicalities cannot be used to decline the claim of a person- petition was dismissed in absence of both the parties – held that second petition was maintainable in these circumstances. (Para-51 to 82)

Motor Vehicle Act, 1988- Section 168- Claimant had claimed the compensation of Rs.12,00,000/-, whereas, he was entitled for more compensation- held, that it is the duty of Claim Tribunal to award just compensation and it can award more compensation than claimed-. (Para- 85 to 101)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, n 2010 AIR SCW 6085

Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787

Kavita versus Deepak and others, 2012 AIR SCW 4771

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354

Vinobabai and others versus K.S.R.T.C. and another, 1979 ACJ 282

Himachal Road Transport Corporation and another versus Jarnail Singh and others, Latest HLJ 2009 (HP) 174

Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81

Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627

Oriental Insurance Co. Ltd. versus Shri Kishan Chand & others, ILR, HP, 2015 Volume-III,

New India Assurance Co. Ltd. versus C. Padma and another, AIR 2003 Supreme Court 4394

Mantoo Sarkar versus Oriental Insurance Company Limited and others, (2009) 2 Supreme Court Cases 244,

Hussain Pasha versus Andhra Pradesh State Road Trans. Corpn. & Anr., II (2007) ACC 454

Karmi Devi versus Satendra Kumar Singh and another, reported in 2010 ACJ 1661

Savitri and others versus M.A.C.T.-cum-District and Sessions Judge, Jhunjhunu and others, 2013 ACJ 1361
New India Assurance Co. Ltd. versus R. Srinivasan, AIR 2000 Supreme Court 941
Sheodan Singh versus Daryao Kunwar, AIR 1966 Suprememe Court 1332
Erach Boman Khavar versus Tukaram Shridhar Bhat and another, 2014 AIR SCW 61
United India Insurance Company Ltd. versus Smt. Kulwant Kaur, Latest HLJ 2014 (HP) 174
Nagappa versus Gurudayal Singh and others, AIR 2003 Supreme Court 674
State of Haryana and another versus Jasbir Kaur and others, AIR 2003 Supreme Court 3696
The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another, AIR 2003 Supreme Court 4172
A.P.S.R.T.C. & another versus M. Ramadevi & others, 2008 AIR SCW 1213
Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr., 2009 AIR SCW 3717
Ningamma & another versus United India Insurance Co. Ltd., 2009 AIR SCW 4916
Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service, 2013 AIR SCW 5800
Smt. Savita versus Bindar Singh & others, 2014 AIR SCW 2053

For the appellant: Ms. Archana Dutt, Advocate.
For the respondents: Respondents No. 1 and 2 already ex-parte.
Mr. B.M. Chauhan, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Appellant-claimant-injured has invoked the jurisdiction of this Court in terms of Section 173 of the Motor Vehicles Act, 1988 (for short "the MV Act") and has questioned the judgment/award, dated 6th October, 2007, made by the Motor Accident Claims Tribunal, Chamba Division, Chamba,(H.P.) (for short "the Tribunal") in M.A.C. Petition No. 75 of 2004, titled as Jagdish versus Rahul Bus Service and others, whereby the claim petition filed by the claimant came to be dismissed (for short "the impugned award").

2. Before I give the brief resume of the case, I deem it proper to record herein that the appellant-claimant-injured has been driven from pillar to post and post to pillar by the authorities including the Tribunal and the insurer, who have succumbed to the procedural wrangles and tangles and this is how the purpose of granting of compensation in terms of the mandate of Chapters X, XI and XII of the MV Act stands defeated.

3. The appellant-claimant-injured had filed a claim petition before the Tribunal, which was diarized as MAC Petition No. 54 of 2002, and came to be dismissed on 27th May, 2004. He filed a fresh claim petition on 3rd June, 2004, which was dismissed vide the impugned award on the ground that claim petition was barred in view of the dismissal of first claim petition.

4. The core points for consideration involved in this appeal are:

(i) Whether the appellant-claimant-injured has pleaded and proved that the driver, namely Shri Som Raj, had driven the offending

vehicle, i.e. bus, bearing registration No. HP-38-7596, rashly and negligently on 3rd July, 2002, at about 1.30 p.m. near Loona Pul (Gehra), and caused the accident, of which he is victim?

(ii) Whether registration of First Information Report (for short "FIR") was required for maintaining the claim petition?

(iii) Whether second claim petition was not maintainable and was barred in view of the fact that the first claim petition filed by the appellant-claimant-injured was dismissed in default in absence of both the parties, vide order, dated 27th May, 2004?

5. In order to determine all these issues, it is necessary to give brief resume of the lis, which has given birth to the appeal in hand.

6. Shri Jagdish, appellant-claimant-injured filed a claim petition before the Tribunal for grant of compensation to the tune of Rs.12,00,000/-, as per the break-ups given in the claim petition, on the ground that he became the victim of a vehicular accident, which was caused by the driver, namely Shri Som Raj, while driving the offending vehicle, i.e. bus, bearing registration No. HP-38-7596, rashly and negligently on 3rd July, 2002, at about 1.30 p.m. near Loona Pul (Gehra).

7. The claim petition was resisted by respondents No. 1 and 3, i.e. the owner-insured and the insurer on the grounds taken in the respective memo of objections.

8. It is apt to record herein that respondent No. 2, i.e. the driver of the offending vehicle has not contested the claim petition and was set ex-parte.

9. After examining the pleadings and the documents, the Tribunal framed following issues on 3rd December, 2004:

"1. Whether the accident took place due to the rash and negligent driving of bus No. HP-38-7596 by its driver in which petitioner received injuries as alleged? OPP

2. Whether the petitioner is entitled to compensation, if so, to what amount and from whom? OP Parties

3. Whether the petition is not maintainable and the petitioner has no cause of action to file the present petition as alleged? OPR

4. Whether the vehicle was being used in contravention of the provisions contained in the Motor Vehicles Act as well as the terms and conditions of the Insurance Policy as alleged? OPR-3

5. Whether the driver of the vehicle was not holding a valid and effective driving licence at the time of accident as alleged? OPR

6. Relief."

10. Appellant-claimant-injured has examined Dr. Rakesh Verma as PW-2, Shri Mulkh Raj as PW-3, Shri Sonu as PW-4, Shri Natho Ram as PW-5, Shri Mohan Lal as PW-6, Dr. S.K. Jain as PW-7, Shri Manoj Davis as PW-8, Dr. Maharaj Krishan Man as PW-9, himself appeared in the witness box as PW-1 and placed on record the disability certificate

as Ext. PW-2/A, prescription slips as Ext. PW-7/A & Ext. PW-7/B, treatment summary as Ext. PW-9/A to Ext. PW-9/C, Medical bills as Ext. PA to Ext. PH, Ext. PJ to Ext. PM, Ext. P-1 to Ext. 155, Other medical bills and bus tickets and taxi receipts as Mark X-1 to X-20, X-28 to 30, X-42 to X-44, X-58, 60, 61, 67, 71 to 74, X-96, 101, 105, 109, 127, 137, 138, 139, X-148, 151, 160, 176, 180 to 183, X-186, X-197, X-208, X-211, 212, 217, 218, X-221 to 458.

11. Respondents have not led any evidence and have placed on record the copies of insurance policy as Ext. R-1, route permit as Ex. R-2, Registration certificate as Ext. R-3 and driving licence as Ext. R-4. Thus, the evidence led by the claimant-injured has remained unrebutted.

Issue No. 1:

12. Respondents No. 1 and 3 have not denied the averments contained in the claim petition specifically, but evasively. The claimant-injured has specifically averred in para 24 of the claim petition that the accident was outcome of the rash and negligent driving of the offending vehicle by its driver, which has not been specifically denied by respondents No. 1 and 3 in their replies. The driver, against whom rashness and negligence has been alleged, has not contested the claim petition.

13. It is beaten law of land that evasive denial is deemed to be admission in terms of the mandate of Order VIII of the Code of Civil Procedure, 1908 (for short "CPC").

14. The claimant-injured in paras 13 and 22 of the claim petition has given details how he is entitled to compensation. The said details and figures have not been denied by respondents No. 1 & 3 and, as stated hereinabove, respondent No. 2 has not contested the same.

15. It has come in the evidence that the claimant-injured is a motor mechanic by profession, was requested by the driver to repair his vehicle, accordingly, he accompanied the driver, made the repairs and the bus was set in motion, the driver was in a position to drive the said vehicle and started to ply, the claimant-injured also boarded the said bus and unfortunately, that vehicle met with the accident at Loona Pul (Gehra), in which the claimant-injured sustained injuries, was taken to Hospital at Chamba, thereafter was shifted to Sanjivani Hospital, Chamba, where he was admitted on 3rd July, 2002, was referred to CMC Ludhiana on 4th July, 2002, where he remained admitted from 4th July, 2002, to 10th July, 2002. He has undergone treatment and has placed on record the documents, details of which have been given hereinabove, and has proved that he was in hospital. The doctors have stated that the claimant-injured was in hospital as a case of Road Traffic Accident (RTA).

16. PW-2, Dr. Rakesh Verma, stated that he has issued the disability certificate, which has been exhibited as Ext. PW-2/A, and has proved that the claimant-injured has suffered permanent disability to the extent of 40%.

17. PW-9, Dr. Maharaj Krishan Man, who has treated the claimant-injured at CMC Ludhiana, has proved the discharge summary, Ext. PW-9/A, which does disclose that the claimant-injured was admitted in hospital on 4th July, 2002, and was discharged on 10th July, 2002. It is specifically recorded in Ext. PW-9/A that the claimant-injured has sustained injuries in a road traffic accident. Ext. PW-9/B is treatment summary and Ext.PW-9/C is a medical certificate, which do disclose that the claimant-injured was treated

with screw fixation with across knee exfix on 4th July, 2002, bone clearance on 7th August, 2002, flap coverage on 16th August, 2002, STSG on 10th September, 2002, Exfix removal on 26th October, 2002 and screw removal on 4th February, 2003.

18. Thus, the claimant-injured has proved that he has sustained injuries, which are outcome of a road traffic accident, which has rendered him permanently disabled to the extent of 40%. He was also under treatment for a pretty long time and all documents on the record from page 109 to 461 are the proof of the fact that he was under treatment and has spent a huge amount on his treatment.

19. The claimant-injured has also led evidence, oral as well as documentary, that he was a mechanic by profession, his services were hired by the driver of the offending vehicle for repairing the said vehicle, he had gone with the driver to the place where the vehicle was stationed, made repairs, vehicle was made functional and, thereafter, bus was in working condition, the driver started the vehicle, the mechanic also boarded the vehicle, met with the accident, in which he sustained injuries.

20. The owner-insured and the insurer have not led any evidence in rebuttal and the driver has not contested the claim petition. Thus, the evidence of the claimant-injured has remained unrebutted.

21. Having said so, the claimant-injured has proved that the driver, namely Shri Som Raj, while driving the offending vehicle, bus, bearing registration No. HP-38-7596, rashly and negligently on 3rd July, 2002, at about 1.30 p.m. near Loona Pul (Gehra), caused the accident, in which he sustained injuries. Accordingly, issue No. 1 is decided in favour of the claimant-injured and against the respondents. Point No. 1 is answered accordingly.

22. Before I deal with issues No. 2 and 3, I deem it proper to determine issues No. 4 and 5.

Issue No. 4:

23. The insurer has taken a stand that the offending vehicle was being driven in breach of the provisions of the MV Act and the terms and conditions of the insurance policy, has not led any evidence, thus, has failed to discharge the onus. Even otherwise, there is not even a single iota of evidence on the record to suggest the fact that the driver had driven the offending vehicle in contravention of the provisions of the MV Act read with the insurance policy. Accordingly, issue No. 4 is determined against the insurer and in favour of the claimant-injured and the insured-owner.

Issue No. 5:

24. It was for the insurer to prove that the driver of the offending vehicle was not having a valid and effective driving licence, has not led any evidence, thus, has failed to discharge the onus. However, the driving licence is on the file as Ext. R-4, which does disclose that the driver was having a valid and effective driving licence. Accordingly, issue No. 5 is decided against the insurer and in favour of the claimant-injured, owner-insured and the driver.

Issue No. 2:

25. Shri Mulkh Raj has appeared in the witness box as PW-3 and deposed that the claimant-injured was working under him and was earning Rs.250/- - Rs.300/- per day.

The statement of PW-3 does support the plea of the claimant-injured and is suggestive of the fact that he would have been earning not less than Rs.9,000/- per month.

26. PW-2, Dr. Rakesh Verma, has stated that he was a member of the Medical Board which has issued the disability certificate in favour of the claimant-injured after examining him and proved the disability certificate, Ext. PW-2/A, in terms of which the claimant-injured has suffered permanent disability to the extent of 40%. Thus, it is a proved fact that it has affected his income to the extent of 40%. Meaning thereby, the claimant-injured has suffered loss of income to the tune of Rs.3,600/- per month.

27. Admittedly, the claimant-injured was 24 years of age at the time of accident. Thus, in order to assess just and appropriate compensation, multiplier of '15' is applicable in view of Schedule-II appended with the MV Act read with the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.** Thus, the claimant-injured is entitled to Rs. 3,600/- x 12 x 15 = Rs.6,48,000/- per annum under the head 'loss of income'.

28. The concept of granting compensation is outcome of Law of Torts. While considering the case for grant of compensation, particularly in injury cases, some guess work has to be done.

29. The Apex Court in case titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** has discussed all aspects and laid down guidelines how a guess work is to be done and how compensation is to be awarded under various heads. It is apt to reproduce paras 9 to 14 of the judgment hereinbelow:

> *"9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.*
>
> *10. It cannot be disputed that because of the accident the appellant who was an active practising lawyer has become paraplegic on account of the injuries sustained by him. It is really difficult in this*

background to assess the exact amount of compensation for the pain and agony suffered by the appellant and for having become a life long handicapped. No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame.

11. In the case Ward v. James, 1965 (1) All ER 563, it was said:

> *"Although you cannot give a man so gravely injured much for his "lost years", you can, however, compensate him for his loss during his shortened span, that is, during his expected "years of survival". You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet Judges and Juries have to do the best they can and give him what they think is fair. No wonder they find it well-nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The Judges have worked out a pattern, and they keep it in line with the changes in the value of money."*

12. In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards.

13. This Court in the case of C.K. Subramonia Iyer v. T. Kunhikuttan Nair, AIR 1970 SC 376, in connection with the Fatal Accidents Act has observed (at p. 380):

> *"In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable."*

14. In Halsbury's Laws of England, 4th Edition, Vol. 12 regarding non-pecuniary loss at page 446 it has been said :-

> *"Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries,*

and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award. The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."

30. The said judgment was also discussed by the Apex Court in case titled as **Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085,** while granting compensation in such a case. It is apt to reproduce para-7 of the judgment hereinbelow:

"7. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases - and that is now recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand."

31. The Apex Court in case titled as **Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** also laid down guidelines for granting compensation. It is apt to reproduce paras 8 & 9 of the judgment hereinbelow:

"8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.

9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same

work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."

32. The Apex Court in case titled as **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771,** also discussed the entire law and laid down the guidelines how to grant compensation. It is apt to reproduce paras 16 & 18 of the judgment hereinbelow:

"16. In Raj Kumar v. Ajay Kumar (2011) 1 SCC 343, this Court considered large number of precedents and laid down the following propositions:

"The provision of the motor Vehicles Act, 1988 ('the Act', for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.

The heads under which compensation is awarded in personal injury cases are the following:

"Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

17. ....

18. In light of the principles laid down in the aforementioned cases, it is suffice to say that in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and inability to lead a normal life and enjoy amenities, which would have been enjoyed but for the disability caused due to the accident. The amount awarded under the head of loss of earning capacity are distinct and do not overlap with the amount awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses."

33. The claimant-injured is also entitled to compensation, in view of the judgments (supra) under various heads, i.e. pecuniary damages and non-pecuniary damages. As discussed hereinabove, the claimant-injured is entitled to Rs.6,48,000/- under the head 'loss of income'.

34. In view of the the disability certificate and the medical record available on the file, it can be safely said that the claimant-injured has suffered for so many years and is suffering even now. Screws have been fixed and removed, has undergone pain and sufferings and has also to undergo such pain and sufferings throughout his life. Viewed thus, the claimant-injured is held entitled to Rs.1,00,000/- under the head 'pain and sufferings undergone' and Rs.1,00,000/- under the head 'pain and sufferings in future'.

35. The injury has affected the amenities of life of the claimant-injured and has made his life virtually a burden. It has shattered his physical frame. By guess, it can be held that the claimant-injured is also entitled to at least Rs.1,00,000/- under the head 'loss of amenities'.

36. The claimant-injured has claimed Rs.5,40,000/- under the head 'medical treatment' including Rs. 5,00,000/- for medicines and operation etc., Rs.30,000/- for transportation (taxi charges) and Rs.10,000/- for attendant charges. He has placed on record the medical documents and the medical bills, which comes to Rs.2,90,753.07/-. The claimant-injured has spent a huge amount on his treatment and has to go for treatment in future also. Accordingly, the claimant-injured is held entitled to

Rs.3,00,000/- under the head 'medical expenditure incurred' and Rs.1,00,000/- under the head 'medical expenditure in future'.

37. Admittedly, the claimant-injured was taken to Chamba Hospital, thereafter to Sanjivani Hospital, Chamba and from the said hospital, was taken to CMC Ludhiana for treatment and had to go to Ludhiana two-three times for follow-up, thus, claimant-injured has spent a lot of amount on transportation charges. He has claimed Rs.30,000/-, though meager, is awarded in favour of the claimant-injured under the head 'transportation charges'.

38. The treatment summary certificate, Ext. PW-9/C, is a proof of the fact that the claimant-injured was admitted and discharged from the hospital on different intervals with effect from 4th July, 2002 to 4th October, 2003, would have been dependent on the attendant. He has pleaded that he was attended upon by the attendants and claimed Rs.10,000/- as attendant charges, is held entitled to Rs.10,000/- under the head 'attendant charges'.

39. Ms. Archana Dutt, learned counsel for the claimant-injured, has stated that he was unmarried at the time of accident, was not in a position to get a suitable match and is dependent on his parents. The father of the claimant-injured, namely Shri Natho Ram, while appearing as PW-5, has deposed that after the accident, the claimant-injured was bed ridden, was and is totally dependent upon them. Thus, the claimant-injured has lost marriage prospects, i.e. was not in a position to get a suitable match, which he would have got, had he not become the victim of the said accident. Thus, I deem it proper to award Rs.1,00,000/- under the head 'loss of marriage prospects'.

40. The question is - who is to be saddled with liability? Admittedly, the offending vehicle was insured. The said factum has not been denied by the insurer-respondent No. 3, i.e. The New India Assurance Company and has failed to discharge the onus to prove issues No. 4 and 5. Viewed thus, the insurer-respondent No.3 has to indemnify and is, accordingly, saddled with entire liability.

Issue No. 3:

41. The next question is - whether the claim petition can be dismissed on the ground that the claimant-injured has not lodged the FIR.

42. I deem it proper to record herein that lodging of FIR or dismissal of criminal case or acquittal cannot be a ground to deny compensation. It was for the doctor at Chamba to inform the police, which he has miserably failed to do so. A question was put to the doctor, while he was appearing as PW-7, as to whether he had lodged FIR. He replied in negative. PW-7 has specifically stated that the documents i.e. the prescription slips, Ext. PW-7/A and Ext. PW-7/B, are not forged.

43. Can a claim petition be dismissed on the ground that FIR was not lodged when there is evidence on the file that the driver had driven the offending vehicle rashly and negligently or can a claim petition be dismissed on the ground of acquittal. The answer is in negative for the following reasons:

44. The findings recorded by the Criminal Court in acquittal cannot be a ground to defeat the rights of the claimants. Even, if the driver is acquitted in the criminal proceedings, that may not be a ground for dismissal of the claim petitions.

45. My this view is fortified by the judgment rendered by the Apex Court in **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354** wherein a bus hit an over-hanging high tension wire resulting in 26 casualties. The driver earned acquittal in the criminal case on the score that the tragedy that happened was an act of God. The Apex Court held that the plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rightly rejected by the Tribunal. It is apt to reproduce para 2 of the judgment herein:

> *"2. The Facts: A stage carriage belonging to the petitioner was on a trip when, after nightfall, the bus hit an over-hanging high tension wire resulting in 26 casualties of which 8 proved instantaneously fatal. A criminal case ensued but the accused-driver was acquitted on the score that the tragedy that happened was an act of God. The Accidents Claims Tribunal which tried the claims for compensation under the Motor Vehicles Act, came to the conclusion, affirmed by the High Court, that, despite the screams of the passengers about the dangerous overhanging wire ahead, the rash driver sped towards the lethal spot. Some lost their lives instantly; several lost their limbs likewise. The High Court, after examining the materials, concluded:*
>
> > *"We therefore sustain the finding of the Tribunal that the accident had taken place due to the rashness and negligence of R. W. 1 (driver) and consequently the appellant is vicariously liable to pay compensation to the claimant."*
>
> *The plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rejected and rightly. The requirements of culpable rashness under Section 304A, I.P.C. is more drastic than negligence sufficient under the law of tort to create liability. The quantum of compensation was moderately fixed and although there was, perhaps, a case for enhancement, the High Court dismissed the cross-claims also. Being questions of fact, we are obviously unwilling to re-open the holdings on culpability and compensation."*

46. It is also profitable to reproduce relevant portion of para 8 of the judgment rendered by the High Court of Karnataka in a case titled **Vinobabai and others versus K.S.R.T.C. and another,** reported in **1979 ACJ 282:**

> *" 8. .... Thus, the law is settled that when the driver is convicted in a regular trial before the Criminal Court, the fact that he is convicted becomes admissible in evidence in a civil proceeding and it becomes prima facie evidence that the driver was culpably negligent in causing the accident. The converse is not true ; because the driver is acquitted in a criminal case arising out of the accident, it is not established even prima facie that the driver is not negligent, as a higher degree of culpability is required to bring home an offence."*

47. Reliance is also placed on the judgment made by this Court in **Himachal Road Transport Corporation and another versus Jarnail Singh and others,** reported in **Latest HLJ 2009 (HP) 174,** wherein it has been held that acquittal of the driver in the

criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims Tribunal whether the driver was negligent or not in causing the accident. It is apt to reproduce relevant portion of para 15 of the judgment herein:

> *"15. In view of the definitive law laid down by their Lordships of the Hon'ble Supreme Court and the judgments cited hereinabove, it is now well settled law that the acquittal of the driver in the criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims Tribunal whether the driver was negligence or not in causing the accident. ...."*

48. The purpose of granting compensation is just to come to the rescue of the victim of a traffic accident in order to ensure that he should not become victim of the social evils. The Tribunal has to exercise due care and caution and to take special care to see that the innocent victim does not suffer and the driver, owner-insured and the insurer do not escape their liability merely because some doubt here and some obscurity there.

49. The claim petition is to be determined summarily and that is why the CPC is not applicable. Some of the provisions of CPC have been made applicable in terms of the provisions of the Rules framed by the Central Government as well as State Government. The State of Himachal Pradesh has also framed the Himachal Pradesh Motor Vehicle Rules, 1999 (for short "the Rules") in terms of Sections 169 and 176 (b) of the MV Act, and only some of the provisions of CPC have been made applicable.

50. The Tribunal should not throw out the claim petition on flimsy grounds and should not succumb to other niceties. Thus, lodging of FIR is no ground for dismissing the claim petition. Point No. 2 is accordingly determined.

51. The Tribunal has dismissed the claim petition vide the impugned award also on the ground that the claimant-injured had filed earlier claim petition, which was dismissed in default and accordingly point No. 3 was framed hereinabove, which relates to the issue.

52. Chapters X, XI and XII of the MV Act are really social legislation and its aim and object is to reach to the victim of a traffic accident. The legislature thought it proper to remove all technicalities and even to delete the limitation provision from the statute enabling the claimants to receive compensation. Sections 168 and 169 contained in Chapter XII of the MV Act specifically provide that the claim petition should be tried summarily and provisions of CPC are not applicable. Only some of the provisions are applicable, which are made applicable in terms of the Rules (supra). The claim petition cannot be dismissed on the ground that it is barred by some other provisions of law, which are not applicable, for the following reasons:

53. It is beaten law of land that granting of compensation is a welfare legislation and the hypertechnicalities, mystic maybes, procedural wrangles and tangles have no role to play and cannot be made ground to defeat the claim petitions and to defeat the social purpose of granting compensation.

54. My this view is fortified by the judgment of the Apex Court in **N.K.V. Bros.'s case (supra).** It is apt to reproduce relevant portion of para 3 of the judgment herein:

> *"3. Road accidents are one of the top killers in our country, specifically when truck and bus drivers operate nocturnally. This*

> *proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accident Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their "neighbour". Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practised by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Court should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard. Emphasis supplied"*

55. The Jammu and Kashmir High Court in the case titled as **Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81,** held that the MV Act is Social Welfare Legislation and the procedural technicalities cannot be allowed to defeat the purpose of the Act. It is profitable to reproduce para 20 of the judgment herein:

> *"20. Before concluding, it is also observed that it is a social welfare legislation under which the compensation is provided by way of Award to the people who sustain bodily injuries or get killed in the vehicular accident. These people who sustain injuries or whose kith and kins are killed, are necessarily to be provided such relief in a short span of time and the procedural technicalities cannot be allowed to defeat the just purpose of the Act, under which such compensation is to be paid to such claimants."*

56. It is also apt to reproduce relevant portion of para 12 of the judgment of the Apex Court in the case titled as **Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627,** herein:

> *"12. ....While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims*

of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."

57. It is apt to reproduce Rule 232 of the Rules herein:

*"**232. The Code of Civil Procedure to apply in certain cases:-***

The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall so far as may be, apply to proceedings before the Claims Tribunal, namely, Order V, Rules 9 to 13 and 15 to 30; Order IX; Order XIII; Rule 3 to 10; Order XVI, Rules 2 to 21; Order XVII; Order XXI and Order XXIII, Rules 1 to 3."

58. In terms of the provisions of the Rule 232 (supra), Order IX CPC is applicable.

59. Before I deal with the provisions relating to dismissal in default, restoration, limitation and other aspects, I deem it proper to reproduce the order of dismissal passed in the claim petition by the Tribunal on 27th May, 2004, herein:

"27.5.2004:
Present: None.
Be called again.

Sd/-
MACT, Chamba.

Called again.
Present: None.

The case has been called thrice during the day, but none appeared on behalf of the parties. Therefore, the petition is dismissed in default. Be consigned to the record room after due completion.

Announced in the open Court this 27th day of May, 2004

Sd/-
(P.D. Goel)
Motor Accident Claims Tribunal
Chamba Division, Chamba (HP)"

60. The said claim petition was dismissed in absence of both the parties. Order IX Rule 4 CPC is applicable. It is apt to reproduce Order IX Rule 4 CPC herein:

"Order IX. Appearance of Parties and Consequence of Non-appearance.

....

***4. Plaintiff may bring fresh suit or Court may restore suit to file. -** Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfied the Court that there was sufficient cause for such failure as is referred to in rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit."*

61. While going through this provision of law, it mandates that in case a suit is dismissed in default in absence of both the parties, is not barred from filing a fresh suit, but within the period of limitation. Thus, the only fetter/restriction contained in this provision of law is that fresh suit can be filed provided it is not barred by time.

62. Admittedly, the fresh claim petition has been filed on 3rd June, 2004, i.e. within one month from the date of dismissal of the first claim petition and claim petition relates to accident, which has occurred on 3rd July, 2002.

63. Whether the second/fresh claim petition was barred? The answer is in the negative for the following reasons:

64. The application for restoration can be made in terms of Order IX Rule 4 CPC within thirty days. In the instant case, fresh claim petition has been filed on 3rd June, 2004. If we treat this as an application, it is within time, but instead of application for restoration, fresh claim petition came to be filed.

65. This Court in a latest judgment, dated 1st May, 2015, in the case titled as **Oriental Insurance Co. Ltd. versus Shri Kishan Chand & others,** being **FAO No. 186 of 2008,** held that fresh claim petition can be filed. It is apt to reproduce paras 12 and 15 of the judgment herein:

12. The next argument of the learned counsel for the appellant-insurer that the claim petition was not maintainable because the first claim petition came to be dismissed in default, was not restored, is not tenable for the reason that in terms of Order IX Rule 4 CPC, a fresh suit can be filed, provided it is not hit by limitation.

13. ....

14. ....

15. The claim petition is to be taken to its logical end without any delay, that too, summarily. The cumbersome procedure is not to be followed in view of the mandate of Sections 169 and 176 (b) of the MV Act."

66. The MV Act has been amended in the year 1994, it has gone through a sea change and provisions of Section 166 (3) of the Act stand deleted, which prescribed limitation period for filing claim petition. The purpose of deletion of the said provision was

that the victim should get compensation and delay in filing the petition and limitation period should not come in his way. The Apex Court dealt with this issue in the case titled as **Sohan Lal Passi's case (supra).**

67. The limitation period is not prescribed for filing claim petition in terms of the mandate of Section 166 of the MV Act after deletion of Section 166 (3) of the MV Act. Therefore, claim petition can be filed at any time. Viewed thus, second claim petition was not barred in terms of mandate of Order IX Rule 4 CPC read with other laws applicable.

68. The Apex Court, while dealing with Section 166 (3) of the MV Act, in a case titled as **New India Assurance Co. Ltd. versus C. Padma and another,** reported in **AIR 2003 Supreme Court 4394,** held that Court should be untrammelled by the technicalities and reach the injured-victim in order to achieve the goal of social legislation, the aim of which is to provide cheap, fast and speedy compensation to them in order to save them from social evils. It is apt to reproduce paras 7 and 12 of the judgment herein:

> *"7. In the instant case, at the time when the respondents had filed claim petition on 2-11-1995, the situation was completely different. Sub-section (3) of Section 166 of the Act had been omitted by Act 53 of 1994 w.e.f. 14-11-1994. The result of the Act 53 of the Motor Vehicles (Amendment) Act, 1994 is that there is no limitation prescribed for filing claim petitions before the Tribunal in respect of any accident w.e.f. 14-11-1994.*
>
> *8 to 11. ....*
>
> *12. Learned counsel for the appellant, next contended that since no period of limitation has been prescribed by the Legislature. Article 137 of the Limitation Act may be invoked, otherwise, according to him, stale claims would be encouraged leading to multiplicity of litigation for non-prescribing the period of limitation. We are unable to countenance with the contention of the appellant for more than one reason. Firstly, such an Act like Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, if otherwise the claim is found genuine. Secondly, it is a self contained Act which prescribes mode of filing the application, procedure to be followed and award to be made. The Parliament, in its wisdom, realised the grave injustice and injury being caused to the heirs and legal representatives of the victims who suffer bodily injuries/die in accidents, by rejecting their claim petitions at the threshold on the ground of limitation, and purposely deleted sub-section (3) of Section 166, which provided the period of limitation for filing the claim petitions and this being the intendment of the Legislature to give effective relief to the victims and the families of the motor accidents untrammelled by the technicalities of the limitation, invoking of Article 137 of the Limitation Act would defeat the intendment of the Legislature."*

69. The Apex Court in a case titled as **Mantoo Sarkar versus Oriental Insurance Company Limited and others,** reported in **(2009) 2 Supreme Court Cases 244,** held that MV Act is a special statute; the jurisdiction and powers of the Tribunal are wider

than Civil Court and it is for the Tribunal-Presiding Officer to try to achieve the goal as early as possible while keeping in view the mandate of Section and the words used. It is apt to reproduce relevant portion of para 11 herein:

> *"11. ....*
>
> *The said Act is a special statute. The jurisdiction of the Tribunal having regard to the terminologies used therein must be held to be wider than the civil court."*

70. The Andhra Pradesh High Court in a case titled as **Hussain Pasha versus Andhra Pradesh State Road Trans. Corpn. & Anr.,** reported in **II (2007) ACC 454,** held that second claim petition is maintainable and dismissal of earlier claim petition cannot be the ground for dismissing the latter one. It is apt to reproduce relevant portion of para 4 of the judgment herein:

> *"4. ....Therefore, I hold that the Tribunal was in error in dismissing the O.P. of the appellant on the ground that the earlier O.P. was dismissed for default and that his remedy is to file a petition for the restoration of earlier O.P. If a petition for restoration of the earlier O.P. were to be filed, either that O.P. or this O.P. has to be withdrawn because two O.Ps. are not maintainable in respect of same accident. Because the earlier O.P. was dismissed for default for non-prosecution, appellant can proceed with the prosecution of this O.P. the point is answered accordingly."*

71. The High Court of Jharkhand at Ranchi in a case titled as **Karmi Devi versus Satendra Kumar Singh and another, reported in 2010 ACJ 1661,** held that plaintiff/claimant has two remedies, i.e. filing of fresh suit or application for restoration of the suit. It is apt to reproduce para 15 of the judgment herein:

> *"15. In the light of the provisions contained in Order 9 and the law discussed hereinabove, it can be safely concluded that in case of dismissal of suit under Order 9, rule 4, C.P.C. the plaintiff has both the remedies of filing of fresh suit or application for restoration of the suit. If he chooses one remedy he is not debarred from availing himself of the other remedy. Both these remedies are simultaneous and would not exclude either of them."*

Applying the principle to the instant case, limitation is not applicable. Thus, the claimant has rightly filed fresh/second claim petition.

72. The High Court of Rajasthan, Jaipur Bench in a case titled as **Savitri and others versus M.A.C.T.-cum-District and Sessions Judge, Jhunjhunu and others,** reported in **2013 ACJ 1361,** held that when a claim petition has not been decided on merits and was dismissed in default without entering into the merits, the Court should take pragmatic view rather than going into the technicalities and should decide the claim petition on merits enabling the claimant to reap the fruits. It is apt to reproduce relevant portion of para 5 of the judgment herein:

> *"5. The Act of 1988 being a beneficial legislation, the court has to, in a situation like this, take a pragmatic view of the matter rather than being too technical and, in the facts of this case, when it is clear that*

> *there was no adjudication on merits, the claimants cannot be left in the lurch without any remedy."*

73. The Apex Court, in a case tilted as **New India Assurance Co. Ltd. versus R. Srinivasan,** reported in **AIR 2000 Supreme Court 941,** while dealing with a case of similar facts, which had arisen from a complaint under the Consumer Protection Act (68 of 1986), held that it is permissible to file a second case. It is apt to reproduce relevant portion of para 16 and para 20 of the judgment herein:

> *"16. ....The fact that the case was not decided on merits and was dismissed in default of non-appearance of the complainant cannot be overlooked and, therefore, it would be permissible to file a second complaint explaining why the earlier complaint could not be pursued and was dismissed in default.*
>
> *17 to 19. ....*
>
> *20. In the instant case, the vital fact of there being an insurance cover in favour of the respondent is not disputed. The loss suffered by the respondent is not disputed and the claim of the respondent is also not questioned. The only point urged before the State Commission as also before the National Commission and, for that matter, before us is that on account of the first complaint having been dismissed in default and the complaint having not been restored, the second complaint would not lie. The interest of justice, in our opinion, cannot be defeated by this rule of technicality. The rules of procedure, as has been laid down by this Court a number of times, are intended to serve the ends of justice and not to defeat the dispensation of justice. The respondent had suffered loss which was squarely covered by the Policy of Insurance granted by the appellant. Since his claim is not being questioned before us on merits and is being sought to be defeated on the technical plea referred to above. We are not prepared to interfere with the orders passed by the District Forum, the State Commission and the National Commission, particularly as it is stated before us that the whole of the claim amount has already been paid to the respondent."*

74. Having said so, the second claim petition was maintainable and the Tribunal has fallen in an error in holding that it was barred by time and was not maintainable.

75. The argument of the learned counsel for insurer that the claimant is caught by doctrine of *res judicata,* is not tenable for the reason that the doctrine of *res judicata* is applicable when there is a decision on merits.

76. It is apt to reproduce relevant portion of Section 11 of the CPC herein:

> "***11. Res Judicata. -*** *No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit*

or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

.........................."

77. The claim petition was dismissed in default without entering into and discussing the merits. On the plain reading of Section 11 (supra), one comes to an inescapable conclusion that the doctrine of *res judicata* is not applicable.

78. However, this question was raised before the High Court of Jharkhand at Ranchi in **Karmi Devi's case (supra).** It is apt to reproduce paras 17 and 20 of the judgment herein:

"17. The principle of res judicata is based on the common law maxim nemo debet bis vexari pro una et eadem causa, which means that no man shall be vexed twice over the same cause of action. It is a doctrine applied to give finality to a lis. According to this doctrine, an issue or a point once decided and attains finality, should not be allowed to be reopened and re-agitated in a subsequent suit. In other words, if an issue involved in a suit is finally adjudicated by a court of competent jurisdiction, the same issue in a subsequent suit cannot be allowed to be re-agitated. It is, therefore, clear that for the application of principle of res judicata, there must be an adjudication of an issue in a suit by a court of competent jurisdiction.

18. ....

19. ....

20. From a plain reading of the term 'decree', it is manifestly clear that to constitute a decree, there must be a formal expression of an adjudication which conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit, but the decree shall not include any adjudication from which an appeal lies as an appeal from an order or any order of dismissal for default. It is, therefore, evidently clear that a dismissal of a suit or application for default particularly under Rule 2 or Rule 3 of Order 9, C.P.C., is not the formal expression of an adjudication upon any right claimed or the defence set up in a suit. An order of dismissal of a suit or application in default is also not appealable order as provided under Order 43 of the Code of Civil Procedure. If we read Order 43, C.P.C., we will find that orders passed under Order 9, Rule 9, C.P.C. or Order 9, Rule 13, C.P.C., are made appealable but an order passed under Order 9, Rule 4, C.P.C. is not appealable. It is, therefore, clear that an order of dismissal of a suit or application in default under Rule 2 or Rule 3 of Order 9, C.P.C, is neither an adjudication or a decree nor it is an appealable order. If that is so, such order of dismissal of a suit under Rule 2 or Rule 3 of Order 9, C.P.C, does not fulfil the requirement of the term 'judgment' or 'decree', inasmuch as there is no adjudication. In my considered opinion, therefore, if a fresh suit is filed, then such an order of dismissal cannot and shall not operate as res judicata."

79. The Apex Court has dealt with this issue in a case titled as **Sheodan Singh versus Daryao Kunwar,** reported in **AIR 1966 Supremem Court 1332.**

80. The Apex Court in a latest judgment in the case titled as **Erach Boman Khavar versus Tukaram Shridhar Bhat and another,** reported in **2014 AIR SCW 61,** held that there should be a conscious adjudication of an issue and the plea of *res judicata* cannot be taken aid of unless there is an expression of an opinion on merits. It is apt to reproduce relevant portion of para 34 of the judgment herein:

> *"34. From the aforesaid authorities it is clear as crystal that to attract the doctrine of res judicata it must be manifest that there has been conscious adjudication of an issue. A plea of res judicata cannot be taken aid of unless there is an expression of opinion on the merits..................."*

81. Thus, the argument of the learned counsel for the insurer that the claim petition is caught by law of *res judicata* and barred by limitation and other provisions of law, is devoid of any force and is rejected.

82. Viewed thus, it is held that the Tribunal has fallen in an error in dismissing the claim petition. Point No. 3 is replied and decided accordingly.

83. Delay has crept-in because of the fact that the Tribunal has wrongly applied the procedure and rules, which have defeated the very purpose of the MV Act. Rules and procedure are meant for achieving the purpose of the Act and not to defeat the same. Unfortunately, rules have been applied, which have not only defeated the very purpose of the Act, but has made the claimant-injured to run from pillar to post and post to pillar. The delay caused in the case in hand is really a terrible commentary and suggests how we have reached the claimant-injured, who is the victim of a road traffic accident. It pains me to record herein that delay has taken away the settings of the law.

84. The claimant-injured has claimed compensation to the tune of Rs.12,00,000/-, as per the details given in the claim petition, however, while making the assessment (supra), it appears that the claimant-injured is entitled to compensation more than claimed.

85. The question is - Whether the Tribunal or Appellate Court is/are within its/their jurisdiction to grant more compensation than what is claimed?

86. It would be profitable to reproduce Section 168 (1) of the MV Act herein:

> *"**168. Award of the Claims Tribunal.** - On receipt of an application for compensation made under section 166 , the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:*

......................"

87. The mandate of Section 168 (1) (supra) is to 'determine the amount of compensation which appears to it to be just'.

88. The word "just' has been defined in the **Webster's Encyclopedic Unabridged Dictionary of the English Language, Deluxe Edition,** at page No. 1040, herein:

> "**just,** adj. **1.** guided by truth, reason, justice, and fairness: *We hope to be just in our understanding of such difficult situation.* **2.** done or made according to principle; equitable; proper: *a just reply.* **3.** based on right; rightful; lawful; *a just claim.* **4.** in keeping with truth or fact; true; correct: *a just analysis.* **5.** given or awarded rightly; deserved, as a sentence, punishment, or reward: *a just penalty.* **6.** in accordance with standards or requirements; proper or right: *just proportions.* **7. (**esp. in Biblical use) righteous. **8.** actual, real, or genuine. -*adv.* **9.** within a brief preceding time; but a moment before: *The sun just came out.* **10.** exactly or precisely: *This is just what I mean.* **11.** by a narrow margin: barely: *The arrow just missed the mark.* **12.** only or merely: *he was just a clerk until he became ambitious.* **13.** actually; really; positively: *The weather is just glorious."*

89. In the **Oxford Advanced Learner's Dictionary,** the word "just" has been defined at page No. 702, as under:

> *"**just.** - adv. **1.** exactly, **2.** at the same moment as, **3.** as good,nice, easily, etc., **4.** after, beefore, under, etc. sth, **5.** used to say that you/sb did sth very recently, **6.** at this/that moment, **7.** about/going to do sth, **8.** simply, **9.** (informal) really; completely, **10.** to do sth only, **11.** used in orders to get sb's attention, give permission etc., **12.** used to make a polite request, excuse etc., **13.** could/might/may - used to show a slight possibility that sth is true to will happen, **14.** used to agree with sb..........*
>
> *adj. **1.** that most people consider to be morally fair and reasonable, **2.** people who are just **3.** appropriate in a particular situation."*

90. It is for the Tribunal or the Appellate Court to determine what is just compensation. The claimant-injured is a rustic villager, illiterate, hailing from a rural area, i.e. District Chamba, which is a tribal area, can he be deprived of the higher compensation, to which he is entitled to, which appears to the Court to be just. The answer is in negative.

91. Keeping in view the object of granting of compensation and the legislature's wisdom read with the amendment made in the MV Act in the year 1994, it is for the Tribunal or the Appellate Court to assess the just compensation and is within its powers to grant the compensation more than what is claimed for the following reasons:

92. This Court in a case titled as **United India Insurance Company Ltd. versus Smt. Kulwant Kaur,** reported in **Latest HLJ 2014 (HP) 174,** held that the Tribunal as well

as the Appellate Court is/are within the jurisdiction to enhance the compensation and grant more than what is claimed. It is apt to reproduce paras 41 to 45 of the judgment herein:

> "41. Before I determine what is the just and adequate compensation in the case in hand, it is also a moot question – whether the Appellate Court can enhance compensation, even though, not prayed by the medium of appeal or by cross-objection.
>
> 42. The Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") has gone through a sea change in the year 1994 and sub-section (6) has been added to Section 158 of the MV Act, which reads as under:
>
> > ***"158. Production of certain certificates, licence and permit in certain cases. -***
> >
> > *..................................*
> >
> > *(6) As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer incharge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and Insurer."*
>
> In terms of this provision, the report is to be submitted to the Tribunal having the jurisdiction.
>
> 43. Also, an amendment has been carried out in Section 166 of the MV Act and sub-section (4) stands added. It is apt to reproduce sub-section (4) of Section 166 of the MV Act herein:
>
> > ***"166. Application for compensation. -***
> >
> > *......................................*
> >
> > *(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act."*
>
> It mandates that a Tribunal has to treat report under Section 158 (6) (supra) of the MV Act as a claim petition. Thus, there is no handicap or restriction in granting compensation in excess of the amount claimed by the claimant in the claim petition.
>
> 44. Keeping in view the purpose and object of the said provisions read with the mandate of Section 173 of the MV Act, I am of the

view that the Appellate Court is exercising the same powers, which the Tribunal is having. Also, sub-clause (2) of Section 107 of the Code of Civil Procedure (hereinafter referred to as "the CPC") mandates that the Appellate Court is having all those powers, which the trial Court is having. It is apt to reproduce Section 107 sub-clause (2) of the CPC herein:

> *"**107. Powers of Appellate Court. -***
>
> *................................*
>
> *(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein."*

45. Thus, in the given circumstances, the Tribunal as well as the Appellate Court is within the jurisdiction to enhance the compensation. "

93. The same view was taken by the Apex Court in the case of **Nagappa versus Gurudayal Singh and others,** reported in **AIR 2003 Supreme Court 674.** It is apt to reproduce paras 7, 9 and 10 of the judgment herein:

> *"7. Firstly, under the provisions of Motor Vehicles Act, 1988, (hereinafter referred to as "the MV Act") there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case where from the evidence brought on record if Tribunal/Court considers that claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. Only embargo is – it should be 'Just' compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the M.V. Act. Section 166 provides that an application for compensation arising out of an accident involving the death of or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both, could be made (a) by the person who has sustained the injury; or (b) by the owner of the property; (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be. Under the proviso to sub-section (1), all the legal representatives of the deceased who have not joined as the claimants are to be impleaded as respondents to the application for compensation. Other important part of the said Section is sub-section (4) which provides that "the Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act." Hence, Claims Tribunal in appropriate case can treat the report forwarded to it as an*

application for compensation even though no such claim is made or no specified amount is claimed.

8. ....

9. It appears that due importance is not given to sub-section (4) of Section 166 which provides that the Tribunal shall treat any report of the accidents forwarded to it under sub-section (6) of Section 158, as an application for compensation under this Act.

10. Thereafter, Section 168 empowers the Claims Tribunal to "make an award determining the amount of compensation which appears to it to be just". Therefore, only requirement for determining the compensation is that it must be 'just'. There is no other limitation or restriction on its power for awarding just compensation."

94. In the case titled as **State of Haryana and another versus Jasbir Kaur and others,** reported in **AIR 2003 Supreme Court 3696,** the Apex Court has discussed the expression 'just'. It is apt to reproduce para 7 of the judgment herein:

"7. It has to be kept in view that the Tribunal constituted under the Act as provided in S. 168 is required to make an award determining the amount of compensation which is to be in the real sense "damages" which in turn appears to it to be 'just and reasonable'. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate the compensation must be "just" and it cannot be a bonanza; nor a source of profit; but the same should not be a pittance. The Courts and Tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a wide discretion is vested on the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot be just. (See Helen C. Rebello v. Maharashtra State Road Transport Corporation (AIR 1998 SC 3191)."

95. The same view has been taken by the Apex Court in a case titled as **The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another,** reported in **AIR 2003 Supreme Court 4172**.

96. The Apex Court in a case titled as **A.P.S.R.T.C. & another versus M. Ramadevi & others,** reported in **2008 AIR SCW 1213,** held that the Appellate Court was within its jurisdiction and powers in enhancing the compensation despite the fact that the claimants had not questioned the adequacy of the compensation.

97. The Apex Court in the case titled as **Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr.,** reported in **2009 AIR SCW 3717,** laid down the same principle while discussing, in para 27 of the judgment, the ratio laid down in the judgments rendered in the cases titled as *Nagappa v. Gurudayal Singh & Ors, (2003) 2 SCC 274; Devki Nandan Bangur and Ors. versus State of Haryana and Ors. 1995 ACJ 1288; Syed Basheer Ahmed & Ors. versus Mohd. Jameel & Anr., (2009) 2 SCC 225; National Insurance Co. Ltd. versus Laxmi Narain Dhut, (2007) 3 SCC 700; Punjab State Electricity Board Ltd. versus Zora Singh and Others (2005) 6 SCC 776; A.P. SRTC versus STAT and State of Haryana & Ors. versus Shakuntla Devi, 2008 (13) SCALE 621.*

98. The Apex Court in another case titled as **Ningamma & another versus United India Insurance Co. Ltd.,** reported in **2009 AIR SCW 4916,** held that the Court is duty bound to award just compensation to which the claimants are entitled to. It is profitable to reproduce para 25 of the judgment herein:

> *"25. Undoubtedly, Section 166 of the MVA deals with "Just Compensation" and even if in the pleadings no specific claim was made under section 166 of the MVA, in our considered opinion a party should not be deprived from getting "Just Compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the Court is duty bound and entitled to award "Just Compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. However, whether or not the claimants would be governed with the terms and conditions of the insurance policy and whether or not the provisions of Section 147 of the MVA would be applicable in the present case and also whether or not there was rash and negligent driving on the part of the deceased, are essentially a matter of fact which was required to be considered and answered at least by the High Court."*

99. The Apex Court in a latest judgment in a case titled **Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service,** reported in **2013 AIR SCW 5800,** has specifically held that compensation can be enhanced while deciding the appeal, even though prayer for enhancing the compensation is not made by way of appeal or cross appeal/objections. It is apt to reproduce para 9 of the judgment herein:

> *"9. In view of the aforesaid decision of this Court, we are of the view that the legal representatives of the deceased are entitled to the compensation as mentioned under the various heads in the table as provided above in this judgment even though certain claims were not preferred by them as we are of the view that they are legally and legitimately entitled for the said claims. Accordingly we award the compensation, more than what was claimed by them as it is the statutory duty of the Tribunal and the appellate court to award just and reasonable compensation to the legal representatives of the*

deceased to mitigate their hardship and agony as held by this Court in a catena of cases. Therefore, this Court has awarded just and reasonable compensation in favour of the appellants as they filed application claiming compensation under Section 166 of the M.V. Act. Keeping in view the aforesaid relevant facts and legal evidence on record and in the absence of rebuttal evidence adduced by the respondent, we determine just and reasonable compensation by awarding a total sum of Rs. 16,96,000/- with interest @ 7.5% from the date of filing the claim petition till the date payment is made to the appellants."

100. The Apex Court in a latest judgment in the case titled as **Smt. Savita versus Bindar Singh & others,** reported in **2014 AIR SCW 2053,** has laid down the same proposition of law and held that the Tribunal as well as the Appellate Court can ignore the claim made by the claimant in the application for compensation. It is apt to reproduce para 6 of the judgment herein:

"6. After considering the decisions of this Court in Santosh Devi as well as Rajesh v. Rajbir Singh (supra), we are of the opinion that it is the duty of the Court to fix a just compensation. At the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation."

101. I have discussed hereinabove, what is the just and appropriate compensation, which is to be awarded to the claimant-injured in the instant case.

102. Having glance of the above discussions, the impugned award is set aside, the claim petition is granted and the claimant is held entitled to compensation to the tune of Rs.14,88,000/- (i.e. Rs. 6,48,000/- + Rs.1,00,000/- + Rs.1,00,000/- + Rs.1,00,000/- + Rs.3,00,000/- + Rs.1,00,000/- + Rs.30,000/- + Rs.10,000/- + Rs. 1,00,000/-) with interest @ 7.5 % per annum from the date of the claim petition on Rs. 3,40,000/- {i.e. medical expenditure already incurred + transportation charges + attendant charges} and on remaining amount, from the date of the impugned award till its realization. The insurer-respondent No. 3 is saddled with liability and is directed to deposit the same within six weeks before the Registry.

103. On deposition, Registry is directed to release 50% of the awarded amount in favour of the claimant-injured through payee's account cheque on proper identification and the remaining 50% is to be deposited in fixed deposits for a period of six years.

104. Viewed thus, the appeal is allowed, the impugned award is set aside and the claim petition is granted, as indicated hereinabove.

105. Send down the record after placing copy of the judgment on Tribunal's file.

****

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

FAOs No. 140, 146, 194 & 195 of 2008
Date of decision: 15.05.2015

1. **FAO No. 140 of 2008**
Oriental Insurance Company Ltd. ...Appellant
Versus
Geeta Devi & others ..Respondents

2. **FAO No. 146 of 2008**
Oriental Insurance Company Ltd. ...Appellant
Versus
Raj Kumar & others ..Respondents

3. **FAO No. 194 of 2008**
Jaiwanti Devi ...Appellant
Versus
Smt. Geeta Devi & others ..Respondents

4. **FAO No. 195 of 2008**
Jaiwanti Devi ...Appellant
Versus
Sh. Raj Kumar & others ..Respondents

Motor Vehicle Act, 1988- Section 149- Petitioner pleaded that deceased had gone to attend the marriage but on return, the vehicle met with an accident- held, that in view of averments made in the petition, injured and deceased were travelling as gratuitous passengers- insurer was rightly directed to satisfy the awards with a right to recovery. (Para-12 to 15)

FAOs No. 140 & 146 of 2008
For the appellant(s): Nemo
For the respondents: Mr. Surinder Saklani, Advocate, for respondent No. 1.
Mr. Lovneesh Kanwar, Advocate, for respondents No. 2 & 3.

FAOs No. 194 & 195 of 2008
For the appellant(s): Mr. Lovneesh Kanwar, Advocate.
For the respondents: Mr. Surinder Saklani, Advocate, for respondent No. 1.
Mr. Dhruv Shaunak, Advocate, vice Mr. Vikram Thakur, Advocate, for respondent No. 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

By this judgment and order, all the appeals are being disposed of together because they are outcome of a motor vehicular accident, which was caused by driver, namely, Kali Dass @ Ramesh Kumar, while driving Swaraj Mazda bearing registration No. HP-28-1666, rashly and negligently.

2. In **FAOs No. 140 & 146 of 2008,** the insurer-Oriental Insurance Company Limited has questioned the awards passed in Claim Petition No. 67 of 2004 titled as Smt. Geeta Devi versus Jaiwanti Devi & others and Claim Petition No. 68 of 2004, titled as Raj Kumar versus Jaiwanti Devi & others, dated 4th January, 2008, hereinafter referred to as 'the impugned awards', on grounds taken in the memo of appeals.

3. By the medium of **FAOs No. 194 & 195 of 2008,** the owner has questioned the aforesaid impugned awards, on the grounds taken in the memo of appeals.

Brief Facts:

4. The claimants being victims of the motor vehicular accident had filed claim petitions before the Tribunal for grant of compensation, as per the break-ups given in the respective claim petitions. It is averred in the claim petitions that on 08.02.2004, Parvej Kumar and Raj Kumar had boarded Swaraj Mazda bearing registration No. HP-28-1666 to attend a marriage ceremony at village Gharwalhri, Tehsil Sadar, District Mandi, H.P., and while returning back, the vehicle met with an accident, at about 5.30 p.m., near the aforesaid village, which was being driven by driver, namely, Kali Dass @ Ramesh Kumar, rashly and negligently and Parvej Kumar and Raj Kumar sustained injuries and Parvej Kumar succumbed to the injuries.

5. The respondents resisted the claim petitions on the grounds taken in the respective memo of objections.

6. The Tribunal, on the pleadings of the parties, framed common issues in both the claim petitions. It is apt to reproduce the issues framed in Claim Petition No. 67 of 2004:-

> 1. *Whether respondent No. 2 was driving the Swaraj Mazda HP-28-1666 on 7.2.2004, at 5.30 p.m., at Village Gharwalhi, in rash and negligent manner, resulting in death of Parvej Kumar, as alleged? ....OPP*
> 2. *If issue No. 1 is proved, to what amount and from whom the petitioner is entitled? ...OPP*
> 3. *Whether the driver of the vehicle HP-28-1666 at the time of accident was not holding a effective and valid driving licence and was driving the vehicle in violation of the terms and conditions of the insurance policy, as alleged? OPR-3*
> 4. *Whether the petitioner alongwith other passenger was traveling as gratuitous passenger in vehicle HP-28-1666, as alleged? If so, its effect? OPR-3*

5. Relief."

7. The parties led evidence in both the claim petitions. The Tribunal, after scanning the evidence, oral as well as documentary, passed the impugned awards, whereby the insurer-Insurance Company was asked to satisfy the impugned awards, with right of recovery.

8. The claimants and the driver have not questioned the impugned awards, on any count. Thus, it has attained finality, so far as it relates to them.

9. The insurer-Oriental Insurance Company has questioned both the impugned awards, by the medium of FAOs No. 140 & 146 of 2008, on the ground that the Tribunal has fallen in error in directing it to satisfy the impugned awards.

10. The owner-insured has also questioned both the impugned awards, by the medium of FAOs No. 194 & 195 of 2008, on the ground that the Tribunal has fallen in error in granting right of recovery to the insurer.

11. The only dispute in these appeals is-whether the Tribunal has rightly granted right of recovery to the insurer. The answer is in the affirmative.

12. The claimants have specifically averred in the claim petitions that claimant Raj Kumar and Parvej Kumar were traveling in the offending vehicle after attending the marriage at Village Gharwalhri, the vehicle met with an accident and they sustained injuries and Parvej Kumar succumbed to the injuries.

13. It is apt to reproduce para 24(i) of Claim Petition No. 67 of 2004 herein:-

> ***"(i) That on the unfortunate and fateful day of 8-2-2004, deceased alongwith his father Raj Kumar has gone alongwith other persons of village to attend the marriage at village Gharwalhi, Tehsil Sadar, District Mandi, H.P. and while returning from the above marriage in the ill-fated vehicle i.e. Swaraj Mazda bearing No. HP-28-1666, owned by respondent No. 1, which was being driven by respondent No. 2 in very high speed and in very rash and negligent manner and at about 5.30 PM near about 20 mts. ahead from village Gharwalhi on Mandi-Dharampur road, respondent No. 2 lost control over the vehicle and as a result of which the vehicle met with an accident and fell downwards from the road. Due to the above accident, the deceased son of petitioner sustained various injuries on different parts of body which proved fatal, as deceased was removed to Zonal Hospital Mandi where declared dead, as he had succumbed to injuries in way to Hospital."***

14. Keeping in view the pleadings in the claim petitions, it can safely be held that the injured and deceased were traveling in the offending vehicle as gratuitous passengers.

15. In terms of the mandate contained in Chapter-XI, Sections 146, 147 and 149 of the Motor Vehicles Act, 1988 read with the fact that claimants are the third party, the Tribunal has rightly directed the insurer to satisfy the impugned award, at the first instance, with right of recovery.

16. Accordingly, the impugned awards are upheld and the appeals are dismissed.

17. The Registry is directed to release the entire compensation amount in favour of claimants, strictly as per the terms and conditions, contained in the impugned awards.

18. Send down the records after placing a copy of the judgment on each file of the claim petitions.

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

Rakesh Kumar son of Shri Sohan Lal ….Petitioner
Versus
State of H.P. ….Non-petitioner

Cr.MP(M) No. 484 of 2015
Order Reserved on 8th May, 2015
Date of Order 15th May, 2015

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 376(D) and 506 of IPC- it was pleaded that challan has been filed before the Court- statement of eye-witnesses have been recorded and the disposal of the case will take some time- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behaviour of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- mere fact that petitioner is in judicial custody and there will be delay in the conclusion of the trial is not sufficient to grant bail- petitioner is facing trial of heinous and grave offence of gang rape – release of the petitioner on bail would affect the trial adversely- bail declined but direction issued to trial Court to dispose of the case expeditiously. (Para-6 to 9)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

For the Petitioner: Mr. Ashok Kumar Thakur, Advocate
For the Non-petitioner: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail petition is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with FIR No. 79 of 2014 dated 16.5.2014 registered under Section 376(D) and 506 IPC at P.S. Baleauganj District Shimla (H.P.)

2. It is pleaded that petitioner did not commit any offence. It is further pleaded that petitioner is innocent and he is government employee and working in education

department. It is pleaded that challan already stood filed in the Court and statements of five witnesses also stood recorded by learned trial Court. It is pleaded that trial will take long time to conclude. It is also pleaded that petitioner will comply all terms and conditions imposed by the Court in bail order. Prayer for acceptance of bail petition sought.

3. Per contra police report filed. As per police report, co-accused Rakesh Kumar and Ram Parsad @ Ramu were already familiar with each other. There is recital in police report that co-accused Rakesh Kumar is posted as peon in education department. There is further recital in police report that on dated 16.5.2014 co-accused Rakesh Kumar was sent to SBI Kalibari in connection with bank draft and thereafter co-accused Rakesh Kumar did not come back. There is also recital in police report that co-accused Rakesh Kumar at 11 AM went to place i.e. 103 tunnel Shimla and co-accused Ram Parsad @ Ramu met him at tunnel 103 Shimla and thereafter both accused went towards railway track in Summer Hill forest. There is further recital in police report that prosecutrix and her companion Manish Attri met accused persons upon the railway track. There is also recital in police report that thereafter both accused persons afraid prosecutrix and her friend and told the prosecutrix and her friend that police raid was effected and police officials would also caught the prosecutrix and her friend. There is further recital in police report that after creating fear in the mind of prosecutrix and her friend accused persons took the prosecutrix and her friend in forest and thereafter accused persons separated the prosecutrix and her friend upon different path. There is further recital in police report that thereafter both accused persons namely Rakesh Kumar and Ram Parsad @ Ramu committed gang rape upon prosecutrix in forest and threatened the prosecutrix that they would kill her in case she would narrate the incident to anybody. There is further recital in police report that challan already stood filed in Court on dated 11.8.2014 which is pending before learned Additional Sessions Judge, Court No.1, Shimla. There is recital in police report that statements of seven witnesses already stood recorded and case is listed for further prosecution evidence. Prayer for dismissal of bail petition sought.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in this bail petition:-

1. Whether bail petition filed under Section 439 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail petition?
2. Final Order.

<u>Findings on Point No.1</u>

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that petitioner is in judicial custody since ten months and there will be delay in conclusion of trial and on this ground bail petition filed by petitioner be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Petitioner is facing the trial of heinous

and grave offence of sexual assault mentioned under Section 376(D) IPC i.e. gang rape. The direction would be issued to learned trial Court to dispose of the case expeditiously.

8. Another submission of learned Advocate appearing on behalf of the petitioner that any condition imposed by Court will be binding upon the petitioner and on this ground bail petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In present case petitioner is facing trial under heinous and grave criminal offence punishable under Section 376(D) of IPC. Court is of the opinion that if petitioner is released on bail at this stage then trial of case will be adversely affected and interest of State and general public will also be adversely affected.

9. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if petitioner is released on bail at this stage then petitioner will induce and threat the prosecution witnesses is accepted for the reasons mentioned hereinafter. There is apprehension in the mind of Court that if petitioner is released on bail at this stage then petitioner will threat and induce the prosecution witnesses which would adversely effect the case. In view of gravity of offence punishable under Section 376(D) IPC it is not expedient in the ends of justice to release the petitioner on bail. In view of above stated facts point No.1 is answered in negative.

Point No.2 (Final order)

10. In view of my findings on point No.1 bail petition filed by petitioner under Section 439 Cr.P.C. is rejected. However learned trial Court is directed to dispose of the case expeditiously. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail petition filed under Section 439 of Code of Criminal Procedure 1973. Pending petition(s) if any also disposed of. Petition filed under Section 439 of Code of Criminal Procedure is disposed of. Pending petition(s) if any also disposed of.

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

Ravi Kumar @ Chimnu son of Sh. Waryam Singh ….Petitioner
Versus
State of H.P. ….Non-petitioner

Cr.MP(M) No. 485 of 2015
Order Reserved on 8th May, 2015
Date of Order 15th May, 2015

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 366, 376, 354, 506 and 511 read with Section 34 of IPC- it is pleaded that trial will take a long time- prosecution

witnesses did not support the prosecution version- original culprits were not apprehended and the petitioners were falsely implicated- held, that contradictions in the statements of the witnesses will be seen by the trial Court at the time of disposal of the case - merely because, there will be delay in the conclusion of trial is no ground for granting bail- petitioner is facing trial for heinous offence of sexual assault, such offences are increasing – every woman has a right to reside in the society with honour and dignity- releasing the petitioner on bail will affect the trial adversely- hence, bail declined but direction issued to the trial Court to conclude the trial expeditiously. (Para-6 to 14)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

For the Petitioner: Mr. Suresh Kumar Thakur, Advocate
For the Non-petitioner: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present bail petition is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with FIR No. 162 of 2013 dated 31.5.2013 registered under Section 366, 376, 511, 354, 506 read with Section 34 IPC at P.S. Nurpur District Kangra (H.P.)

2. It is pleaded that bail petition be allowed because there is difference in statement recorded under Section 154 Cr.P.C. and tatima statement. It is further pleaded that bail petition be allowed because trial will take long time to conclude. It is also pleaded that witnesses have not supported the prosecution story as alleged by prosecution and on this ground bail application be allowed. It is pleaded that police officials did not catch the original culprits and implicate the petitioner falsely in present case. It is pleaded that false case is filed because hot altercation took place between co-accused Rakesh Kumar alias Mahashu and police and due to anger Rakesh Kumar @ Mahashu slapped on the face of police officials. It is further pleaded that there is no call detail on record and on this ground bail petition be allowed. It is pleaded that statement of prosecutrix and other material witnesses already stood recorded by learned trial Court. It is pleaded that any condition imposed by Court will be binding upon the petitioner. Prayer for acceptance of bail petition sought.

3. Per contra police report filed. As per police report, on dated 31.5.2013 prosecutrix was going to sewing work and when she reached at Makodjaman at 9.40 AM then a Scorpio vehicle white in colour came from behind and same was stopped. There is recital in police report that in vehicle four boys were sitting out of whom two boys came down from vehicle and one of them gagged mouth of prosecutrix while other boy caught the prosecutrix from her hairs and under duress they pushed the prosecutrix inside the vehicle and took the prosecutrix inside the vehicle. There is further recital in police report that thereafter the vehicle was took towards Rehan via Nurpur. There is further recital in police report that prosecutrix tried her best to save herself from the clutches of accused persons but all accused persons threatened the prosecutrix with dire consequences. There is recital

in police report that one of co-accused picked up a knife and told the prosecutrix that in case she makes hue and cry then she would be killed. There is further recital in police report that in the meanwhile all four boys started molesting the prosecutrix. There is also recital in police report that one boy put off the clothes of prosecutrix and tried to rape the prosecutrix. There is further recital in police report that when prosecutrix restricted about act of sexual assault then clothes of prosecutrix were given back to her. There is further recital in police report that thereafter the vehicle was stopped at village Kehar and two of boys went outside the vehicle to take the water and thereafter prosecutrix came out of vehicle and cried loudly upon which all four boys took away the vehicle and went away. There is further recital in police report that challan stood filed in the court of learned Additional Sessions Judge Dharamshala on dated 29.7.2013. Prayer for dismissal of bail petition sought.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in this bail petition:-

1. Whether bail petition filed under Section 439 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail petition?
2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of petitioner that there is contradiction in statement recorded under Section 154 Cr.P.C. and in statements recorded by learned trial Court and on this ground bail petition filed by petitioner be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that trial is under process and some of prosecution witnesses are still to be examined by learned trial Court. Court is of the opinion that if there is any material contradiction in testimonies of prosecution witnesses same would be appreciated by learned trial Court at the time of final disposal of case. Court is of the opinion that at this stage it is not expedient in the ends of justice to appreciate the evidence recorded by learned trial Court as same would prejudice the merits of case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that witnesses have not supported the prosecution story and on this ground bail petition filed by petitioner be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that fact whether there are major contradictions in testimonies of prosecution witnesses or not will be examined by learned trial Court when case would be disposed of on merits. At this stage it is not expedient in the ends of justice to give any finding upon merits of case when criminal case is under process of prosecution evidence.

8. Another submission of learned Advocate appearing on behalf of the petitioner that there will be delay in conclusion of trial and on this ground bail petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that direction will be given to learned trial Court to dispose of the case expeditiously because petitioner is in judicial custody and criminal case requires expeditious disposal.

9. Another submission of learned Advocate appearing on behalf of the petitioner that hot altercation took place between co-accused Rakesh Kumar and police officials and

due to anger co-accused Rakesh Kumar @ Mahashu had slapped on face of police officials and due to above stated facts false case was planted against accused persons and on this ground bail petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that in bail matters it is not expedient in the ends of justice to give any finding on the merits of the case. Entire plea of accused persons will be considered by learned trial Court at the time of final disposal of criminal case on merits in accordance with law.

10. Another submission of learned Advocate appearing on behalf of petitioner that there is no call detail on record and on this ground bail petition filed by petitioner be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is not expedient in the ends of justice to give any findings on merits. Court is of the opinion that if any finding is given at this stage on merits the same will prejudice the fair trial of case because prosecution has not closed its evidence and case is under the process of examination of prosecution witnesses at this stage.

11. Another submission of learned Advocate appearing on behalf of petitioner that if bail is not granted to petitioner then whole future of petitioner will be spoiled because age of petitioner is 28 years and petitioner is behind the bars for last 23-24 months and on this ground bail petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that no one is above the law and it is well settled law that majesty of law always prevails. It is well settled law that criminal cases are decided upon proved oral as well as documentary facts placed on record. It is also well settled law that criminal cases are not disposed of upon any sentimental feelings. It is well settled law that all criminal Courts are under legal obligation to dispose of the cases in accordance with law.

12. Another submission of learned Advocate appearing on behalf of petitioner that any condition imposed by Court will be binding upon the petitioner and on this ground bail petition filed by petitioner be allowed is rejected being devoid of any force. Petitioner is facing the trial of heinous offence of sexual assault punishable under Section 366, 376, 511, 354, 506 read with Section 34 IPC. Sexual assaults are increasing in the society day by day. Every woman has legal right to reside in society with honour and dignity. No one can be allowed to sexually assault the woman in barbarous manner. Courts are under legal obligation to protect the life and liberty of women in the society in accordance with law. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.***

13. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if petitioner is released on bail at this stage then trial of case will be adversely effected is accepted for the reasons hereinafter mentioned. In present case trial is under process and Court is of the opinion that if petitioner is released on bail at this stage then trial of case will be adversely effected. Court is of the opinion that if petitioner is released at this stage then interest of State and interest of general public will also be adversely effected. In view of above stated facts, point No.1 is answered in negative.

Point No.2 (Final order)

14. In view of my findings on point No.1 bail petition filed by petitioner under Section 439 Cr.P.C. is rejected. However learned trial Court is directed to dispose of the case expeditiously because petitioner is in judicial custody and case requires expeditious disposal. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail petition filed under Section 439 of Code of Criminal Procedure 1973. Petition filed under Section 439 of Code of Criminal Procedure is disposed of. Pending petition(s) if any also disposed of.

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

Sheel Darshan Sood and another. ….Applicants/Plaintiffs.
Versus
Manju Sood and others. ….Non-applicants/Defendants.

OMP No.4026 of 2013 in
Civil Suit No. 16 of 2013.
Order reserved upon OMP on: 7.5.2012.
Date of Interim Order upon OMP: May 15 ,2015

Code of Civil Procedure, 1908 - Order V Rule 20- An application for substituted service was filed on the ground that defendants No. 4, 7 and 8 had left Shimla long time ago and their whereabouts were not known- contesting defendant pleaded that defendants No. 4 and 8 had died and instead of bringing on record their legal representatives, present application has been filed- held, that there was no satisfactory proof of death and the factum of the death was disputed – report of process server was contradictory and did not establish the death of the defendants - therefore, an issue framed to determine, whether defendant No. 4 and 8 had died and parties ordered to lead evidence. (Para-5 to 7)

For the applicants:	Mr. Bhupinder Gupta, Sr. Advocate with Mr.Neeraj Gupta, Advocate.
For non-applicants	Mr.R.L.Sood, Sr.Advocate No.1to 3 with Mr. Sanjeev Kumar, Advocate.
For non-applicants No.9 to 18.	Mr.Ashok Sood, Advocate and Mr. Dhreeja Vashisht, Advocate

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Interim Order Upon OMP No. 4026 of 2013 filed under Order 5 Rule 20 CPC:

Plaintiffs Sheel Darshan Sood and others filed civil suit for declaration, specific performance, partition by metes and bound and rendition of accounts relating to three storey building situated at 22 The Mall Shimla HP. In civil suit No. 16 of 2013 present application filed by plaintiffs under Order 5 Rule 20 read with Section 151 CPC for serving defendants No.4,7 & 8 by way of substituted service. It is pleaded that co-defendants No.4,7 and 8 namely Shamsher C/o 22 The Mall Shimla 171001, Sh Vijay Kumar Sood son of Sh

Balak Ram Sood resident of 27/2 Upper Flat Lower Bazar Shimla-171001 and Sh Jagar Nath C/o 22 The Mall Shimla-171001 have left Shimla long time ago and their whereabouts are not known. It is pleaded that report was submitted by process server that co-defendants No.4 and 8 have either left Shimla or have died. It is further pleaded that present address or legal heirs of co-defendants No. 4 and 8 not mentioned in the report by process server. It is further pleaded that plaintiffs have no reason to believe that c o-defendants No.4 and 8 have died because they have left Shimla in connection with their business long time ago. It is further pleaded that service upon co-defendants No. 4,7 and 8 be effected under Order 5 Rule 20 of the Code of Civil Procedure 1908 by way of publication in daily News Paper circulated in Himachal Pradesh.

2. Per contra reply filed on behalf of contesting defendants No.1,3,9 to 18 pleaded therein that application under Order 5 Rule 20 read with Section 151 CPC is not maintainable. It is pleaded that defendants No. 4 and 8 have died and in order to avoid to bring on record their legal representatives present application has been filed by plaintiffs. It is further pleaded that both Shamsher and Jagar Nath co-defendants No.4 and 8 have left Shimla long time ago to carry on business in the upper regions of Shimla and their whereabouts are not known since more than 40 years. It is pleaded that plaintiffs have themselves admitted in the plaint that co-defendants namely Shamsher and Jagar Nath have left Shimla long time ago. It is further pleaded that co-defendants No.4 and 8 would be legally presumed to be dead as per Section 108 of the Indian Evidence Act 1872. It is further pleaded that as per report of process server placed on record co-defendants No.4 and 8 have died. It is further pleaded that Additional Registrar (Judicial) on dated 3.4.2013 directed plaintiffs to take steps for bringing on record legal representatives of co-defendants No. 4 and 8. It is further pleaded that present Civil Suit has been filed by plaintiffs against dead persons. It is further pleaded that present application filed by plaintiffs for service of dead persons is not permissible under law. Prayer for dismissal of application filed under Order 5 Rule 20 CPC sought.

3. Court heard learned Advocate appearing on behalf of the applicants/ plaintiffs and learned Advocate appearing on behalf of non-applicants/defendants and also perused entire records carefully.

4. Following points arise for determination in the present application.

1. Whether framing of issues are essential in the ends of justice in view of material proposition of fact affirmed by one party and denied by other party upon application filed under Order 5 Rule 20 CPC?.

2. Final Order.

Finding upon Point No.1.

5. Submission of learned Advocate appearing on behalf of non-applicants/defendants that death certificates of co-defendants No.4 and 8 are already placed on record and on this ground application filed under Order 5 Rule 20 CPC be dismissed is rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that death certificates are not per se admissible and contents of death certificates of Shamsher Chand and Jagar Nath are disputed by the plaintiffs. It is well settled law that documents should be proved by way of primary evidence or by way of secondary evidence as per Indian Evidence Act 1872. Even Photostat copy of death certificate of Jagar Nath placed on record and primary document of death certificate of Jagar Nath not placed on record as

required under Section 61 of Indian Evidence Act 1872. Even permission to prove death of Jagar Nath by way of secondary evidence not sought as required under Indian Evidence Act 1872.

6. Another submission of learned Advocate appearing on behalf of non-applicants/defendants that in view of the report of process server placed on record relating to co-defendants Shamsher Chand and Jagar Nath application filed under Order 5 Rule 20 CPC be dismissed is also rejected for the reason hereinafter mentioned. Court has carefully perused the report of process server. It is proved on record that the report of process server is written in two different inks with two contradictory reports. In one pen ink process server has submitted report that co-defendant No.4 Shamsher and co-defendant No.8 Jagar Nath are not residing at C/o 22, The Mall Shimla HP and in another pen ink process server has submitted report that or co-defendants No.4 and 8 have died long ago. At this stage it is not expedient in the ends of justice to rely upon two contradictory report of process server written with two pen inks. Admittedly the suit property is situated in Urban area number 22 The Mall Shimla process server while submitting his service report relating to service of co-defendants No.4 and 8 relied upon oral statement of Sh Gautam Sood son of contesting co-defendant No.3 Ajay Kumar Sood. Process server did not verify the fact of death of co-defendant No.4 and 8 from ward Commissioner or from any independent person. It is well settled law that issues are to be framed when material proposition of fact is affirmed by one party and denied by other party. See AIR 1994 HP 27 titled Dr.Om Prakash Rawal Vs. Mr.Justice Amrit Lal Bahri. It is well settled law that dead person cannot be served under Order 5 Rule 20 CPC. It is well settled law that only alive person can be served under Order 5 Rule 20 CPC. It is held that framing of issue is essential in the present case in order to decide present application properly and effectively and to impart substantial justice inter se parties in view of fact that material proposition of fact is affirmed by one party and denied by other party. Hence following issues are framed upon application filed under Order 5 Rule 20 CPC.

1. Whether co-defendants No.4 and 8 who are not heard for more than seven years are alive as alleged under Section 108 of Indian Evidence Act 1872?.

....Onus placed upon applicants/plaintiffs.

2. Whether applicants/plaintiffs have no cause of action to file application under Order 5 Rule 20 CPC against co-defendants No.4 and 8 who are dead as alleged?.

...Onus placed upon non-applicants/defendants.

3. Relief.

<u>Point No.2 (Final Order</u>):

7. In view of findings upon point No.1 case be listed for applicants/plaintiffs evidence upon application filed under Order 5 Rule 20 CPC. The date for recording of applicants/plaintiffs evidence upon application filed under Order 5 Rule 20 CPC will be fixed by Additional Registrar Judicial. It is further ordered that statement of process server who has submitted service report relating to service of co-defendants No. 4 and 8 will also be recorded in the ends of justice. It is further ordered that process server will be examined under Order 5 Rule 19 CPC on oath touching his proceedings in the ends of justice. It is further ordered that till recording of entire evidence of both parties application filed under

Order 5 Rule 20 CPC shall remain in abeyance and after recording of entire evidence of both parties same will be disposed of in accordance with law. Ordered accordingly.

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

Bishan Singh alias Bishnoo ……Appellant.
Versus
State of Himachal Pradesh …….Respondent.

Cr. Appeal No. 444 of 2012
Reserved on: May 15, 2015.
Decided on: May 16, 2015.

Indian Penal Code, 1860- Sections 302 and 201 read with Section 34- Deceased had engaged the services of 'B' and other Gorkhas- wife of the deceased told that deceased had not reached his home, although, he had told his mason or labrourers that he was going to his house- a missing report was lodged subsequently- accused got recovered the dead body, a stick, wooden plank with which the dead body was tied and a rope – he also gave Nishandehi of the place where he had killed the deceased- Medical Officer stated that it was not possible to opine about the exact cause of death but the possibility of the head injury could not be ruled out- no material was placed on record to show that there was any dispute regarding the payment- there was discrepancy regarding the person who had recorded the statement of the accused under Section 27 of the Indian Evidence Act- danda, wooden plank or rope were not sent for analysis to FSL - no entry was made at the time of taking out the case property for production before the Court- held, that in these circumstances, prosecution version was not proved. (Para-17 to 23)

For the appellant: Mr. Bhupinder Ahuja, Advocate.
For the respondent: Mr. Anup Rattan and Mr. M.A.Khan, Addl. AGs, with Mr. P.M.Negi, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 24/25.7.2012, rendered by the learned Sessions Judge, Kinnaur at Rampur, H.P. in Sessions Trial No. 01 of 2011, whereby the appellant-accused Bishan Singh (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 302, 201 and 34 IPC alongwith other co-accused namely, Geeta Ram and Bir Bahadur for offences punishable under Section 201 read with Section 34 IPC, has been convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000/- under Section 302 IPC and in default to further undergo simple imprisonment for one year. He was further sentenced to undergo rigorous imprisonment for four years under Section 201 IPC read with section 34 IPC and to pay a fine of Rs. 3000/- and in default to undergo simple imprisonment for six months. Accused Geeta Ram and Bir Bahadur were sentenced to undergo rigorous

imprisonment for four years each and to pay fine of Rs. 3000/- each under Section 201/34 IPC and in default to further undergo simple imprisonment for six months each.

2. The case of the prosecution, in a nut shell, is that Maghu Ram (hereinafter referred to as the deceased), cousin of the complainant had taken the construction work of the house of one Sh. Ganga Dev (PW-4), in village Urni, on contract basis. The deceased had engaged the services of Bishan Singh as mason and other Gorkhas. On 11.8.2010, Sh. Ganga Dev, telephonically informed Smt. Hira Devi, wife of the deceased that Maghu Ram had not reached his house despite the fact that he had told his mason and labourers that he was coming to his house. They started searching him but to no avail. They searched him at Urni where he had taken the work on contract. Even there, neither the deceased was found nor his labourers. Thus, on 26.8.2010, Sh. Shyam Dass, brother of the deceased lodged a missing report at Police Post Tapri. Thereafter, FIR was lodged on 2.9.2010. During investigation, accused Bishan Dass made a disclosure statement under Section 27 of the Evidence Act that he had concealed the dead body of the deceased in a cave and that in this regard he alongwith the co-accused had knowledge. He also gave Nishandehi of the Dogri of one Sh. Anand Singh, situated at village GTalgale where on 11.8.2010, he had allegedly killed the deceased. The site plan was prepared. Thereafter, he took the police to Makhim jungle from where, he got recovered the dead body, concealed in a cave behind bushes. The dead body was identified by Sh. Shiv Ram (complainant) and one Sh. Rattan Dass from the clothes. The photographs of the place of recovery were taken. Inquest papers were prepared. The dead body was subjected to post mortem examination. The dead body was sent to PHC, Urni and from there it was referred to IGMC, Shimla. On 5.9.2010, accused Bishan Dass also made a disclosure statement under Section 27 of the Evidence Act regarding a Danda which he had kept behind his Dera at place Galgale and also to get the same recovered. On the basis of the statement given Nishandehi of the place situated on the backside of the cowshed of Anand Singh and got recovered a Danda. The sketch map was prepared on the spot before sealing it. Fard Nishandehi and site plan of recovery were prepared. Accused Geeta Ram also made a disclosure statement under Section 27 of the Evidence Act that he could get recovered the bali/wooden plank, used in lifting the dead body to the forest which was kept concealed on the lower side of the cowshed of Sh. Anand Singh, of which he alongwith the co-accused had the knowledge. Upon Nishandehi of the place, bali/wooden plank was got recovered. Fard Nishandehi and site plan of recovery were prepared. Bali was taken into possession. Similarly, accused Bir Bahadur made a disclosure statement under Section 27 of the Evidence Act regarding a rope which had been used to tie the dead body with the Bali and that he could get the same recovered from the Dogri of the house of Sh. Jitender in which accused Bir Bahadur was living. he got recovered the rope and in this regard Fard Nishandehi and site plan of recovery were prepared. The blood samplesof the parents of the deceased were also taken for DNA profiling and sent to FSL, Junga alongwith the teeth and bones, preserved during the post mortem examination of the deceased. On completion of the investigation, challan was put up after completing all the codal formalities. Accused Bishan Dass was tried for offences punishable under Section 302, 201 and 34 IPC whereas accused Geeta Ram and Bir Bahadur were tried for offences punishable under Sections 201/34 IPC.

3. The prosecution, in order to prove its case, has examined as many as 13 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution version and pleaded innocence. The learned trial Court convicted and sentenced 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. M.A.Khan, learned Addl. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 24/25.7.2012.

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

6. PW-1 Shiv Ram, testified that on 11.8.2010, Ganga Dev had informed Hira Devi wife of Maghu Ram deceased that the deceased has not been coming at the site of construction work. Hira Devi told Ganga Dev that he has not come home. Thereafter, they searched Maghu Ram in the relations and other places but his whereabouts were not known. On 26.8.2010, Shyam Dass, brother of the deceased lodged missing report at Police Post Tapri. On 2.9.2010, they came to know that accused Bishan Dass along with other co-accused had killed him. His statement Ext. PW-1/A was recorded by the police. The accused were arrested. The dead body of the deceased was got recovered by the accused from Markami jungle. He identified the dead body. In his cross-examination, he admitted that ASI Ganga Dev had told telephonically to his sister-in-law that Maghu Ram has performed second marriage and has gone to Kinnaur.

7. PW-2 Smt. Hira Devi, is the wife of the deceased. She testified that on 11.9.2010, Ganga Dev informed her that her husband was not attending the construction work of his house. She told him that he has not visited the house. Thereafter, she made a telephonic call to Bishan Singh accused and he told her that Maghu Ram has performed second marriage and has left the place. She searched her husband with her relations and other places but he was not found anywhere. On 26.8.2010, Shyam Dass lodged missing report at P.P. Tapri.

8. PW-3 Surender Singh, deposed that the accused Bishan Singh made disclosure statement under Section 27 of the Indian Evidence Act that he has killed Sh. Maghu Ram and has concealed his body in Makhim forest about which only he, Geeta Ram and Bir bahadur have the knowledge. The statement to this effect was recorded vide Ext. PW-3/A. He signed the same along with Rattan Dass and accused Bishan Singh appended his thumb impression on the same. Thereafter, accused Bishan Singh led the police party to the spot where he had killed Maghu Ram and concealed his dead body for three days in the cow shed. In this regard memo Ext. PW-3/B was prepared. Accused Bishan Singh told that on 14.8.2010, at mid night, he alongwith co-accused Bir Bahadur and Geta Ram had taken the dead body of Maghu Ram from the cow shed and had concealed the same in the cave in Mukami forest. Thereafter, accused Bishan Singh led the police party to the place where he had concealed the dead body of Maghu Ram in the cave and get the same recovered which was identified by Shiv Ram, the relative of deceased. Recovery memo Ext. PW-1/B was prepared. In his cross-examination, he deposed that he went to the Police Post Tapri. 5-6 persons were already present there. The statement of accused Bishan Singh under section 27 of the Evidence Act was recorded by the SHO under the supervision of the Superintendent of Police.

9. PW-4 Ganga Dev, deposed that he had given contract of construction work of his house to Maghu Ram. In April, 2010, he started the construction work of his Dogri/house. Accused Bishan Singh was working as mason and co-accused Geeta Ram and Bir Bahadur as labourers. In the month of August, 2010, when deceased Maghu Ram did

not attend the construction work, he informed his wife that Maghu Ram was not attending the work and asked her as to whether he was at home or not. The accused persons were arrested on 5.9.2010. He was associated in the investigation by the police. During investigation, accused Bishan Singh made disclosure statement that he has killed Maghu Ram with a danda and has concealed the danda about which only he has the knowledge and he can get recovered the same. Statement to this effect was recorded vide Ext. PW-4/A. Accused led the police party to the place where he had kept concealed the danda at place Galgale. He got recovered danda from behind the Dogari of Anand Singh. Sketch was prepared vide memo Ext. PW-4/B. The danda was taken into possession vide memo Ext. PW-4/C. It was put in parcel of cloth and sealed with seal "K". Accused Geeta Ram also made disclosure statement that the plank used for lifting the dead body of deceased by him and Bir Bahadur and Bishan Singh was concealed by him and only he has the knowledge of the same and can get recovered the same. Memo Ext. PW-4/D was prepared to this effect. Thereafter, accused Geeta Ram led the police party to the place where he had concealed the plank/bali and got recovered the same from fencing. It was taken into possession vide memo Ext. PW-4/E. Thereafter, accused Bir Bahadur also made disclosure statement that he has concealed the rope used for tying the dead body in the house of Jitender. The statement was recorded vide memo Ext. PW-4/F. Accused Bir Bahadur led the police party to the place where he had concealed the rope. It was got recovered. Danda Ext. P-2, Wood Ext. P-3, rope Ext. P-4 were produced in the Court during the recording of the statement of PW-4 Ganga Dev. He admitted in his cross-examination that he was receiving complaints that Maghu Ram used to consume liquor. Maghu Ram used to disclose that he has no issue and wanted to perform second marriage.

10. PW-5 Yash Pal, deposed that on 5.9.2010, SHO got deposited with him the case property in case No. 71/2010 dated 2.9.2010. He made the necessary entries in the malkhana register. On 10.9.2010, HC Sandeep Kumar had deposited the long bone of deceased Maghu Ram along with the clothes of deceased which he brought from IGMC, Shimla. The case property was also entered in the malkhana register on 23.9.2010. The SHO PS, deposited two envelopes and the blood samples of deceased Maghu Ram for DNA profiling which were sealed with seal impression "T" and sent to FSL Junga through Const. Chander Mohan.

11. PW-6 Const. Chander Mohan testified that he has carried the case property to FSL, Junga on 23.9.2010.

12. PW-10 Dr. Piyush Kapila, has conducted the post mortem of the dead body and issued post mortem report Ext. PW-10/B. According to him, from the available remains, it was not possible to opine about the exact cause of death by keeping in view the ante mortem fracture of the head. The possibility of the head injury could not be ruled out.

13. PW-11 S.P. Ashok Kumar, testified that the accused were apprehended and brought before him for interrogation. While in custody, accused Bishan Singh made a disclosure statement vide Ext. PW-3/A. The accused Bishan Singh alongwith co-accused took them to the place where he alongwith the co-accused had killed the deceased Maghu Ram and also the place where his dead body was concealed. Spot map was prepared. Dead body was found hidden beneath stones in jungle Makhim. According to him, the house where the deceased was allegedly killed was three storeyed, including the ground floor.

14. PW-12 Dr. Rajeev Sandal, deposed that the body of the deceased maghu Ram was identified by Shiv Ram son of late Sh. Segi Ram. According to him, it was suspected case of murder. The dead body was found in the shape of Skelton. It was referred to the department of Forensic medicines, IGMC, Shimla for expert opinion. The post mortem report is Ext. PW-12/A.

15. PW-13 ASI Ishwar Singh, deposed that he has taken photographs of the spot and also prepared the CD of the spot from where the dead body was got recovered. In his cross-examination, he deposed that the house where the deceased was killed was double sotreyed.

16. PW-15 SI Tejender Kumar, has carried out the investigation. According to him, FIR Ext. PW-15/A was registered on the basis of Ext. PW-1/A. The dead body was recovered on the basis of the disclosure statement made by the accused Bishan Singh. He also got recovered the danda. Accused Geeta Ram also made the disclosure statement that he could get the bali recovered. He got the same recovered. Accused Bir Bahadur also made the disclosure statement that he had concealed the rope in the house of Tejender. He also got the same recovered. He prepared the spot map of the recovery of danda Ext. PW-15/B, Balli Ext. PW-15/C, rope Ext. PW-15/D. In his cross-examination, he deposed that he was present with the Superintendent of Police when statement under Section 27 of the Evidence Act were recorded. The statement of Bishan Singh was recorded by the Superintendent of Police himself. He visited the spot and there was three storeyed house on the spot.

17. The entire case of the prosecution is based on circumstantial evidence. The case of the prosecution, precisely, is that PW-4 Ganga Dev had engaged deceased Maghu Ram as contractor. He did not come for work. PW-4 Ganga Dev made inquiries from the wife of Maghu Ram. She told that he has not come home. Thereafter, the inquiries were made on 11.8.2010. The missing report was lodged by one Shyam Dass on 16.8.2010. Thereafter, the FIR was registered on 2.9.2010.

18. The FIR has to be registered promptly. It is also settled law that the registration of FIR belatedly would not affect the case of the prosecution if the delay has been satisfactorily explained. However, in this case, the deceased Maghu Ram has gone missing from 11.8.2010. The only statement made by PW-1 Shiv Ram and PW-2 Smt. Hira Devi is that inquiries were made from the relatives and other places. The missing report was lodged after about 15 days on 26.8.2010 by brother of deceased Sh. Shyam Dass. The FIR was registered on 2.9.2010. The delay in lodging the FIR has not been explained satisfactorily.

19. According to PW-10 Dr. Piyush Kapila and PW-12 Dr. Rajeev Sandal, the body was in the shape of Skelton. According to PW-10 Dr. Piyush Kapila, from the available remains, it was not possible to opine about the exact cause of death by keeping in view the ante mortem fracture of the head. According to him, the possibility of head injury could not be ruled out. The police has taken the blood samples of the parents of the deceased. These were sent for DNA profiling and the report is Ext. PX. Sh. Leba Ram and Smt. Lacchi Devi were found to be the biological parents of the deceased.

20. The prosecution has not attributed any motive to the accused Bishan Singh. Accused Bishan Singh was employed as mason. There is no material placed on the record by the prosecution that there was any dispute regarding payment or any such issue. Mr.

M.A. Khan, learned Addl. Advocate General, for the State has placed strong reliance upon the disclosure statement made by accused Bishan Singh vide Ext. PW-3/A, whereby the accused has disclosed that he has concealed the dead body in the forest. PW-3 Surinder Singh has stated in his cross-examination that the statement of the accused Bishan Singh under Section 27 of the Indian Evidence Act was recorded by the SHO under the supervision of the Superintendent of Police. However, PW-15 SI Tejender Kumar stated that he was present with the Superintendent of Police when statement under Section 27 of the Evidence Act was recorded. The statement of accused Bishan Singh was recorded by the Superintendent of Police himself. There is variance in the statements of PW-3 Surender Singh and PW-15 SI Tejender Kumar, as to who has recorded the statement of accused Bishan Singh under Section 27 of the Evidence Act.

21. Mr. M.K.Khan, learned Addl. Advocate General for the State has then argued that on the basis of the disclosure statement made by the accused, the danda, bali and rope were recovered. Neither danda or bali nor rope were sent for FSL examination. These were produced at the time of recording the statement of PW-4 Ganga Dev, vide Ext. P-2, P-3 and P-4. There is entry in the malkhana register when these were deposited in the malkhana register, however, there is no entry when danda, bali and rope Ext. P-2, P-3 and P-4, respectively, were taken out for production before the Court. The case property is required to be deposited in the malkhana and the entry is required to be made when it is taken out and re-deposited in the malkhana.

22. According to PW-11 Ashok Kumar and PW-15 SI Tejender Kumar the house where deceased was allegedly killed was three storeyed. However, according to PW-13 ASI Ishwar Singh, who has taken photographs of the house, it was double storeyed only. There is variance in the statement of PW-11 Ashok Kumar, PW-13 ASI Ishwar Singh and PW-15 SI Tejender Kumar, whereby the house was double storeyed or three storeyed. It casts doubt whether it is the same house where the deceased was allegedly killed. Moreover, the statements under Section 27 of the Evidence Act made by the accused are dated 2.9.2010 but according to PW-4 Ganga Dev, the accused were arrested on 5.9.2010. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

23. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 24/25.7.2012, rendered by the learned Sessions Judge, Kinnaur at Rampur, H.P., in Sessions trial No. 01 of 2011, under Sections 302/201/34 IPC is set aside. The accused is acquitted of the charge framed under Section 302/201/34 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.

24. 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.

Jeevan Rana. …Appellant.
Versus
State of Himachal Pradesh. …Respondent.

Cr.A. No. 324/2012
Decided on: 1.5.2015

Indian Penal Code, 1860- Section 84- Accused contended that he was insane- reliance was placed upon the testimony of DW-1 who deposed that accused was suffering from bipolar affective disorder and he had impaired judgment as he was suffering from psychosis- held, that accused has to prove that he was suffering from legal insanity- the burden is upon him to establish this fact- accused ran away from the spot, which shows that he knew what he was doing was wrong- PW-1 had not noticed any abnormality in the behavior of the accused- held that the plea of insanity taken by the accused not proved. (Para- 22 to 29)

Cases referred:

Sheralli Wali Mohammed vs. State of Maharashtra, AIR 1972 SC 2443
Nalini Kumari vs. K.S. Bopaiah 2007 (1) KarLJ 342
Sudhakaran vs. State of Kerala 2010 (10) SCC 582
Hari Singh v. State of Madhya Pradesh 2008 (16) SCC 109
Elavarasan V. State, AIR 2011 SC 2816

For the appellant: Mr. Dibender Ghosh, Advocate.
For the Respondent: Mr. Ramesh Thakur, Asstt. A.G.

The following judgment of the Court was delivered:

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

This appeal is instituted against the judgment dated 29.9.2011 rendered by the Additional Sessions Judge, Mandi in Sessions Trial No. 20 of 2010, whereby the appellant-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offences punishable under section 376 and 452 of the Indian Penal Code, has been convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.10,000/- and in default of payment of fine, he was further directed to undergo simple imprisonment for six months for the commission of offence punishable under section 376 (2) (f) of the Indian Penal Code. He was further sentenced to undergo simple imprisonment for a period of one year and to pay a fine of Rs.5,000/- and in default of payment of fine to further undergo simple imprisonment for three months for the commission of offence punishable under section 451 of the Indian Penal Code. Both the sentences were ordered to run concurrently.

2. Case of the prosecution, in a nutshell, is that the grand father of the prosecutrix filed an application before the police on 5.4.2010 stating therein that he had gone towards his fields at about 4.30 P.M. His wife was present at home. The prosecutrix was present in the house with her brother. She was watching T.V. The wife of the complainant and his grandson were in the upper storey. Accused came to the room of prosecutrix and tried to rape her. She shouted for help. However, her noise could not be

heard in the din of the T.V. When the wife of the complainant opened the door, accused ran away. He was identified by the wife of the complainant as Totu alias Jiwan Ram. The incident was narrated to the complainant. He made inquiry from the prosecutrix. She revealed the incident. FIR Ext. PW-15/A was registered. The prosecutrix was medically examined. Accused was arrested. He was also examined medically by Dr. Aman Rana. He issued MLC to PW-1/A. Site Plan Ext. PW-15/A was prepared. Photographs were also taken. Bed sheet was also recovered. Case property was sent to F.S.L., Junga on 12.4.2010 vide RC No. 79/10. The result of the analysis is Ext. PW-15/D. 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 15 witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He admitted that his underwear, pants and shirt were preserved by the Medical Officer. He also produced DW-1 Dr. Savinder Singh. Learned trial Court convicted and sentenced the accused, as noticed hereinabove.

4. Mr. Dibender Ghosh, learned counsel for the accused, has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. Ramesh Thakur, learned Assistant Advocate General, has supported the judgment dated 29.9.2011, passed by the trial Court.

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

7. PW-1 Dr. Aman Rana has medically examined the accused. He issued MLC Ext. PW-1/A. According to him, smegma was absent. He noticed small abrasion on left side of glans penis. In his cross-examination, he deposed that accused was mentally normal as per his opinion. He has not noticed any abrasion or scratch on the person of the accused except one mentioned by him in the MLC.

8. PW-2 Dr. Sarla Chand has examined the prosecutrix. She has issued MLC Ext. PW-2/A. According to her, hymen was ruptured, inflamed and swelling was present. According to her, the child was sexually exposed within 24 hours of examination.

9. Prosecutrix has appeared as PW-3. In her examination-in-chief, she has deposed that she was present in the room watching T.V. on a bed. Her grand-mother was present in the different room. Her younger brother was sleeping in the different room. The accused did a bad act (Ganda Kam). She cried and called her grand mother. She has denied the suggestion that accused behaved like a mentally unsound person and roams in the area. She has denied the suggestion that her grand mother had told her to name the accused. She has denied that no bad act was done with her.

10. PW-4 Prakash Chand is the grand father of the prosecutrix. According to him, his wife came to fields at 5.20 P.M. She informed that the prosecutrix was raped. He went to home. The prosecutrix was crying. She told him that one boy came to her room and raped her. He checked her and found that blood was oozing out of her private parts. He informed his son and told about the incident. Thereafter, he reported the matter vide application Ex.PW-4/A. In his cross-examination, he has deposed that girl was lying on the bed and crying when he reached the home.

11. PW-5 Yashoda Devi is the grand mother of the prosecutrix. She told the prosecutrix to go and watch T.V. in the ground floor. When she was returning from the room, she heard some noise of foot steps. She looked from the window but could not find any person. When she saw again, she noticed the accused. He was having his pant and

underwear upto the knees. When he looked back, she identified him. The accused was trying to put on the clothes. She went down and found that the prosecutrix was lying on the bed. She was crying. She found that cloths of prosecutrix were pulled up. There was blood on the bed sheet and the blood was coming out from the private part of the prosecutrix. She told her that one boy came, who laid upon her. She shouted. Her husband was in the fields. In her cross-examination, she has deposed that she saw the accused running on the passage towards the back side of the house.

12. PW-6 Vijay Kumar has deposed that his father told him that prosecutrix was raped. He checked and found that blood was oozing out from the private part of the prosecutrix. He, his father and his daughter went to Police Station, Sarkaghat. FIR was registered.

13. PW-7 Kishan Chand has deposed that accused came to his house at about 4/4.30 P.M. He took tea and thereafter he left. His wife gave him Rs. 15/-.

14. Statements of PW-8 Prem Singh and PW-9 Rakesh Kumar are formal in nature.

15. PW-10 HHC Shyam Lal has deposed that he brought the prosecutrix to Zonal Hospital, Mandi alongwith her grandfather on 6.4.2010.

16. Statement of PW-11 Rakesh Kumar is formal in nature.

17. PW-12 Dharam Singh has deposed that Constable Rakesh Kumar deposited the case property with him on 5.4.2010. He made the entry at Sr. No. 1316/10. He deposited the case property in Malkhana. SHO Ranjit Singh handed over to him one parcel on 6.4.2010. He made entry at Sr. No. 1317/10. He deposited the same in Malkhana. HHC Shyam Lal deposited 3 parcels with him on the same day. He deposited the same in Malkhana and made entry at Sr. No. 1318/10. He handed over all these articles to HHC Roop Singh with the direction to carry the same to F.S.L., Junga vide RC No. 70/10.

18. PW-13 HHC Roop Singh has carried out the case property to F.S.L., Junga on 12.4.2010 in safe condition.

19. PW-14 ASI Vijay Kumar moved an application Ext. PW-14/B for examination of the accused.

20. PW-15 has deposed that the application was filed on the basis of which FIR Ext. PW-15/A was registered. He prepared the site plan. The photographs were taken. Bed Sheet was recovered. Statements of the witnesses were recorded. Parcels were sent to F.S.L., Junga. Report of F.S.L., Junga Ext. PW-15/B was received.

21. According to the statement of PW-3 prosecutrix, she was watching T.V. in her room. Accused came and performed bad act 'ganda kaam' with her. Her statement inspires confidence though minor. PW-4 Prakash Chand, and PW-5 Yadhoda Devi grandfather and grandmother of the prosecutrix have corroborated the statement of PW-3. PW-4 Prakash Chand when informed by PW-5 Yashoda Devi has noticed the blood oozing from the private part of the prosecutrix. He has moved an application Ext. PW-4/A, on the basis of which FIR was registered. PW-5 Yashoda Devi has identified the accused and noticed the accused putting up his clothes. She also noticed blood on the bed sheet and blood oozing out from the private parts of the prosecutrix. PW-2 Dr. Sarla Chand has opined definitely that hymen was ruptured, inflamed and swelling was present and the prosecutrix was sexually exposed within 24 hours of examination. PW-1 Aman Rana has examined the

accused and issued MLC Ext. PW-1/A. He has noticed abrasion on left side of glans penis. The prosecutrix was born on 4.7.2004 as per Ext. PW-9/A.

22. Mr. Dibender Ghosh has vehemently argued that his client was insane. He has relied upon the statement of DW-1 Dr. Savinder Singh. DW-1 Dr. Savinder Singh has deposed that he has treated the accused. The accused had come to him on 27.7.2009. He was registered on OPD basis. He was diagnosed as suffering from bipolar affective disorder. He prescribed medicines. Patient came again on 28.8.2009. He was admitted in the hospital on the same day. He was put on suitable treatment. He was given four dosages of electric shock. He was discharged on 11.9.2009. Thereafter, patient never came. According to him, patient looked like a normal person. The patient had impaired judgment because he was suffering from psychosis. In his cross-examination, he has admitted that the pages of the indoor file were different. He has not noted pages. Volunteered that pages were not numbered in any file. He did not know the accused personally. He has also admitted that the entries were in different pen inside the red circle. He has also admitted that patient could carry out normal pursuits.

23. We have also gone through Ex.DW-1/A. These are loose papers un-numbered. The Court while taking up the plea of insanity has to see the legal insanity and not medical insanity. It is for the accused to prove that he was suffering from insanity as per section 105 of the Indian Evidence Act. The accused has not led any tangible evidence to prove that he was suffering from insanity.

24. Their Lordships of the Hon'ble Supreme Court in ***Sheralli Wali Mohammed*** vs. ***State of Maharashtra***, AIR 1972 SC 2443 have held that the law presumes every person of the age of discretion to be sane unless the contrary is proved and it would be most dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. Their Lordships have held as under:

> "12. To establish that the acts done are not offences under S. 84 of the Indian Penal Code, it must be proved clearly that, at the time of the commission of the acts, the appellant, by reason of unsoundness of mind, was incapable of either knowing the nature of the act or that the acts were either morally wrong or contrary to law. The question to be asked is, is there evidence to show that, at the time of the commission of the offence, he was labouring under any such incapacity? On this question, the state of his mind before and after the commission of the offence is relevant. The general burden of proof that an accused person is in a sound state of mind is upon the prosecution. In Dahyabhai Chhaganbhai Thakkar v. The State of Gujarat, (1964) 7 SCR 361 at p. 367 = (AIR 1964 SC 1563), Subba Rao, J., as he then was, speaking for the Court said
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> > "(1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) there is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by S. 84 of the Indian Penal Code: the accused may rebut it by placing before the Court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the Court by the accused or by the

prosecution may raise a reasonable doubt in the mind of the Court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the Court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged.''

13. With this in mind, let us consider the evidence to see whether the accused was in an unsound state of mind at the time of the commission of the acts attributed to him, P. W. 3, one of the brothers of the accused stated that the accused used to become excited and uncontrollable, that sometimes he behaved like a mad man, and that he was treated by Dr. Deshpande and Dr. Malville. P. W. 4, Hyderali, also a brother of the accused, has stated that the accused used to suffer from temporary insanity and that he was treated by Dr. Deshpande and Dr. Malville. The evidence of these two witnesses on the question of the insanity of the accused did not appeal to the trial Court and the Court did not, we think rightly, place any reliance upon it. No attempt was made by the defence to examine the two doctors. There was, therefore, no evidence to show that, at the time of the commission of the acts, the accused was not in a sound state of mind. On the other hand, P. W. 8, Rustom Mirja, has stated in his deposition that the accused has been working with him as an additional motor driver for the last 8 or 10 years and that his work and conduct were normal. He also stated that the accused worked with him on March 6, 1968, till 4 P.M. P. W. 16, Dr. Kaloorkar, who examined the accused at 7.20 A.M. on the day of the occurrence, has stated in his deposition that he found that the accused was in normal condition. His evidence has not been challenged in cross-examination.

We think that not only is there no evidence to show that the accused was insane at the time of the commission of the acts attributed to him, but that there is nothing to indicate that he had not the necessary mens rea when he committed the offence. The law presumes every person of the age of discretion to be sane unless the contrary is proved. It would be most dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. The mere fact that no motive has been proved why the accused murdered his wife and child or, the fact that he made no attempt to run away when the door was broke open, would not indicate that he was insane or, that he did not have the necessary mens rea for the commission of the offence. We see no reason to interfere with the concurrent findings on this point either."

25. The nature and symptom of the mis bipolar disease were described by the Hon'ble High Court of Karnataka in ***Nalini Kumari*** vs. ***K.S. Bopaiah*** 2007 (1) KarLJ 342. The Court has observed as under:

"19. Now let us discuss what is mis Bipolar disease and whether it is curable/controllable and treatable disease?

20. In National Institute of Mental Health Publication No. 3679, it is stated:

Introduction:

Bipolar disorder, also known as manic-depressive illness, is a brain disorder that causes unusual shifts in a person's mood, energy, and ability to function. Different from the normal ups and downs that everyone goes through, the symptoms of bipolar disorder are severe. They can result in damaged relationships, poor job or school performance, and even suicide.

But bipolar disorder can be treated, and people with this illness can lead full and productive lives.

(underlining is by us) What is the Course of Bipolar Disorder?

Episodes of mania and depression typically recur across the life span. Between episodes, most people with bipolar disorder are free of symptoms, but as many as one-third of people have some residual symptoms. A small percentage of people experience chronic unremitting symptoms despite treatment.

The classic form of the illness, which involves recurrent episodes of mania and depression, is called bipolar I disorder. Some people, however, never develop severe mania but instead experience milder episodes of hypomania that alternate with depression; this form of the illness is called bipolar II disorder. When four or more episodes of illness occur within a 12-month period, a person is said to have rapid-cycling bipolar disorder. Some people experience multiple episodes within a single week, or even within a single day. Rapid cycling tends to develop later in the course of illness and is more common among women than among men.

People with bipolar disorder can lead healthy and productive lives when the illness is effectively treated (see below - "How is Bipolar Disorder Treated"). Without treatment, however, the natural course of bipolar disorder tends to worsen. Over time a person may suffer more frequent (more rapid-cycling) and more severe manic and depressive episodes than those experienced when the illness first appeared. But in most cases, proper treatment can help reduce the frequency and severity of episodes and can help people with bipolar disorder maintain good quality of life.

21. In Health & Medical Information in Psychiatry (Australia's Central Health & Medical Information Resource), it is stated:

Bipolar Affective Disorder (BPAD) is a psychological disease.

This condition is characterised by alternating syndromes of depression and mania. Depression is a psychiatric syndrome characterised by a subjective feeling of depression, loss of enjoyment in all activities and overwhelming feelings of guilt and worthlessness.

Mania represents the opposite end of the spectrum characterised by erratic and disinhibiter, behaviour, poor tolerance or frustration, over-extension of responsibility and vegetative signs. These include raised libido, weight loss with anorexia, decreased need for sleep and excessive energy.

Incidence:

The prevalence is 1% worldwide. It is equally common in men and women. There is no variation between socioeconomic class or race. Page 0134 The average age of onset is 21. The increased frequency found in divorced people is probably a consequence of the condition.

Predisposing Factors:

The most significant risk factor for the development of BPAD is a family history of either BPAD or depression.

Natural History:

The condition of bipolar usually begins between the ages of 30 to 40 years old. There are two types of bipolar affective disorder - Type I and type II. In type I BPAD, patients will meet the criteria for a full manic episode but may never experience an episode of major depression, type II BPAD, the patient will fulfil the criteria for a major depressive episode but will never experience a full manic episode. They may experience a less form of mania called hypomania.

The patient in an episode of major depression is at increased risk of self-harm and suicidal behaviour and must be monitored closely for risk factors. The duration of depressive episode varies but usually lasts for approximately six months if left untreated. In the majority of cases, the patient experiencing an episode of mania will generally refrain from self-harm behaviour. They will, however, place their finances and social life at risk by indulging in wreckless behaviour. These episodes again last for around 3-6 months if left untreated by medication. The patient with type I BPAD will typically experience 10 episodes of mania throughout their lives.

Prognosis:

The average duration of a manic episode is 3-6 months with 95% making a full recovery in time. Recurrence is the rule is bipolar disorders, with up to 90% relapsing within 10 years. In terms of overall prognosis, 15% completely recover from the illness. 50-60% partially recover and one third will retain chronic symptoms resulting in social and occupational dysfunction.

Investigation:

Patients should be screened for thyroid function and can produce hypothyroidism. During treatment, lithium levels should be checked for 3 months, along with regular thyroid and renal function rents.

Treatment Overview:

The primary treatment for BPAD involves long-term daily medications. The most commonly used drug in the initial management of BPAD is lithium. The drug takes about 2 weeks to take effect and is effective in stabilising the patient's mood. Other drugs such as valproate and tegretol are more commonly used in the long term to help prevent the recurrence of mania and depression in patients with BPAD. They may also be combined with lithium for greater effect, if one agent proves inadequate to control the symptoms.

Psychotherapy is also helpful in the management of BPAD Group therapy, family therapy and individual psychotherapy have been shown to improve the outcome of this condition when combined with the regular use of medications.

22. In Wikipedia, the free encyclopedia, it is stated:

Bipolar disorder (previously known as Manic Depression) is a psychiatric diagnostic category describing a class of mood disorders in which the person experiences clinical depression and/or mania, hypomania, and/or mixed stated. The disorder can cause great distress among those afflicted and those living with them. Bipolar disorder can be a disabling condition, with a higher-than-average risk of death through suicide.

The difference between bipolar disorder and unipoloar disorder (also called major depression) is that bipolar disorder involves both elevated and

depressive mood states. The duration and intensity of mood states varies widely among people with the illness. Fluctuating from one mood state to the next is called "cycling". Mood swings can cause impairment or improved functioning depending on their direction (up or down) and severity (mild to severe). There can be change in one's energy level, sleep pattern, activity level, social rhythms and cognitive functioning. Some people may have difficulty functioning during these times.

Domains of the bipolar spectrum:

Bipolar disorder is often a life-long condition that must be carefully managed. Because there is so much variation in severity and nature of mood problems, it is increasingly being called bipolar spectrum disorder. The spectrum concept refers to subtypes of bipolar disorder or a continuant of mood problems, that can include sub-syndromal (below the symptom threshold for categorical diagnosis) symptoms. Nassir Ghaemi, M.D., has also contributed to the development of a bipolar spectrum questionnaire. The full bipolar spectrum includes all states or phases of the bipolar disorders.

Kraepelin's (1921) construct is useful for primary care clinicians, patients and families. It describes variations in two directions (mania and depression) and of three aspects: mood, activity and thinking.

Bipolar depression:

According to the Mayo Clinic, in the depressive phase, signs and symptoms include: persistent feelings of sadness, anxiety, guilt, anger, isolation and/or hopelessness, disturbances in sleep and appetite, fatigue and loss of interest in daily activities, problems concentrating, irritability, chronic pain without a known cause, recurring thoughts of suicide.

A 2003 study by Robert Hirschfeld, M.D., of the University of Texas Medical Branch, Galveston found bipolar patients fared worse in their depressions than unipolar patients. In terms of disability, lost years of productivity, and potential for suicide, bipolar depression, which is different (in terms of treatment), from unipolar depression, is now recognized as the most insidious aspect of the illness.

Severe depression may be accompanied by symptoms of psychosis. These symptoms include hallucinations (hearing, seeing or otherwise sensing the presence of stimuli that are not there) and delusions (false personal beliefs that are not subject to reason or contradictory evidence and are not explained by a person's cultural concepts). They may also suffer Page 0136 from paranoid thoughts of being persecuted or monitored by some powerful entity such as the government or a hostile force or become paranoid that they'll be abandoned and left by those close to them. Intense and unusual religious beliefs may also be present, such as patients' strong insistence that they have a God-given role to play in the world, a great and historic mission to accomplish, or even that they possess supernatural powers. Delusions in a depression may be far more distressing, sometimes taking the form of intense guilt for supposed wrongs that the patient believes he or she has inflicted on your others. There are a number of conflicting theories on what can be considered the cause of bipolar depression, and what may be a symptom, none of which are yet widely accepted as correct.

It is crucially important to understand that there is no blood test or brain scan that expresses distinctly that this disorder exists.

Diagnosis:

Diagnostic criteria:

Flux is the fundamental nature of bipolar disorder. Both within and between individuals with the illness, energy, mood, thought, sleep, and activity are among the continually changing biological markers of the disorder. The diagnostic subtypes of bipolar disorder are thus static descriptions - snapshots, perhaps - of an illness in continual change. Individuals may stay in one subtype, or change into another, over the course of their illness. The DSMV, to be published in 2011, will likely include further and more accurate sub-typing (Akiskal and Ghaemi, 2006).

There are currently four types of bipolar illness. The DSM-IV-TR details four categories of bipolar disorder, Bipolar I, Bipolar II, Cyclothymia, and Bipolar Disorder NOS (Not Otherwise Specified).

According to the DSM-IV-TR, a diagnosis of Bipolar I disorder requires one or more manic or mixed episodes. A depressive episode is not required for a diagnosis of BP I disorder, although the overwhelming majority of people with BP I suffer from them as well.

Bipolar II, the more common but by no means less severe type of the disorder, is usually characterized by one or more episodes of hypomania and one or more severe depressions. A diagnosis of bipolar II disorder requires only one hypomanic episode. This stipulation is used mainly to differentiate it from unipolar depression. Although a patient may be depressed, it is very important to find out from the patient or the patient's family or friends if hypomania has ever been present, using careful questioning. This, again, avoids the antidepressant problem. Recent screening tools such as the Hypomanic Check List Questionnaire (HCL-32) have been developed to assist the quite often difficult detection of Bipolar II disorders.

A diagnosis of Cyclothymic Disorder requires the presence of numerous hypomanic episodes, intermingled with depressive episodes that do not meet full criteria for major depressive episodes. The main idea here is that there is a low-grade cycling of mood which appears to the observer as a personality trait, but interferes with functioning.

Page 0137 If an individual clearly seems to be suffering from some type of bipolar disorder but does not meet the criteria for one of the subtypes above, he or she receives a diagnosis of Bipolar Disorder NOS (Not Otherwise Specified).

Misdiagnosis:

There are many problems with symptom accuracy, relevance, and reliability in making a diagnosis of bipolar disorder using the DSM-IV-TR. These problems all too often lead to misdiagnosis.

Infact, University of California at San Diego's Hagop Akiskal M.D., believes that the way the bipolar disorders in the DSM are conceptualized and presented routinely lead many primary care doctors and mental health professionals to misdiagnose bipolar patients with unipolar depression, when

a careful history from patient, family, and/or friends would yield the correct diagnosis.

If misdiagnosed with depression, patients are usually prescribed antidepressants, and the person with bipolar depression can become agitated, angry, hostile, suicidal, and even homicidal (these are all symptoms of hypomania, mania, and mixed states).

Treatment:

Currently, bipolar disorder cannot be cured, though psychiatrists and psychologists believe that it can be managed.

The emphasis of treatment is on effective management of the long-term course of the illness, which usually involves treatment of emergent symptoms. Treatment methods include pharmacological and psychotherapeutic techniques. Leading bipolar specialist, Gillian Townley, has researched the effect of the Ferret Rabbit process.

Prognosis and the goals of long-term treatment:

A good prognosis results from good treatment which, in turn, results, from an accurate diagnosis. Because bipolar disorder continues to have a high rate of both under-diagnosis and misdiagnosis, it is often difficult for individuals with the illness to receive timely and competent treatment.

Bipolar disorder is a severely disabling medical condition. In fact, it is the 6th leading cause of disability in the world, according to the World Health Organization. However, with appropriate treatment, many individuals with bipolar disorder can live full and satisfying lives. Persons with bipolar disorder are likely to have periods of normal or near normal functioning between episodes.

Ultimately one's prognosis depends on many factors, which are, infact, under the individual's control; the right medicines; the right does of each; a very informed patient; a good working relationship with a competent medical doctor; a competent, supportive and warm therapist; a supportive family or significant other; and a balanced lifestyle including a regulated stress level, regular exercise and regular sleep and wake times.

There are obviously other factors that lead to a good prognosis, as well, such as being very aware of small changes in one's energy, mood, sleep Page 0138 and eating behaviors, as well as having a plan in conjunction with one's doctor for how to manage subtle changes that might indicate the beginning of a mood swing. Some people find that keeping a log of their moods can help them in predicting changes.

The goals of long-term optimal treatment are to help the individual achieve the highest level of functioning while avoiding lapse.

23. The following is a quote from a successfully treated individual with bipolar disorder (from the U.S. National Institute of Mental Health):

Manic-depression distorts moods and thoughts, incites dreadful behaviors, destroys the basis of rational thought, and too often erodes the desire and will to live. It is an illness which is biological yet looks and feels psychological, one that is unique in conferring advantage and pleasure, yet one that brings in its wake almost unendurable suffering and, not infrequently, suicide. I am fortunate that I have not died from my illness,

fortunate in having received the best medical care available, and fortunate of having the friends, colleagues, and family that I do.

Bipolar disorder and creativity Bipolar disorder is found in disproportionate numbers in people with creative talent such as artists, musicians, authors, performers, poets and scientists, and some credit the condition for their creativity. Many famous historical figures gifted with creative talents commonly are believed to have been affected by bipolar disorder, and were "diagnosed" after their deaths based on letters, correspondence, contemporaneous accounts, or other material.

It has been speculated that the mechanisms, which cause the disorder may also spur creativity.

Kay Redfield Jamison, who herself has bipolar disorder and is considered a leading expert on the disease, has written several books that explore this idea, including Touched with Fire. Research indicates that while mania may contribute to creativity (See Andreasen, 1988), hypomanic phases experienced in bipolar I, II, and in cyclothymia appear to have the greatest contribution in creativity (See Richarges, 1988). This is perhaps due to the distress and impairment associated with full-blown mania, which may be preceded by symptoms of hypomania (i.e. increased energy, confidence, activity), but soon spirals into a state much too debilitating to allow creative endeavour.

Hypomanic phases of the illness allow for heightened concentration on activities, and the manic phases allow for around-the-clock work with minimal need for sleep.

Another theory is that the rapid thinking associated with mania generates a higher volume of ideas and as well associations drawn between a wide range of seemingly unrelated information.

The increased energy also allows for grater volume of production."

26. Their Lordships of the Hon'ble Supreme Court in ***Sudhakaran*** vs. ***State of Kerala*** 2010 (10) SCC 582 have distinguished the legal insanity with medical insanity as under:

"26. The defence of insanity has been well known in the English Legal System for many centuries. In the earlier times, it was usually advanced as a justification for seeking pardon. Over a period of time, it was used as a complete defence to criminal liability in offences involving mens rea. It is also accepted that insanity in medical terms is distinguishable from legal insanity. In most cases, in India, the defence of insanity seems to be pleaded where the offender is said to be suffering from the disease of Schizophrenia.

27. The plea taken in the present case was also that the appellant was suffering from "paranoid schizophrenia". The term has been defined in Modi's Medical Jurisprudence and Toxicology1 as follows:

"Paranoia is now regarded as a mild form of paranoid schizophrenia. It occurs more in males than in females. The main characteristic of this illness is a well-elaborated delusional system in a personality that is otherwise well preserved. The delusions are of persecutory type. The true nature of this illness may go unrecognized for a long time because the personality is well preserved, and some of these paranoiacs may pass off as a social reformers or founders of queer

pseudo- religious sects. The classical picture is rare and generally takes a chronic course.

Paranoid Schizophrenia, in the vast majority of case, starts in the fourth decade and develops insidiously. Suspiciousness is the characteristic symptom of the early stage. Ideas of reference occur, which gradually develop into delusions of persecution. Auditory hallucinations follow which in the beginning, start as sound or noises in the ears, but later change into abuses or insults. Delusions are at first indefinite, but gradually they become fixed and definite, to lead the patient to believe that he is persecuted by some unknown person or 1 [23rd Ed. Page 1077] some superhuman agency. He believes that his food is being poisoned, some noxious gases are blown into his room and people are plotting against him to ruin him. Disturbances of general sensation give rise to hallucinations which are attributed to the effects of hypnotism, electricity, wireless telegraphy or atomic agencies. The patient gets very irritated and excited owing to these painful and disagreeable hallucinations and delusions. "

28. The medical profession would undoubtedly treat the appellant herein as a mentally sick person. However, for the purposes of claiming the benefit of the defence of insanity in law, the appellant would have to prove that his cognitive faculties were so impaired, at the time when the crime was committed, as not to know the nature of the act.

29. Section 84 of the Indian Penal Code recognizes the defence of insanity. It is defined as under:-

"Nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

30. A bare perusal of the aforesaid section would show that in order to succeed, the appellant would have to prove that by reason of unsoundness of mind, he was incapable of knowing the nature of the act committed by him. In the alternate case, he would have to prove that he was incapable of knowing that he was doing what is either wrong or contrary to law."

27. Their Lordships of the Hon'ble Supreme Court in ***Hari Singh*** v. ***State of Madhya Pradesh*** 2008 (16) SCC 109 have held that section 84 of the Indian Penal Code lays down the legal test of responsibility in cases of alleged unsoundness of mind. There is no definition of unsoundness of mind in the Indian Penal Code. Courts have, however, mainly treated this expression as equivalent to insanity. Their Lordships have further held that every person, who is mentally diseased, is not *ipso facto* exempted from criminal responsibility. Their Lordships have held as under:

"5. Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind. There, is no definition of "unsoundness of mind" in the IPC. Courts have, however, mainly treated this expression as equivalent to insanity. But the term "insanity" itself has no precise definition. It is a term used to describe varying degrees of mental disorder. So, every person, who is mentally diseased, is not ipso facto exempted from criminal responsibility. A distinction is to be made between legal insanity and medical insanity. A Court is concerned with legal insanity, and not with medical

insanity. The burden of proof rests on an accused to prove his insanity, which arises by virtue of Section 105 of the Indian Evidence Act, 1972 (in short the `Evidence Act') and is not so onerous as that upon the prosecution to prove that the accused committed the act with which he is charged. The burden on the accused is no higher than that resting upon a plaintiff or a defendant in a civil proceeding. (See Dahyabhai v. State of Gujarat AIR 1964 SC 1563). In dealing with cases involving a defence of insanity, distinction must be made between cases, in which insanity is more or less proved and the question is only as to the degree of irresponsibility, and cases, in which insanity is sought to be proved in respect of a person, who for all intents and purposes, appears sane. In all cases, where previous insanity is proved or admitted, certain considerations have to be borne in mind. Mayne summarises them as follows:

> "Whether there was deliberation and preparation for the act; whether it was done in a manner which showed a desire to concealment ; whether after the crime, the offender showed consciousness of guilt and made efforts to avoid detections whether, after his arrest, he offered false excuses and made false statements. All facts of this sort are material as bearing on the test, which Bramwall, submitted to a jury in such a case : Would the prisoner have committed the act if there had been a policeman at his elbow ? It is to be remembered that these tests are good for cases in which previous insanity is more or less established. These tests are not always reliable where there is, what Mayne calls, "inferential insanity".

6. Under Section 84 IPC, a person is exonerated from liability for doing an act on the ground of unsoundness of mind if he, at the time of doing the act, is either incapable of knowing (a) the nature of the act, or (b) that he is doing what is either wrong or contrary to law. The accused is protected not only when, on account of insanity, he was incapable of knowing the nature of the act, but also when he did not know either that the act was wrong or that it was contrary to law, although he might know the nature of the act itself. He is, however, not protected if he knew that what he was doing was wrong, even if he did not know that it was contrary to law, and also if he knew that what he was doing was contrary to law even though he did not know that it was wrong. The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the Court and if this is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused. The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors. Every person is presumed to know the natural consequences of his act. Similarly every person is also presumed to know the law. The prosecution has not to establish these facts.

7. There are four kinds of persons who may be said to be non compos mentis (not of sound mind), i.e., (1) an idiot; (2) one made non compos by illness (3) a lunatic or a mad man and (4.) one who is drunk. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without

lucid intervals; and those are said to be idiots who cannot count twenty, or tell the days of the week, or who do not know their fathers or mothers, or the like, (See Archbold's Criminal Pleadings, Evidence and Practice, 35th Edn. pp.31-32; Russell on Crimes and Misdemeanors, 12th Edn. Vol., p.105; 1 Hala's Pleas of the Grown 34). A person made non compos mentis by illness is excused in criminal cases from such acts as are- committed while under the influence of his disorder, (See 1 Hale PC 30). A lunatic is one who is afflicted by mental disorder only at certain periods and vicissitudes, having intervals of reason, (See Russell, 12 Edn. Vol. 1, p. 103; Hale PC 31). Madness is permanent. Lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.

8. Section 84 embodies the fundamental maxim of criminal law, i.e., actus non reum facit nisi mens sit rea" (an act does not constitute guilt unless done with a guilty intention). In order to constitute an offence, the intent and act must concur; but in the case of insane persons, no culpability is fastened on them as they have no free will (furios is nulla voluntas est).

9. The section itself provides that the benefit is available only after it is proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that even if he did not know it, it was either wrong or contrary to law then this section must be applied. The crucial point of time for deciding whether the benefit of this section should be given or not, is the material time when the offence takes place. In coming to that conclusion, the relevant circumstances are to be taken into consideration, it would be dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. It is only unsoundness of mind which naturally impairs the cognitive faculties of the mind that can form a ground of: exemption from criminal responsibility. Stephen in `History of the Criminal Law of England, Vo. II, page 166 has observed that if a person cuts off the head of a sleeping man because it would be great fun to see him looking for it when he woke up, would obviously be a case where the perpetrator of the act would be incapable of knowing the physical effects of his act. The law recognizes nothing but incapacity to realise the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently dim to apprehend what he is doing, he must always be presumed to intend the consequence of the action he takes. Mere absence of motive for a crime, howsoever atrocious it may be, cannot in the absence of plea and proof of legal insanity, bring the case within this section This Court in Sherall Walli Mohammed v. State of Maharashtra: (1972 Cr.LJ 1523 (SC)), held that the mere fact that no motive has been proved why the accused murdered his wife and child or the fact that he made no attempt to run away when the door was broken open would not indicate that he was insane or that he did not have necessary mens rea for the offence. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under Section 84 as the law contained in that section is still squarely based on the outdated Naughton rules of 19th Century England. The provisions of Section 84 are in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords, in M Naughton's case (1843) 4 St. Tr. (NS) 847. Behaviour, antecedent, attendant and

subsequent to the event, may be relevant in finding the mental condition of the accused at the time of the event, but not that remote in time. It is difficult to prove the precise state of the offender's mind at the time of the commission of the offence, but some indication thereof is often furnished by the conduct of the offender while committing it or immediately after the commission of the offence. A lucid interval of an insane person is not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficiently to enable the person soundly to judge the act; but the expression does not necessarily mean complete or prefect restoration of the mental faculties to their original condition. So, if there is such a restoration, the person concerned can do the act with such reason, memory and judgment as to make it a legal act ; but merely a cessation of the violent symptoms of the disorder is not sufficient.

10. The standard to be applied is whether according to the ordinary standard, adopted by reasonable men, the act was right or wrong. The mere fact that an accused is conceited, odd irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts, in the past or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this section."

28. Their Lordships of the Hon'ble Supreme Court in ***Elavarasan*** V. ***State***, AIR 2011 SC 2816 have held that while determining whether the accused is entitled to the benefit of Section 84 I.P.C. the Court has to consider the circumstances that proceeded, attended or followed the crime but it is equally true that such circumstances must be established by credible evidence. Their Lordships have held as under:

"21. From the deposition of the above two witnesses who happen to be the close family members of the appellant it is not possible to infer that the appellant was of unsound mind at the time of the incident or at any time before that. The fact that the appellant was working as a government servant and was posted as a Watchman with no history of any complaint as to his mental health from anyone supervising his duties, is significant. Equally important is the fact that his spouse Smt. Dhanalakshim who was living with him under the same roof also did not suggest any ailment afflicting the appellant except sleeplessness which was diagnosed by the doctor to be the effect of excessive drinking. The deposition of PW3, Valli that her son was getting treatment for mental disorder is also much too vague and deficient for this Court to record a finding of unsoundness of mind especially when the witness had turned hostile at the trial despite multiple injuries sustained by her which she tried to attribute to a fall inside her house. The statement of the witness that her son was getting treatment for some mental disorder cannot in the circumstances be accepted on its face value, to rest an order of acquittal in favour of the appellant on the basis thereof. It is obvious that the mother has switched sides to save her son from the consequences flowing from his criminal act.

25. What is important is that the depositions of the two doctors examined as court witnesses during the trial deal with the mental health condition of the appellant at the time of the examination by the doctors and

not the commission of the offence which is the relevant point of time for claiming the benefit of Section 84 I.P.C. The medical opinion available on record simply deals with the question whether the appellant is suffering from any disease, mental or otherwise that could prevent him from making his defence at the trial. It is true that while determining whether the accused is entitled to the benefit of Section 84 I.P.C. the Court has to consider the circumstances that proceeded, attended or followed the crime but it is equally true that such circumstances must be established by credible evidence. No such evidence has been led in this case. On the contrary expert evidence comprising the deposition and certificates of Dr. Chandrashekhar of JIPMER unequivocally establish that the appellant did not suffer from any medical symptoms that could interfere with his capability of making his defence. There is no evidence suggesting any mental derangement of the appellant at the time of the commission of the crime for neither the wife nor even his mother have in so many words suggested any unsoundness of mind leave alone a mental debility that would prevent him from understanding the nature and consequences of his actions. The doctor, who is alleged to have treated him for insomnia, has also not been examined nor has anyone familiar with the state of his mental health stepped into the witness box to support the plea of insanity. There is no gainsaying that insanity is a medical condition that cannot for long be concealed from friends and relatives of the person concerned. Non- production of anyone who noticed any irrational or eccentric behaviour on the part of the appellant in that view is noteworthy. Suffice it to say that the plea of insanity taken by the appellant was neither substantiated nor probablised.

26. Mr. Mani, as a last ditch attempt relied upon certain observations made in Mahazar Ex.P3 in support of the argument that the appellant was indeed insane at the time of commission of the offences. He submitted that the Mahazar referred to certain writings on the inner walls of the appellant's house which suggested that the appellant was insane. A similar argument was advanced even before the Courts below and was rejected for reasons which we find to be fairly sound and acceptable especially when evidence on record establishes that the appellant was an alcoholic, who could scribble any message or request on the walls of his house while under the influence of alcohol. The Courts below were, therefore, justified in holding that the plea of insanity had not been proved and the burden of proof cast upon the appellant under Section 105 of the Evidence Act remained undischarged. The High Court has also correctly held that the mere fact that the appellant had assaulted his wife, mother and child was not ipso facto suggestive of his being an insane person."

29. In the instant case, the plea of insanity is not available to the accused under section 84 of the Indian Penal Code, as he knew what he was doing since he ran away from the spot and he was noticed by PW-5 Yashoda Devi putting up his cloths. Even PW-1 Dr. Aman Rana has not noticed any abnormality in his behaviour. The medical evidence produced is not sufficient to prove that at the time of commission of rape, accused was medically insane and incapable of understanding the nature of act performed by him. Hence, his defence under section 84 of the Indian Penal Code is not proved.

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

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

Chobe Ram ……Appellant.
Versus
Chander Kala & ors. …….Respondents.

RSA No. 347 of 2003.
Reserved on: 28.4.2015.
Decided on: 6.5.2015.

Code of Civil Procedure, 1908- Order 19- Plaintiff relied upon an affidavit - however, he had not made specific averment in the plaint regarding the execution of affidavit- he had not examined the Executive Magistrate who had attested the affidavit- compromise was already arrived at and there was no question of executing the affidavit – held, that in these circumstances, affidavit was not admissible in evidence. (Para-21 and 22)

For the appellant(s): Mr. Jagan Nath, Advocate, vice Mr. Anand Sharma, Advocate.
For the respondent: Mr. T.S.Chauhan, Advocate, for respondent No. 1(d).
None for respondents No. 1(a) to 1(c) & respondent No.2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Kullu, H.P. dated 6.6.2003, passed in Civil Appeal No.09 of 2002.

2. Key facts, necessary for the adjudication of this regular second appeal are that the predecessor-in-interest of the plaintiffs, namely, Sh. Poshu Ram, has filed suit for possession of house shown in the site plan attached with the Plaint and for recovery of Rs. 500/- per month by way of *mesne* profit for the use and occupation of the house in suit and also for permanent prohibitory injunction. According to the plaintiffs, the land measuring 9 biswas comprising in khata khatauni No. 428 min/503 min, Kh. No. 555, situated in Phati Mohal, Kothi Khokhan, Tehsil and District Kullu, is recorded as Phati Abadi which was owned and possessed by the plaintiff as shown in the copy of jamabandi for the year 1993-94 and on the portion of this land a house of plaintiff measuring 27 x 14 *Haath* is also standing and that adjoining to the said land and house of the plaintiff abuts land comprising Kh. No. 551 and 552 which was also owned and possessed by the plaintiff over which the fruit bearing orchard of the plaintiff is also standing. An agreement was entered into between the plaintiff and defendant No. 1 to sell the fruit crop of the orchard comprising Kh. No. 551 and 552 for the fruit seasons from 1997 to 2001 for consideration of Rs. 50,000/- and Rs. 40,000/- was payable by the defendant No. 1 to the plaintiff on or before 10.7.1997. The defendant has committed breach of the agreement. The defendant No. 1 has requested the plaintiff to allow him to keep some bardana in suit house and to allow defendant No. 2 to keep him as his Chowkidar, namely Sh. Purkhu. The plaintiff granted licence and permission to defendant No. 1 to use and occupy the house for two months w.e.f. 10.4.1997 to 9.6.1997. He was also entitled to recover Rs. 500/- towards mesne profits.

3. The suit was contested by the defendants. According to them, the original plaintiff was neither owner nor in possession of the property in suit and the site plan was not correct. The house did not exist on the abadi comprising Kh. No. 555. It is also denied that on the request of defendant No. 1, the original plaintiff allowed defendant No. 1 to use and occupy the house as licensee for two months. It is also contended that since the original plaintiff has no right, title or interest over the suit land nor was owner-in-possession of the property in suit. Infact, the plaintiff was not residing or right holder of Phati Mohal. He was resident of Phati Balh. The defendant No. 1 was resident and right holder of Phati Mohal from the time immemorial. The father of defendant No. 1 has constructed house 22 years back on the portion of abadi in suit land comprising Kh. No. 555.

4. The replication was filed by the plaintiff. The learned Senior Sub Judge, Kullu, H.P. framed the issues on 17.1.1998. The learned Senior Sub Judge, Kullu, H.P., dismissed the suit on 19.12.2001. Sh. Chobe Ram, feeling aggrieved, preferred an appeal before the learned District Judge, Kullu. The learned District Judge, Kullu, partly allowed the same on 6.6.2003. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 25.5.2004:

> "1. Whether document/affidavit Ext. PW-7/A could not have been read in evidence by the learned first appellate Court as the same was not pleaded and proved in accordance with law which vitiated the findings arrived at by the learned first appellate Court?"

6. Mr. Jagan Nath, Advocate, for the appellant has supported the judgment and decree passed by the learned Senior Sub Judge, Kullu. He then contended that the affidavit Ext. PW-7/A dated 17.5.1995 could not be read in evidence by the learned first appellate Court since the same was neither pleaded in the plaint nor proved in accordance with law. On the other hand, Mr. T.S.Chauhan, Advocate, has supported the judgment rendered by the first appellate Court dated 6.6.2003.

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

8. PW-1 Sh. Poshu Ram has testified that he was owner of the land in the suit over which 1 ½ storyed slate posh house and apple plants of 28 years old were raised. He constructed the house in the suit land about 14 years ago. He was having his orchard of 14/15 bighas abutting to the suit land. Out of 14/15 bighas of his land, 4 ½ bighas of land was given to the tenants and the tenants sold the land to Chobe Ram in the year 1993. He inherited the land in suit from his mother in the year 1956 and since then he has been possessing the same. He filed a suit in the Court. The suit was compromised between the parties. The defendant No. 1 has sworn in an affidavit which was attested by the Executive Magistrate wherein the defendant has agreed to give two karam wide passage through Kh. No. 553 to give access to Kh. Nos. 551, 552 and 555 and after purchasing the land from his tenants, Brestu and others Chobe Ram resold the same and made colony. Defendant No. 1 requested him to give the house in suit for two months to keep his bardana therein which request was accepted by him and after two months, when he demanded the possession of his house from Chobe Ram, the defendant asserted the same to be his Phati abadi having possession over it. The defendant has removed six apple plants. Police came to the spot. Chobe Ram has installed electricity meter over it and rented out the same to Pukhru Ram. He submitted an application for appointment of L.C. The site plan of the house was prepared by Nidhi Singh. He proved shajra nasab Ext. PW-1/F. He proved Ext. PW-1/G shajra nasab of phati abadi of Fulnu Devi. He proved shajra nasab Ext. PW-1/H and copy

of abadi Ext. PW-1/I. He also proved copy of musabi Ext. PW-1/J, copy of mutations Ext. PW-1/K to PW-1/M alongwith the copies of jamabandi Ext. PW-1/N and PW-1/O.

9. PW-2 Madan Lal deposed that Poshu Ram was having orchard and 1 ½ storyed house. The house was constructed in the year 1975.

10. PW-3 Beli Ram testified that the suit land was owned by Poshu Ram. There was apple orchard1 ½ storyed house over the same. It was in possession of Chobe Ram since 1997. Chobe Ram has also cut apple trees.

11. PW-4 Prem Dass Bhatia, deposed that Poshu Ram is owner of the land in suit over which 1 ½ storyed house and fruit orchard are standing. The house of Phulma Devi Ward Panch and Dev Raj abuts the land in suit. Chobe Ram had taken the orchard of Poshu on contract and then took the possession of the same. Chobe Ram had white washed the house in suit and installed the electricity meter and also raised retaining wall. Chobe Ram is not having any land abutting land in suit. Chobe Ram's father was having 2 bighas five biswas of land and a house which was dismantled.

12. According to PW-5 Sh. Narender Sharma, affidavit of Chobe Ram dated 17.5.1995 was entered at Sr. No. 303 in his register. He has not brought the photocopy of the original affidavit as it was destroyed as per rules.

13. PW-6 Nidhi Singh has proved site plan Ext. PW-1/A.

14. PW-7 Chuni Lal Sharma, Advocate, Kullu, has stated that he knows Chobe Ram. In affidavit Ext. PW-7/A, he identified Chobe Ram, but this affidavit was not attested by the Executive Magistrate in his presence nor any person put signatures in his presence. The signature of defendant was already there on the affidavit. He identified Chobe Ram in the precincts of the Court. He never went to the Executive Magistrate and Ext. PW-7/A was brought to him by Chobe Ram.

15. PW-8 Dr. R.Sharma, Asstt. Government Examiner of Questioned Documents has testified that he examined several documents and gave his opinion. He received the documents from the Court of Senior Sub Judge, Kullu vide letter No. 2237 dated 21.12.2000 alongwith Q-1 to Q-3, Ext. PW-7/A and admitted signatures A-1 to A-3 which are Vakalatnama and written statement and after examining these documents he came to the conclusion that Q-1 to Q-3 and A-1 to A-3 were written by the same person. He proved his reports Ext. PW-8/A and PW-8/B.

16. Sh. Chobe Ram has appeared as DW-1. He testified that he was owner-in-possession of the house in suit which has been constructed on the abadi land at the time of his fore fathers which is 23' x 23'. He also constructed a shed. He pays the house tax of the house and proved receipts Ext. D-1 to D-5. He has also installed electricity meter and proved the bills alongwith receipts thereof which are Ext. D-6 to Ext. D-8. According to him, the plaintiff was resident of Phati Balh, Kothi Majara having no house in Phati Mohal. Purkhu, defendant No. 2 was his tenant and the plaintiff filed the suit just to harass him.

17. DW-2 Hari Chand has supported the version of DW-1 Chobe Ram.

18. The case of the plaintiff, precisely, is that Chobe Ram has sworn in an affidavit Ext. PW-7/A, before the Executive Magistrate, Kullu vide which he agreed to give two karam wide passage through Kh. No. 553 to give access to Kh. Nos. 551, 552 and 555 to Poshu Ram.

19. Ext. PW-7/A is dated 17.5.1995 and the compromise is dated 16.5.1995. If the matter had already been compromised on 16.5.1995, there was no occasion to Chobe Ram to sworn in an affidavit dated 17.5.1995. PW-7 Chuni Lal Sharma, Advocate, as noticed above, has admitted that he identified Chobe Ram, but this affidavit was not attested by the Executive Magistrate in his presence nor any person put signatures in his presence. The signature of defendant was already there on the affidavit. He identified Chobe Ram in the precincts of the Court. He never went to the Executive Magistrate and Ext. PW-7/A was brought to him by Chobe Ram.

20. The plaintiff has moved an application under Order 18 Rule 17A and under Order 18 Rule 2(4) read with Section 151 CPC. It was allowed on 12.11.1998. Thereafter, the plaintiff again moved an application under Order 18 Rule 17 and under Order 18 Rule 2(4) read with Section 151 CPC. According to the averments contained in the application, the plaintiff at the time of examination of PW-7 Sh. Chuni Lal, Advocate, he could not put specific suggestions. The learned Sr. Sub Judge, Kullu, has rightly come to the conclusion while deciding the application on 25.6.1999 that it was for the plaintiff to have taken all care and caution to have put all the suggestions to said PW-7 Sh. Chuni Lal when he appeared in the witness box. Rather, PW-7 Chuni Lal has not supported the case of the plaintiff. Thus, Chuni Lal, PW-7 could not be recalled for putting further suggestions to him. It was for the plaintiff to prove the affidavit Ext. PW-7/A dated 17.5.1995. Thus, the learned Sr. Sub Judge, Kullu, has rejected the application on 25.6.1999. The plaintiff filed another application under Order 18 Rule 17A and Order 18 Rule 2(4) read with Section 151 CPC for comparison of signatures of defendant on the affidavit and Sh. N.C.Sood, Dy. Government Examiner, office of the Government Examiner of Questioned Douments, Ministry of Home Affairs, was ordered to be summoned for 11.7.2001 vide order dated 16.5.2001. The plaintiff filed yet another application under Order 18 Rule 17A and order 18 Rule 2(4) for placing on record copy of Order dated 17.5.1995 passed by the Sr. Sub Judge, Kullu in Civil Suit No. 87/94 and application dated 16.5.1995 for preponment and taking case on that date and also to prove certified copy of compromise dated 16.5.1995 in Civil Suit No. 87 of 1994. The application was dismissed by the learned Sr. Sub Judge, Kullu on 20.8.2001. The learned trial Court has noticed that the plaintiff wanted to place on record documents dated 17.5.1995 and 16.5.1995 but no reason was assigned why those were withheld by the plaintiff for such a long period and it was not the case of the plaintiff that after exercising due diligence he could not produce the same at the time when he was leading his evidence. The application was rejected on 20.8.2001.

21. Mr. Jagan Nath, Advocate, has taken the Court through the plaint. There is no averment with regard to Ext. PW-7/A. In view of this, the plaintiff ought to have made a specific averment in the plaint and then could lead the evidence to prove the affidavit. The plaintiff has not examined the Executive Magistrate who has attested the affidavit on 17.5.1995. The Court, as noticed above, that the compromise is dated 16.5.1995 and the affidavit was sworn in on 17.5.1995. There was no occasion for the Chobe Ram to sworn in an affidavit after the compromise had already been arrived at on 16.5.1995.

22. The learned first appellate court has failed to take into consideration the repeated filing of application by plaintiff under Order 18 Rule 17 and under Order 18 Rule 2(4) read with Section 151 CPC to prove the affidavit Ext. PW-7/A in order also to wriggle out of the statement made by PW-7 Chuni Lal Advocate. The trial Court has correctly appreciated the oral as well as documentary evidence, more particularly, Ext. PW-7/A while dismissing the case of the plaintiff but the first appellate Court has erred in law by placing reliance on Ext. PW-7/A, which has not been proved in accordance with law. It was not pleaded in the plaint that defendant No. 1 has sworn in an affidavit on 17.5.1995. The

defendant No. 1 has proved on record the copies of house rent payable by him vide Ext. D-1 to D-5 and also the electricity bills. The first appellate Court has wrongly treated the affidavit as admissible on behalf of defendant Chobe Ram to come to the conclusion that the plaintiff was owner of the land comprised in Kh. No. 555. The substantial question of law is answered accordingly.

23. Consequently, the Regular Second Appeal is allowed. The judgment of the trial Court dated 19.12.2006 is restored. The judgment of the first appellate Court dated 6.6.2003 is set aside.

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

Chobe Ram ……Appellant.
Versus
Chanderkala & ors. …….Respondents.

RSA No. 483 of 2005.
Reserved on: 28.4.2015.
Decided on: 7.5.2015.

Registration Act, 1908- Section 17- Plaintiff had filed a civil suit in which a compromise was effected - the tenants surrendered the possession of 1-10 bighas while 3-00 bighas was gifted to the tenants- compromise did not form part of the order- plaintiffs were not shown to be the owners of the land- right was created for the first time by means of the compromise and the compromise was required to be registered, however, it was never registered, therefore, it could not have been relied upon to pass a decree. (Para-20 to 24)

For the appellant(s): Mr. Karan Singh Kanwar, Advocate,
For the respondent: Mr. T.S.Chauhan, Advocate, for respondent Nos. 1(a), 1(b) and 1(d).
None for respondent Nos. 1(c), to 1(e) & respondent Nos.2 to 4.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Kullu, H.P. dated 30.6.2005, passed in Civil Appeal No.49 of 2004.

2. Key facts, necessary for the adjudication of this regular second appeal are that respondents-plaintiffs (hereinafter referred to as the plaintiffs) instituted a suit for permanent prohibitory injunction against the appellant-defendant No. 1 (hereinafter referred to as the defendant) and Sh. Hukam Ram, defendant No. 2. The plaintiff Poshu died during the pendency of this regular second appeal. His legal heirs were brought on record vide order dated 3.1.2012. The suit was filed for permanent prohibitory injunction restraining the defendant from causing any sort of interference or obstruction in two karams wide path shown in photo copy of aks musabi by points A and B passing through the portion of Kh. No. 553, connecting common village path running along the side of western boundary of Kh. No. 553 which touches eastern boundary of said Kh. number and connecting khasra Nos. 552 and 555, with the aforesaid village path, situated in Phati Mohal, Kothi Khokhan, Tehsil and District Kullu, and for mandatory injunction that in case it is found that defendant had

succeeded in causing any obstruction, the same be ordered to be removed. According to the averments made in the plaint, the plaintiff, predecessor-in-interest of the present respondents No. 1(a) to 1(e) Sh. Poshu Ram, had filed suit bearing No. 87 of 1994. In the said litigation, Chobe Ram entered into amicable settlement and compromise was effected i.e. Ext. PW-1/B on 16.5.1995. It was further stated in the plaint that the land situated in Kh. No. 553 measuring 4-10-0 in Phati Mohal, Kothi Khokhan was earlier owned and possessed by the plaintiff Poshu and there were tenants who failed to pay the rent and Poshu had to file a suit for possession. The compromise was effected, as stated hereinabove, and the tenants surrendered the possession of 1-10-0 bigha in favour of plaintiff Poshu Ram and land 3-0-0 was gifted to the tenants by the plaintiff Poshu Ram. He became owner of land qua 1-10-0 bighas.

3. The suit was contested by the defendant. He denied the right, title and interest of the plaintiffs over Kh. No. 553. He purchased 10 biswas of land in Kh. No. 553 from Trilok Nath and 1/9 share from Brestu and 4/90 share from Shukari. The execution of compromise dated 16.5.1995 was denied. Defendant No. 2 filed a separate written statement and supported the version of the plaintiffs.

4. The replication was filed by the plaintiffs. The learned Civil Judge (Senior Divn.), Kullu, H.P. framed the issues on 16.5.2002. The learned Civil Judge (Senior Divn.), Kullu, H.P, decreed the suit on 31.5.2004. Sh. Chobe Ram, defendant No. 1 feeling aggrieved, preferred an appeal before the learned District Judge, Kullu. The learned District Judge, Kullu, dismissed the same on 30.6.2005. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 20.9.2005:

> "1. Whether the Courts below in decreeing the suit have erred in considering and relying inadmissible evidence by way of compromise Ext. PW-1/B in Civil Suit No. 87/94, which was not recorded in that Civil Suit by the Court and that suit was dismissed as withdrawn, the compromise otherwise was not registered.?"

6. Mr. Karan Singh Kanwar, Advocate, for the appellant, on the basis of the substantial question of law, has argued that the Courts below have wrongly relied upon the compromise Ext. PW-1/B in Civil Suit No. 87 of 1994. He also contended that the defendant was not party to Civil Suit No. 87 of 1994. On the other hand, Mr. T.S.Chauhan, Advocate, has supported the judgments and decrees rendered by both the Courts below.

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

8. PW-1 Umavati, brought the record of Civil Suit No. 87/94. She proved the copy of plaint Ext. PW-1/A, copy of compromise dated 16.5.1995 vide Ext. PW-1/B, copy of application dated 16.5.1995 vide Ext. PW-1/C, order dated 17.5.1995 Ext. PW-1/D and order dated 30.5.1995 vide Ext. PW-1/E.

9. PW-2 Bhagat Ram, proved affidavit dated 17.5.1995 vide Ext. PW-2/A.

10. PW-3 Radha Devi deposed that the affidavit was attested by the Executive Magistrate on 17.5.1995 and was entered at Sr. No. 303. She admitted in her cross-examination that entries made at Sr. Nos. 301, 302 and 303 were not in her hand writing and she was not in a position to disclose as to who has made these entries. She was not in a position to state as to who had signed it. She could not identify the signatures of the Executive Magistrate. The name of the person who has sworn in the affidavit was not mentioned in the register, including his permanent address.

11. The plaintiff has appeared as PW-4. He stated that the property at Mohal was inherited by him from his mother. His mother inherited the same from her father Bali Ram. He was owner of Kh. No. 553 measuring 4 bighas 10 biswas. He proved copy of jamabandi Ext. PW-4/A. He had kept Brestu, Piaru and Shobha Ram as tenants over the suit land. They did not pay any rent to him. He filed civil suit and the matter was compromised. The land measuring 1 ½ bigha was left for him and he was also put in possession. He has given them 3 bighas of land by way of gift. He further stated that he entered into an agreement on 16.5.1995 with Brestu, Shukri, Mangri, Tarlok Nath and Chobe Ram. It was scribed by Bhoj Chander, Advocate. The contents were read over and explained. He put his signatures over the same and thereafter other persons also signed the same. He proved affidavit Ext. PW-1/B. The map of the path was prepared by Nidhi Singh.

12. PW-5 Vidya Sagar, deposed that he was Vice President of Panchayat Sayogi. An agreement was entered into on 16.5.1995 in his presence and other witnesses Kurbu Ram, Bhoj Chander Thakur, Advocate and Prem Chander Thakur, Advocate. It was scribed by Bhoj Chander Thakur, Advocate. The contents were read over in Hindi to the parties. They have signed the same. He along with Kurbu Ram singed as marginal witnesses.

13. PW-9 C.L.Sharma, Advocate, deposed that he was practicing since 1979 in District Courts Kullu. The affidavit was brought to him by Chobe Ram. He has identified him. He also put his signatures on Ext. PW-7/A. The copy of the same is Ext. PW-2/A. In his cross-examination, he admitted that the affidavit dated 17.5.1995 was not typed in his presence. On the affidavit, the name of the person who has drafted/typed it is not mentioned. He did not know where it was typed. It was not attested in his presence before the Executive Magistrate on 17.5.1995. The signatures were already put on the affidavit before he put his signatures. In his presence, neither Chobe Ram nor Executive Magistrate put their signatures. In his further cross-examination, he stated that the affidavit was not got prepared by Chobe Ram. Volunteered that Chobe Ram had brought it to him.

14. PW-11 B.C.Thakur, deposed that he was an Advocate of Poshu in Civil Suit No. 87/94. The agreement was scribed by him and P.C.Thakur. The contents of the same were read over to the parties. They, after admitting the contents to be correct had put their signatures. The marginal witnesses Kurbu and Vidya Sagar singed the same. The rest of the marginal witnesses also signed the same. He has moved the application on 16.5.1995 vide Ext. PW-1/C before the Senior Sub Judge, Kullu. He has signed the same.

15. PW-12 Karam Singh deposed that he has seen the disputed path. It was at a distance of 100-150 meters from his house. The width of the path is 9 ft. 4 inch and 105 ft. in length.

16. PW-13 Nidhi Singh has prepared Ext. PW-13/A. He admitted in his cross-examination that he has not signed Ext. PW-13/A nor any date was mentioned.

17. PW-14 Jai Singh has produced the record of Civil Suit No. 120/97.

18. PW-15 Ghaman Singh deposed that the defendant has purchased Rs. 5 stamp on 17.5.1995.

19. The defendant has appeared as DW-1. He testified that the plaintiff was not owner of Kh. No. 533. Kh. No. 555 was abadi. The house 1 ½ storyed existed on this khasra number. He was owner of the abadi and house. He has not sworn in any affidavit on 17.5.1995.

20. The plaintiff Poshu Ram has filed Civil Suit No. 87/1994 for declaration and injunction against Sh. Brestu, Shukri, Mangri, Trilok Nath and Chobe Ram. According to the plaintiff, compromise-deed was prepared vide Ext. PW-1/B. It was scribed by the

learned Advocates and signed by marginal witnesses. It was also signed by Poshu Ram. An application for preponment and taking the case for hearing on 16.5.1995 was filed vide Ext. PW-1/C. The learned trial Court on 17.5.1995 has examined the parties and they were granted time to understand the implication of compromise. The matter was ordered to be put up on 30.5.1995. The statement of the plaintiff was recorded and as per his statement, the suit was withdrawn on 30.5.1995. The statement made by the plaintiff is not on record.

21. The defendant Chobe Ram was not party in the Civil Suit bearing No. 87 of 1994. The compromise dated 16.5.1995 was not even registered. There is no reference in order dated 30.5.1995 about the compromise Ext. PW-1/B. In case the compromise had been effected, the same ought to have been reflected in the order dated 30.5.1995, whereby the suit was withdrawn.

22. The case of the plaintiffs is also that the affidavit Ext. PW-2/A was also sworn in by defendant Chobe Ram. PW-9 C.L.Sharma, has not supported the case of the plaintiff. In his cross-examination, has admitted that the affidavit dated 17.5.1995 was not typed in his presence. He did not know as to where it was typed. It was not attested in his presence before the Executive Magistrate on 17.5.1995. The signatures were already put on the affidavit before he put his signatures. In his presence, neither Chobe Ram nor Executive Magistrate put their signatures. Even if hypothetically presumed that the compromise Ext. PW-1/B was entered into, the same has never formed an integral part of Civil Suit No. 87 of 1994. The Court has already noticed that there is no reference to the compromise even in orders dated 17.5.1995 and 30.5.1995 when the suit was withdrawn.

23. The learned first appellate Court has observed that there was no bar for the parties to enter into compromise even if they were not parties to the suit. However, in the instant case, it is reiterated that the compromise never formed part of the order dated 30.5.1995, whereby the civil suit No. 87 of 1994 was withdrawn.

24. Mr. Karan Singh Kanwar, Advocate, has drawn the attention of the Court to jamabandi Ext. PW-4/A. The plaintiffs have not been shown as owners of the land comprised in Kh. No. 553 in Ext. PW-4/A. Sh. Tirlok Nath Magri and defendant No. 1 Chobe Ram, have been shown as owners-in-possession of the suit land. No tangible evidence has been led by the plaintiffs to rebut jamabandi Ext. PW-4/A. The first appellate Court has come to the wrong conclusion that no new right was created vide compromise Ext. PW-1/B. The right was created for the first time vide Ext. PW-1/B. Thus, the same was required to be registered and admittedly, Ext. PW-1/B was never registered. Both the Courts below have erred in relying upon Ext. PW-1/B, while decreeing the suit of the plaintiffs. The substantial question of law is answered accordingly.

22. Consequently, the Regular Second Appeal is allowed. The judgments and decrees passed by both the Courts below are set aside. Civil Suit No. 71 of 2000 is dismissed.

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

Smt. Jagdishwari Devi ……Appellant.
Versus
Subhash Chand …….Respondent.

RSA No. 121 of 2004.
Reserved on: 6.5.2015.
Decided on: 7.5.2015.

Code of Civil Procedure, 1908- Order 26 Rule 9- Plaintiff had obtained demarcation from the revenue authorities- report was not accepted by trial Court- plaintiff moved an application for appointment of local commissioner, which was allowed- defendant raised objections to the report which were decided along with main appeal- report was supported by Aks Tatima Shajra as well as the copy of Field Book- it was in accordance with the instructions issued by Financial Commissioner - when a fresh local commissioner was appointed, the earlier report would be of no consequences. (Para-10 to 13)

For the appellant(s): Mr. Suneet Goel, Advocate,
For the respondent: Mr. Deepak Kaushal, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Hamirpur, H.P. dated 24.11.2003, passed in Civil Appeal No.72 of 1998.

2. Key facts, necessary for the adjudication of this regular second appeal are that respondent-plaintiff (hereinafter referred to as the plaintiff) instituted a suit for permanent prohibitory injunction and in the alternative for possession, against the appellant-defendant (hereinafter referred to as the defendant). According to the plaintiff, the land comprised in Khata No. 183, Khatoni No. 272, Kh. No. 2755/1/1571/3, measuring 9 marlas, situate in Tika Sujanpur, Tappa Bhaleth, Tehsil Sujanpur, Distt. Hamirpur, H.P., was owned by him and other co-sharers. The defendant was stranger and she has got no right, title or interest over the suit land. The defendant has started illegal and unauthorized interference over the suit land by digging the same for the purpose of raising construction of the septic tank over it and has started collecting construction material over the same.

3. The suit was contested by the defendant. According to the defendant, the septic tank was constructed in her own land and when it was being dug and constructed, the plaintiff raised no objection. The septic tank was ready by 1.10.1993.

4. The replication was filed by the plaintiff. The learned Sub Judge-II, Hamirpur, H.P. framed the issues on 22.4.1994. The learned Sub Judge-II, Hamirpur, H.P, dismissed the suit on 6.3.1998. The plaintiff, feeling aggrieved, preferred an appeal before the learned District Judge, Hamirpur. The learned District Judge, Hamirpur, allowed the same on 24.11.2003. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 24.3.2004:

> "1. Whether the appellate court in this case could have relied upon the report of the Local Commissioner appointed by it without setting aside the report of the earlier Local Commissioner whose report was already on record on questions of facts already gone into by the trial court?"

6. Mr. Suneet Goel, Advocate, for the appellant, on the basis of the substantial question of law framed, has argued that the report of the Local Commissioner appointed by the first appellate Court could not be relied upon without rejecting the report submitted by earlier Local Commissioner. On the other hand, Mr. Deepak Kaushal, Advocate, has supported the judgment and decree rendered by the learned first appellate Court.

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

8. The plaintiff has examined General Power of Attorney Sh. Fateh Chand as PW-1 and Amar Nath as PW-2. He has also examined PW-3 Baldev Ram and PW-4 Bidhi Chand. In rebuttal, the defendant has appeared as DW-1 and examined Swarup Chand as DW-2.

9. It is the admitted case of the parties that plaintiff is owner-in-possession of land comprised in Kh. No. 2755/1/1571/3, measuring 9 marlas, situate in Tika Sujanpur, Tappa Bhaleth, Tehsil Sujanpur, Distt. Hamirpur, H.P., as per jamabandi for the year 1987-88, Ext. PD. The plaintiff had obtained demarcation report from the revenue authorizes, qua Kh. No. 2755/1/1571/3, from PW-4 Sh. Bidhi Chand, the then Field Kanungo, vide his report Ext. PA. The report Ext. PA was not accepted by the trial Court, the same being not in accordance with law and instructions laid down by the Financial Commissioner and by the High Court Rules and Orders. Accordingly, the suit was dismissed.

10. The plaintiff has moved an application under Order 26 Rule 9 CPC for appointment of the Local Commissioner before the first appellate Court. The same was allowed. Sh. Dila Ram, retired Tehsildar was appointed as Local Commissioner to demarcate the suit land afresh on the spot. He visited the spot on 24.2.1999. He prepared the report and placed the same on record alongwith the tatima and statements of the parties. The defendant had raised the objections to the report. These objections were decided alongwith the decision of the appeal. The learned first appellate Court has considered the objections raised by the defendant at length. The Local Commissioner, has conducted the demarcation on the spot in the presence of the parties besides Halqua Patwari and S/Sh. Fateh Chand, Suresh Kumar, Ramesh Kumar, Vijay Kumar and Krishan Sarup etc. The plaintiff had produced Musabi as well as Aks Musabi before him containing sikmi khasra numbers. The Patwari had also produced the mutations pertaining to partition of the land between the parties. The pucca points A, B, C & D were fixed in the presence of the parties. The report was also supported by Aks Tatima Shajra as well as the copy of Field Book. The report was strictly in conformity with the instructions issued by the Financial Commissioner governing the demarcation.

11. PW-1 Fateh Chand has deposed that the defendant has raised the construction of septic tank in the month of October, 1993. Thereafter, they obtained the demarcation in the month of November, 1993 and that they did not raise any objection thereto. According to PW-2 Amar Nath, the defendant had raised the construction of septic tank in October, 1993 and has encroached upon 3 marlas of the suit land. PW-4 Bidhi Chand, has earlier demarcated the suit land and submitted the report to the Court Ext. PA.

12. Defendant, DW-1 has admitted that the construction of the septic tank was completed on 15.9.1993 initially and later on stated that the construction work was commenced on 15.9.1993 and the same was completed within 10-15 days. DW-2 Swarup Chand deposed that the latrine was constructed by the defendant in September, 1993 and later on stated that the construction work commenced on 10-11 September and completed within 15-20 days.

13. The plaintiff has conclusively proved that the defendant has encroached upon the suit land to the extent of 3 marlas. Since the earlier report was not at all in accordance with law, the learned first appellate Court has allowed the application preferred by the plaintiff under Order 26 Rule 9 CPC for the appointment of the Local Commissioner to demarcate the suit land. Since the learned first appellate Court has appointed the Local

Commissioner afresh, the earlier report would be deemed to be of no consequence. The substantial question of law is answered accordingly.

14. Consequently, the Regular Second Appeal is dismissed. The judgment and decree passed by the learned first appellate Court is upheld.

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

Parmeshwari Devi. …Appellant.
Versus
Kamlesh Devi and another. …Respondents.

RSA No. 505 of 2003
Reserved on: 29.4.2015
Decided on: 7.5.2015

Indian Succession Act, 1925- Section 63- Plaintiff claimed that she is owner in possession of suit land on the basis of Will executed by the deceased- deceased had consumed poison- plaintiff admitted in her cross-examination that Doctor had refused to treat the petitioner, according to him, deceased had consumed strong poison- deceased had died at about 3-4 a.m.- witnesses of the Will admitted that the Will was written when the sun was rising- Sun rose at about 6:00 A.M- one witness stated that Will was scribed at the instance of one 'K'- this casts doubt about the execution of the Will- deceased was under the influence of strong poison and could not be in a sound disposing mind- no marginal witness was associated from the vicinity- propounder and her husband had actively participated in the execution of the Will which casts doubt regarding the genesis of the Will. (Para-16 and 17)

For the Appellant : Mr. Bhupinder Gupta, Sr. Advocate with Mr. Ajeet Jaswal, Advocate.
For the Respondents : Mr. N.K. Thakur, Sr. Advocate with Mr. Rahul Verma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 31.10.2003 rendered by the Addl. District Judge, Una in Civil Appeal (RBT) No. 123/2000/97

2. "Key facts" necessary for the adjudication of this appeal are that the appellant-plaintiff (herein after referred to as 'plaintiff' for convenience sake) instituted a suit against the respondents-defendants (hereinafter referred to as the "defendants" for convenience sake) for declaration to the effect that plaintiff was owner in possession of the land measuring 15 kanals 10 marlas out of the land measuring 61 kanals 17 marlas as detailed in the head note of the plaint on the basis of "will" executed by Darshan Lal on 5.4.1984 and the defendants have no right, title and interest of any kind in the suit land and the alleged mutation dated 25.6.1988 in favour of the defendants was wrong, incorrect and contrary to law. Consequential relief was also sought restraining the defendants to interfere with the possession of the plaintiff over the suit land and also restraining them

from taking possession of the suit land. Darshan Lal (deceased) was married to defendant No.1 Kamlesh Devi on 22.6.1983. Defendant No.1 used to live with her parents. On 4.4.1984 due to some heated arguments between deceased Darshan Lal and defendant No.1, Darshan Lal consumed poison. The parents of Darshan Lal tried their best to save his life. However, Darshan Lal died on 5.4.1984. He executed valid "will" regarding his estate in favour of the plaintiff. Thereafter, defendant No.1 gave birth to defendant No.2, namely, Parmila Devi.

3. The suit was contested by the defendants by filing written statement. According to them, Darshan Lal had differences with his parents also. He was not admitted in civil hospital. Darshan Lal became unconscious and remained as such till his death.

4. Plaintiff filed replication to the written statement. Issues were framed by the Sub Judge, Una on 9.11.1989. He decreed the suit on 31.1.1997. Defendants preferred an appeal before the Additional District Judge, Una. He allowed the same on 31.10.2003. Hence, the present Regular Second Appeal. It was admitted on the following substantial questions of law:

1. When the defendant-respondent did not challenge the "will" on any specific ground except that the executant died after consuming poison, could the lower appellate court on its own assume suspicious circumstances enumerated in the impugned judgment and decree and proceed to determine the same in holding the "will" Ex.P-1 to be a sham document, shrouded by suspicious circumstances?
2. Whether the lower appellate court has acted in excess of its jurisdiction in not taking into consideration the pronouncements of this Hon'ble Court as well as the apex court to be considered while determining the due execution and the validity of the will, Ex.P-1? Are not the findings of the lower appellate court illegal, erroneous and perverse being a result of misreading the material evidence and wrong appreciation of the correct law?
3. Whether the impugned judgment and decree passed by the lower appellate court is a result of misreading of oral and documentary evidence and rendering illegal, erroneous and perverse findings by assuming and presuming the facts extraneous to record?

5. Mr. Bhupender Gupta, learned Senior Advocate, for the appellant, on the basis of the substantial questions of law framed, has vehemently argued that the first appellate court has come to a wrong conclusion that the "will" dated 5.4.1984 was shrouded with mystery. According to him, "will" was valid. He has lastly contended that the first appellate court has misread and mis-appreciated the oral as well as documentary evidence.

6. Mr. N.K. Thakur, learned Senior Advocate, has supported the judgment and decree passed by the first appellate court.

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

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

9. Plaintiff Parmeshwari has appeared as PW-1. She has deposed that her son used to quarrel with his wife. Kamlesh Devi used to live in village Basal and she used to tell her son that she would not reside in Pandoga and would reside in Basal. Six years ago, in

the evening, her son was irrigating the land. She and her husband were also undertaking agriculture pursuits. Husband and wife picked up a quarrel and her son told Kamlesh Devi that if she does not want to stay with him, he would commit suicide. He went to his house and consumed poison and told the parents that he has ended the controversy once for all. He told that his property should go to his mother. He was taken to hospital Panjawar. He was treated by the doctor and brought back 3-4 A.M. in the morning and her son told her that his chances of survival were bleak and he wanted to execute the "will". The entire family was on the spot. She has admitted in her cross-examination that there is a regular bus service after 15 minutes between Pandoga and Una. She has also admitted that her husband and her son had told her that Doctor at Panjawar told that he could not treat Darshan Lal since he has taken a very strong poison. They were sad. There was no use of taking him to the hospital. She has also admitted that when Darshan Lal was brought from Panjawar, all of them sat with him and he died. She has also admitted that Darshan Lal wanted to construct his own house at Pandoga. Darshan Lal used to threaten them that if they won't permit him to construct house at Pandoga, he would reside at Basal. She has also admitted that there used to be quarrel between them and Darshan Lal. She initially stated that Darshan Lal has written the "will" and then stated it was scribed.

10. PW-2 Ranbir Singh has scribed the "will". He has deposed that Darshan Lal wanted to execute the "will". He was in sound state of mind. He was normal. Marginal witnesses Thakar Dass and Devi Dass were also present. He identified "will" Ex.P-1. He has read the contents of "will" to Darshan Lal and he after admitting the contents of the same to be correct signed the same followed by marginal witnesses Thakar Dass and Devi Dass. In his cross-examination, he has admitted that his house was situated at a distance of 2 KMs from the house of Darshan Lal.

11. PW-3 Thakar Dass is the marginal witness. He went to the house of Darshan Lal at 5-6 A.M. Darshan Lal was sitting on the cot. Darshan Lal told Kartar Chand that there were very bleak chances of his survival and they should get the "will" executed. The "will" was scribed by Ranbir Singh. In his cross-examination, he has admitted that he left the house at 6.00 A.M. He has also admitted in his cross-examination that when he reached at 5.00 A.M., Darshan Lal was telling that his chances of survival were bleak. He has denied the suggestion that Darshan Lal could not speak, volunteered that his voice was feeble. He has also admitted that there were about 7 houses at a distance of 100 meters.

12. PW-4 Devi Dass is another marginal witness. In his cross-examination, he has deposed that when the "will" was scribed, the sun was rising. Darshan Lal was sitting on the cot. He left for his house within one hour.

13. PW-5 Kartar Chand is the father of Darshan Lal. He has deposed that his son was irrigating the land. He heard that his son and Kamlesh were quarreling. They took him to Dr. Verma at Panjawar. Darshan Lal was administered glucose and he recovered. He was not in a position to state that why Darshan Lal was not taken to Government Hospital. Post-mortem was not got conducted.

14. PW-6 Mohan Lal has deposed that Darshan Lal had consumed poison. They came with the patient in the morning at 3.00 A.M. from Panjawar on 5.4.1984. He has also admitted that Darshan Lal died on 5.4.1984 at 3.45 A.M.

15. Defendant No.1 Kamlesh Devi has appeared as DW-1. In her examination-in-chief, she has testified that Darshan Lal died within 2-3 hours after consuming poison.

He became unconscious after consuming poison. Her husband was taken to Panjawar. She remained at home.

16. Darshan Lal had consumed poison in the evening of 4.4.1984. He was brought back at 3.00/4.00 A.M. on 5.4.1984, as per the statement of PW-1 Parmeshwari Devi. PW-1 Parmeshwari Devi has admitted in her cross-examination that doctor had refused to treat Darshan Lal since according to him, he had consumed strong poison. She has also admitted that Darshan Lal wanted to construct a house at Pandoga and used to threaten that if he was not permitted to construct a house at Pandoga, he would settle at Basal. PW-2 Ranbir Singh has scribed the "will" Ex.P-1. His residence was at a distance of 2 KMs from the house of Darshan Lal. PW-3 Thakar Dass is the marginal witness. He went to the house of Darshan Lal at 5-6 A.M. He signed the "will" as a marginal witness and left the house at 6.00 A.M. However, PW-4 Devi Dass has deposed that when the "will" was scribed, the sun was rising. The first appellate court has taken judicial notice that in the month of April, sun rises after 6.00 A.M. PW-6 Mohan Lal has categorically admitted in his cross-examination that Darshan Lal died in the morning of 5.4.1984 at 3.45 A.M. Darshan Lal had consumed aluminium phosphide (Celphos). Learned first appellate court has referred to Modi Medical Jurisprudence and Toxicology Twenty Second Edition and according to it, the fatal period after consuming aluminium phosphide (celphos) is about 24 hours. Darshan Lal had consumed poison in the evening and his health was bound to deteriorate instead of improving. PW-1 has stated, as noticed hereinabove, that doctor told that Darshan Lal could not survive since he has taken very strong poison. In case Darshan Lal has died at 3.45 A.M., there was no possibility of execution of "will" Ex.P-1. There is also variance when the "will" was scribed and signed by the marginal witnesses. It was for the propounder to dispel the suspicious circumstances qua the "will". Plaintiff has failed to remove the suspicious circumstances. The mutation No.5084 was attested on 25.6.1988. The copy of mutation is Ex.P-5. There is a reference of the statement made by PW-3 Thakar Dass, the marginal witness of will Ex.P-1 in the mutation Ex.P-5. According to him, the "will" was scribed by Darshan Lal at the instance of Kartar Chand. It further casts doubt about the validity of the "will". There was a regular bus service after 15 minutes between Pandoga and Una and despite that Darshan Lal was not taken to hospital. The reason assigned by the plaintiff was that doctor at Panjawar had told her that chances of survival were bleak. In fact, he was brought back at 3.00/3.30 A.M. and he died at 3.45 A.M. The deceased after consuming strong poison could not be in a sound disposing mind to execute the "will". PW-3 Thakar Dass, in his cross-examination, has admitted that the voice of Darshan Lal was feeble. PW-3 Thakar Dass and PW-4 Devi Dass did not belong to the same village and no marginal witnesses were associated from the neighbourhood at the time of execution of "will" though there were 7-8 houses at a distance of 100 meters. The propounder and her husband have actively participated at the time of execution of the "will". It further casts doubt about the validity of the "will".

17. Learned first appellate court has correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgment and decree passed by the first appellate court. All the substantial questions of law are answered accordingly.

18. No other point was urged.

19. In view of the analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Rakesh Kumar & Anr. ....Petitioners.

Versus

Sh. Pratap Chand & Others. ...Respondents.

Civil Revision No. 155 of 2014
Decided on: 07.05.2015.

Code of Civil Procedure, 1908 - Section 24- A Petition for transfer was filed by the tenant stating that no Lawyer was ready to take up his case as the respondent had a great influence in the society- held, that a petition for transfer is not to be dealt with in a light hearted manner – transfer of a case from one Court to another should not be granted readily as a matter of course - power has to be exercised with extreme care, caution and circumspection- petitioners had failed to mention the name of Lawyer who had refused to accept the brief under the influence of respondent- petitioners are adopting delaying tactics to prolong the trial by filing such application- petition is a gross abuse of the process of the Court, hence, same is dismissed with cost of Rs. 50,000/-. (Para-7 to 15)

Cases referred:

Jitendra Singh Vs. Bhanu Kumari and others, (2009) 1 Supreme Court Cases 130
Subhash Chand Sharma Vs. Smt. Shakuntla Devi, ILR, HP VOL.(XLV)-I, 2015, Page, 336
Ramrameshwari Devi and others Vs. Nirmala Devi and others, (2011) 8 Supreme Court Cases 249
South Eastern Coalfields Ltd. Vs. State of M.P (2003) 8 SCC 648
Enviro-legal Action Vs. Union of India and others, (2011) 8 Supreme Court Cases 161

For the petitioners. : Mr. Dushyant Dadwal, Advocate.
For respondent No.1. :Mr. R.L. Sood, Sr.Advocate with Mr. Sanjeev Kumar, Advocate.
For remaining respondents. : None.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge *(Oral)*

This petition under Section 28 of the Himachal Pradesh Rent Control Act, 1987 (for short the 'Act') at the behest of the tenants seeks quashing of order passed by the learned Appellate Authority whereby their application for transfer of the case has been rejected.

2. In the application filed for transfer of case before the learned Appellate Authority, it has contended that the petitioners wanted to engage the services of some lawyers at Rohru, but none was ready to take up the case for the reason that the respondent was local person and had great influence in the locality, as he had retired as a District & Sessions Judge. Not only this, before joining the H.P. Judicial Service he had been practicing Advocate at Rohru and therefore, this was the additional ground that none of the lawyers were ready to accept their brief.

3. The respondent No.1 filed reply wherein it was contended that the allegations made in the application were vague and indefinite to the extreme, besides being incorrect. The petitioners had failed to disclose the names of the lawyers who were allegedly approached by them and who allegedly refused to take up their brief. It is further contended that on 19.3.2014 when the Rent Controller required the petitioners to disclose the name of the lawyers who had refused to accept their brief, the petitioners on 3.4.2014 were able to disclose the name of only one lawyer. Whereas,

there were more than 40 lawyers practicing at the Rohru Bar. The allegations regarding influence in the locality or at Rohru was denied and it was contended that the respondent had commenced his practice at Rohru only for a short stint in the year 1973 and thereafter had immediately joined service but was now a senior citizen aged about 65 years leading a retired life.

4. The learned Appellate Court dismissed the application by holding that the allegations contained therein were vague, general in nature and it was fairly settled that the proceedings in the civil cases could not be transferred on the mere asking of a party. It was further held that since the respondent had retired as a District & Sessions Judge long back, it did not mean that none of the lawyers would be ready to accept his brief.

5. It is this order passed by the learned District & Sessions Judge which has been challenged by the petitioners.

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

7. The basic principle governing the grant of petition for transfer which are required to be borne in mind are that these petition are not to be dealt with in a light hearted manner and transfer of the case from one court to another should not be granted readily for any fancied notion and unless a sufficiently cogent ground is disclosed, transfer should not be allowed as a mater of course. Exercising powers for transfer is discretionary and therefore, have to be exercised with extreme care, caution and circumspection. The petitioner cannot be stopped from going on with his petition in a chosen forum where he has a right of action against the respondent. As a general rule, the courts will not interfere unless the expenses and the difficulty of the trial would be so great as to lead to injustice or the petition has been filed in a particular court only for the purpose of causing injustice.

8. The nature and scope as also the discretion of the court to order transfer civil cases was the subject matter of decision by the Hon'ble Supreme Court in ***Jitendra Singh Vs. Bhanu Kumari and others, (2009) 1 Supreme Court Cases 130*** wherein it was held:-

> "The purpose of Section 24 CPC is merely to confer on the court a discretionary power. A court acting under Section 24 CPC may or may not in its judicial discretion transfer a particular case. Section 24 does not prescribe any ground for ordering the transfer of a case. In certain cases it may 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. In the instant case the reason which has weighed with the High Court for directing transfer does not really make out a case for transfer."

9. The petitioners even before this court have failed to name even a single Advocate who when contacted had refused to accept the brief only because of the so-called 'influence' of the respondent. The learned counsel for the petitioners was not in a position to deny that the respondent had joined the services more than 35 years back and had now retired more than 5 years back. Therefore, in such circumstances to allege that the respondent was exercising influence is not only too far fetched but factually incorrect.

10. The proceedings in the instant case were commenced in 2012 and the case is still at the service stage. This in itself shows that the petitioners have left no stone unturned to drag the proceedings by adopting different and delaying tactics. Such practice in my considered view should

never be encouraged by the courts. To say the least, the conduct of the petitioners is far from being fair and the application is nothing but a sheer abuse of the process of the court.

11. It is the bounden duty of the court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the courts must further ensure that there is no wrongful, unauthorized or unjust gain to anyone as a result of abuse of process of court. This court while adjudicating upon ***RSA No. 481 of 2002, titled Subhash Chand Sharma Vs. Smt. Shakuntla Devi*** decided on 9.1.2015 observed :-

> "20. The Hon'ble Supreme Court has repeatedly pointed out that rent acts have not been enacted only to protect the tenants from unjust eviction but have been enacted to equally enforce the lawful right of the landlords to obtain a possession of their own property in the event of satisfying the grounds prescribed for eviction. In this case the appellant is not even tenant and yet he has succeeded in retaining the premises by not residing but putting a lock on the same.
>
> 21. It is proved on record that the defence set up by the appellant was absolutely false. In Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria, (2012) 5 SCC 370, the Supreme Court held that false claims and defences are serious problems with the litigation. The Supreme Court held as under:-
>
> > *"False claims and false defences*
> >
> > *84. False claims and defences are really serious problems with real estate litigation, predominantly because of ever escalating prices of the real estate. Litigation pertaining to valuable real estate properties is dragged on by unscrupulous litigants in the hope that the other party will tire out and ultimately would settle with them by paying a huge amount. This happens because of the enormous delay in adjudication of cases in our Courts. If pragmatic approach is adopted, then this problem can be minimized to a large extent."*
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> ***In Dalip Singh v. State of U.P., (2010) 2 SCC 114, the Supreme Court observed that a new creed of litigants have cropped up in the last 40 years who do not have any respect for truth and shamelessly resort to falsehood and unethical means for achieving their goals. The observations of the Supreme Court are as under:-***
>
> > *"1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has over shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.*
> >
> > *2. In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."*

In Satyender Singh v. Gulab Singh, 2012 (129) DRJ, 128, the Division Bench of Delhi High Court following Dalip Singh v. State of U.P. (supra) observed that the Courts are flooded with litigation with false and incoherent pleas and tainted evidence led by the parties due to which the judicial system in the country is choked and such litigants are consuming Courts" time for a wrong cause."

The observations of Court are as under:-

> *"2. As rightly observed by the Supreme Court, Satya is a basic value of life which was required to be followed by everybody and is recognized since many centuries. In spite of caution, courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts„ time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court. Indeed, it is a nightmare faced by a Trier of Facts; required to stitch a garment, when confronted with a fabric where the weft, shuttling back and forth across the warp in weaving, is nothing but lies. As the threads of the weft fall, the yarn of the warp also collapses; and there is no fabric left."*

In Sky Land International Pvt. Ltd. v. Kavita P. Lalwani, (2012) 191 DLT 594, Delhi High Court held as under:-

> *"26.20 Dishonest and unnecessary litigations are a huge strain on the judicial system. The Courts are continued to be flooded with litigation with false and incoherent pleas and tainted evidence led by the parties. The judicial system in the country is choked and such litigants are consuming courts„ time for a wrong cause. Efforts are made by the parties to steal a march over their rivals by resorting to false and incoherent statements made before the Court.*
>
> *xxx xxx xxx*
>
> *26.22 Unless the Courts ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that the Courts" scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases. It becomes the duty of the Courts to see that such wrong doers are discouraged at every step and even if they succeed in prolonging the litigation, ultimately they must suffer the costs. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that the dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."*

22. The judicial system has been abused and virtually brought to its knees by unscrupulous litigants like the defendant/appellant in this case. It has to be remembered that Court's proceedings are sacrosanct and should not be polluted by unscrupulous litigants. The defendant/appellant has abused the process of the Court. What is 'abuse of the process of the Court' has been dealt with in detail by this Court in Amar Singh vs. Shiv Dutt and others, RFA No. 646 of 2012 decided on 30.7.2014 wherein it was held:

> *"9. …………Therefore, the question at this stage, would than arise as to whether a party can be permitted to indulge in filing frivolous and vexatious proceedings and whether the same amount to abuse of process of Court.*

10. The Hon'ble Supreme Court in K.K.Modi vrs. K.N.Modi and others, reported in (1998) 3 SCC 573 has dealt in detail with the proposition as to what would constitute an abuse of the process of the Court, one of which pertains to re-litigation. It has been held at paragraphs 43 to 46 as follows:

> *43. The Supreme Court Practice 1995 published by Sweet & Maxwell in paragraph 18/19/33 (page 344) explains the phrase "abuse of the process of the Court" thus: "This terms connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. . . . .*
>
> *The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material."*
>
> *44. One of the examples cited as an abuse of the process of Court is re-litigation. It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. The re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of the Court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the Court. Frivolous or vexatious proceedings may also amount to an abuse of the process of Court especially where the proceedings are absolutely groundless. The Court then has the power to stop such proceedings summarily and prevent the time of the public and the Court from being wasted. Undoubtedly, it is a matter of Courts' discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The Court should also be satisfied that there is no chance of the suit succeeding.*
>
> *45. In the case of Greenhalgh v. Mallard (1947) 2 All ER 255, the Court had to consider different proceedings on the same cause of action for conspiracy, but supported by different averments. The Court held that if the plaintiff has chosen to put his case in one way, he cannot thereafter bring the same transaction before the Court, put his case in another way and say that he is relying on a new cause of action. In such circumstances he can be met with the plea of res judicata or the statement or plaint may be struck out on the ground that the action is frivolous and vexatious and an abuse of the process of the Court.*
>
> *46. In Mcllkenny v. Chief Constable of West Midlands Police Force (1980) 2 All ER 227, the Court of Appeal in England struck out the pleading on the ground that the action was an abuse of the process of the Court since it raised an issue identical to that which had been finally determined at the plaintiffs ' earlier criminal trial. The Court said even when it is not possible to strike out the plaint on the ground of issue estoppel, the action can be struck out as an abuse of the process of the Court because it is an abuse for a party to re-litigate a*

question or issue which has already been decided against him even though the other party cannot satisfy the strict rule of res judicata or the requirement of issue estoppels.

*11. Similarly, the Hon'ble Supreme Court in **Kishore Samrite vs. State of Uttar Pradesh and others, reported in (2013(2) SCC 398**, has dealt in detail with "abuse of process of Court" in the following terms:*

Abuse of the process of Court :

"31. Now, we shall deal with the question whether both or any of the petitioners in Civil Writ Petition Nos. 111/2011 and 125/2011 are guilty of suppression of material facts, not approaching the Court with clean hands, and thereby abusing the process of the Court. Before we dwell upon the facts and circumstances of the case in hand, let us refer to some case laws which would help us in dealing with the present situation with greater precision.

32. The cases of abuse of the process of court and such allied matters have been arising before the Courts consistently. This Court has had many occasions where it dealt with the cases of this kind and it has clearly stated the principles that would govern the obligations of a litigant while approaching the court for redressal of any grievance and the consequences of abuse of the process of court. We may recapitulate and state some of the principles. It is difficult to state such principles exhaustively and with such accuracy that would uniformly apply to a variety of cases. These are:

32.1. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.

32.2. The people, who approach the Court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.

32.3. The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

32.4. Quests for personal gains have become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.

32.5. A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.

32.6. The Court must ensure that its process is not abused and in order to prevent abuse of the process the court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the Court would be duty bound to impose heavy costs.

32.7. Wherever a public interest is invoked, the Court must examine the petition carefully to ensure that there is genuine public interest

involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants.

32.8. The Court, especially the Supreme Court, has to maintain strictest vigilance over the abuse of the process of court and ordinarily meddlesome bystanders should not be granted "visa". Many societal pollutants create new problems of unredressed grievances and the Court should endure to take cases where the justice of the lis well-justifies it. [Refer : Dalip Singh v. State of U.P. & Ors. (2010) 2 SCC 114; Amar Singh v. Union of India & Ors. (2011) 7 SCC 69 and State of Uttaranchal v Balwant Singh Chaufal & Ors. (2010) 3 SCC 402].

33. Access jurisprudence requires Courts to deal with the legitimate litigation whatever be its form but decline to exercise jurisdiction, if such litigation is an abuse of the process of the Court. In P.S.R.Sadhanantham v. Arunachalam & Anr. (1980) 3 SCC 141, the Court held:

> *"15. The crucial significance of access jurisprudence has been best expressed by Cappelletti:*
>
> > *"The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured be a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement the most basic 'human-right' of a system which purports to guarantee legal rights."*
> >
> > *16. We are thus satisfied that the bogey of busybodies blackmailing adversaries through frivolous invocation of Article 136 is chimerical. Access to justice to every bona fide seeker is a democratic dimension of remedial jurisprudence even as public interest litigation, class action, pro bono proceedings, are. We cannot dwell in the home of processual obsolescence when our Constitution highlights social justice as a goal. We hold that there is no merit in the contentions of the writ petitioner and dismiss the petition."*

34. It has been consistently stated by this Court that the entire journey of a Judge is to discern the truth from the pleadings, documents and arguments of the parties, as truth is the basis of the Justice Delivery System.

35. With the passage of time, it has been realised that people used to feel proud to tell the truth in the Courts, irrespective of the consequences but that practice no longer proves true, in all cases. The Court does not sit simply as an umpire in a contest between two parties and declare at the end of the combat as to who has won and who has lost but it has a legal duty of its own, independent of parties, to take active role in the proceedings and reach at the truth, which is the foundation of administration of justice. Therefore, the truth should become the ideal to inspire the courts to pursue. This can be achieved by statutorily mandating the Courts to become active seekers of truth. To enable the courts to ward off unjustified interference in their

working, those who indulge in immoral acts like perjury, prevarication and motivated falsehood must be appropriately dealt with. The parties must state forthwith sufficient factual details to the extent that it reduces the ability to put forward false and exaggerated claims and a litigant must approach the Court with clean hands. It is the bounden duty of the Court to ensure that dishonesty and any attempt to surpass the legal process must be effectively curbed and the Court must ensure that there is no wrongful, unauthorised or unjust gain to anyone as a result of abuse of the process of the Court. One way to curb this tendency is to impose realistic or punitive costs.

36. The party not approaching the Court with clean hands would be liable to be non-suited and such party, who has also succeeded in polluting the stream of justice by making patently false statements, cannot claim relief, especially under Article 136 of the Constitution. While approaching the court, a litigant must state correct facts and come with clean hands. Where such statement of facts is based on some information, the source of such information must also be disclosed. Totally misconceived petition amounts to abuse of the process of the court and such a litigant is not required to be dealt with lightly, as a petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the court. A litigant is bound to make "full and true disclosure of facts". (Refer : Tilokchand H.B. Motichand & Ors. v. Munshi & Anr. [1969 (1) SCC 110]; A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Pari palanai Sangam & Anr. [(2012) 6 SCC 430]; Chandra Shashi v. Anil Kumar Verma [(1995) SCC 1, 421]; Abhyudya Sanstha v. Union of India & Ors. [(2011) 6 SCC 145]; State of Madhya Pradesh v. Narmada Bachao Andolan & Anr. [(2011) 7 SCC 639]; Kalyaneshwari v. Union of India & Anr. [(2011) 3 SCC 287)].

37. The person seeking equity must do equity. It is not just the clean hands, but also clean mind, clean heart and clean objective that are the equi-fundamentals of judicious litigation. The legal maxim jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem, which means that it is a law of nature that one should not be enriched by the loss or injury to another, is the percept for Courts. Wide jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands.

38. No litigant can play 'hide and seek with the courts or adopt 'pick and choose'. True facts ought to be disclosed as the Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. In such cases, the Court is duty bound to discharge rule nisi and such applicant is required to be dealt with for contempt of court for abusing the process of the court. [K.D. Sharma v. Steel Authority of India Ltd. & Ors. [(2008) 12 SCC 481].

39. Another settled canon of administration of justice is that no litigant should be permitted to misuse the judicial process by filing frivolous petitions. No litigant has a right to unlimited drought upon the court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be used as a licence to file misconceived and frivolous petitions. (Buddhi Kota Subbarao (Dr.) v. K. Parasaran, (1996) 5 SCC 530)."

12. Now, it is to be seen as to whether the conduct of the respondents was in fact in abuse of the process of the Court. What is "abuse of process of Court" of course has not been defined or given any meaning in the Code of Civil Procedure. However, a party to a litigation can be said to be guilty of abuse of process of the Court in any of the following cases as held by the Hon'ble Madras High Court in Ranipet Municipality Rep. by its.... Vs. M. Shamsheerkhan, reported in 1998 (1) CTC 66 at paragraph 9. To quote:

" 9. It is this conduct of the respondent that is attacked by the petitioner as abuse of process of Court. What is 'abuse of the process of the Court'? Of course, for the term 'abuse of the process of the Court' the Code of Civil Procedure has not given any definition. A party to a litigation is said to be guilty of abuse of process of the Court, in any of the following cases:-

(1) Gaining an unfair advantage by the use of a rule of procedure.

(2) Contempt of the authority of the Court by a party or stranger.

(3) Fraud or collusion in Court proceedings as between parties.

(4) Retention of a benefit wrongly received.

(5) Resorting to and encouraging multiplicity of proceedings.

(6) Circumventing of the law by indirect means.

(7) Presence of witness during examination of previous witness.

(8) Institution vexatious, obstructive or dilatory actions.

(9) Introduction of Scandalous or objectionable matter in proceedings.

(10) Executing a decree manifestly at variance with its purpose and intent.

(11) Institution of a suit by a puppet plaintiff.

(12) Institution of a suit in the name of the firm by one partner against the majority opinion of other partners etc."

The above are only some of the instances where a party may be said to be guilty of committing of "abuse of process of the Court".

23. The appellant by keeping these proceedings alive has gained an undeserved and unfair advantage. The appellant has successful in dragging the proceedings for a very long time on one count or the other and because of his wrongful possession he has drawn delight in delay in disposal of the cases by taking undue advantage of procedural complications. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. One has only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. The Court has been used as a tool by the defendant/appellant to perpetuate illegalities and has perpetuated an illegal possession. It is on account of such frivolous litigation that the court dockets are overflowing. Here it is apt to reproduce the observations made by the

Hon'ble Supreme Court in paras 174, 175 and 197 of the judgment in Indian Council for Enviro-Legal Action vs. Union of India and others (2011) 8 SCC 161 which are as under:

174. In Padmawati vs Harijan Sewak Sangh, (2008) 154 DLT 411 (Del) decided by the Delhi high Court on 6.11.2008, the court held as under: (DLT p.413, para 6)

"6.The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Court. One of the aims of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person."

We approve the findings of the High Court of Delhi in the aforementioned case.

175. The Court also stated: (Padmawati case, DLT pp. 414-15, para 9)

"Before parting with this case, we consider it necessary to observe that one of the main reasons for over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the lis, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrongdoer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrongdoers are discouraged at every step and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

197. The other aspect which has been dealt with in great details is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view.

1. It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.

2. When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.

3. Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.

4. A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.

5. No litigant can derive benefit from the mere pendency of a case in a court of law.

6. A party cannot be allowed to take any benefit of his own wrongs.

7. Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.

8. The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts."

12. The further question which now arises is as to how to curb this tendency of abuse of process of court. As suggested in Kishore Samrita (supra), one of the ways to curb this tendency is to impose realistic or punitive costs. The Hon'ble Supreme Court in ***Ramrameshwari Devi and others Vs. Nirmala Devi and others, (2011) 8 Supreme Court Cases 249*** took judicial notice of the fact that the courts are flooded with these kinds of cases because there is an inherent profit for the wrongdoers and stressed for imposition of actual, realistic or proper costs and it was held:-

"52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials:

A. Pleadings are the foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial Judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.

B. The court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Act. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at the truth of the matter and doing substantial justice.

C. Imposition of actual, realistic or proper costs and/or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may

consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

D. *The court must adopt realistic and pragmatic approach in granting mesne profits. The court must carefully keep in view the ground realities while granting mesne profits.*

E. *The courts should be extremely careful and cautious in granting ex parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing the parties concerned appropriate orders should be passed.*

F. *Litigants who obtained ex parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No one should be allowed to abuse the process of the court.*

G. *The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.*

H. *Every case emanates from a human or a commercial problem and the court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well-settled principles of law and justice.*

I. *If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.*

J. *At the time of filing of the plaint, the trial court should prepare a complete schedule and fix dates for all the stages of the suit, right form filing of the written statement till pronouncement of the judgment and the courts should strictly adhere to the said dates and the said timetable as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearing fixed in the said suit itself so that the date fixed for the main suit may not be disturbed."*

13. Prior to this the Hon'ble Supreme Court in ***South Eastern Coalfields Ltd. Vs. State of M.P (2003) 8 SCC 648*** had held that the litigation should not turn into a fruitful industry and observed as under :-

> *"28. …… Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation."*

14. The Hon'ble Supreme Court in Indian Council for ***Enviro-legal Action Vs. Union of India and others, (2011) 8 Supreme Court Cases 161*** observed:-

> *"191. In consonance with the principles of equity, justice and good conscience Judges should ensure that the legal process is not abused by the litigants in any manner. The court should never permit a litigant to perpetuate illegality by abusing the legal process. It is the bounden duty of the court to ensure that dishonesty and any attempt to abuse the legl process must be effectively curbed and the court must ensure that there is no wrongful, unauthorized or unjust gain for anyone by the abuse of the process of the court. One way to curb this tendency is to impose realistic costs, which the respondent or the defendant has in fact incurred in order to defend himself in the legal proceedings. The courts would be fully justified even imposing punitive costs where legal process has been abused. No one should be permitted to use the judicial process for earning undeserved gains or unjust profits. The court must effectively discourage fraudulent, unscrupulous and dishonest litigation.*
>
> *192. The court's constant endeavour must be ensure that everyone gets just and fair treatment. The court while rendering justice must adopt a pragmatic approach and in appropriate cases realistic costs and compensation be ordered in order to discourage dishonest litigation. The object and true meaning of the concept of restitution cannot be achieved or accomplished unless the courts adopt a pragmatic approach in dealing with the cases.*
>
> *193. This Court in a very recent case Ramrameshwari Devi v. Nirmala Devi had an occasion to deal with similar questions of law regarding imposition of realistic costs and restitution. One of us (Bhandari, J.) was the author of the judgment. It was observed in that case as under: (SCC pp. 268-69, paras 54-55)*
>
>> ***"54. While imposing costs we have to take into consideration pragmatic realities and be realistic as to what the defendants or the respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter-affidavit, miscellaneous charges towards typing, photocopying, court fee, etc.***
>>
>> ***55. The other factor which should not be forgotten while imposing costs is for how long the defendants or respondents were compelled to contest and defend the litigation in various courts. The appellants in the instant case have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The appellants have also wasted judicial time of the various courts for the last 40 years."***

15. In view of the aforesaid discussion not only is there any merit in this petition but the same is also a gross abuse of the process of court and is accordingly dismissed with costs of Rs. 50,000/-.

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

Ram Swarup and others. ...Appellants.
Versus
Narinder Parkash and others. ...Respondents.

RSA No. 263 of 2013
Reserved on: 4.5.2015
Decided on: 7.5.2015

Specific Relief Act, 1963- Section 34- Plaintiff claimed that land measuring more than 150 bighas was being irrigated through Kuhal known as ***Nal Ka Banda*** since time immemorial openly, peacefully and continuously- defendants have no right to cause interference in the flow of water- Kuhal originates from ***Sharatu Ka Nala***- ***Pataru Ka Nala*** and ***Bagh Ka Nala*** are the tributaries of ***Sharatu Ka Nala*** - defendants threatened to tap the water from ***Sharatu Ka Nala*** and ***Bagh Ka Nala-*** plaintiff relied upon a rough map in which no khasra numbers were mentioned- the points from which the pipes were installed were also not mentioned- defendants got prepared a map by an expert - the factual position shown in the map, got prepared by defendants, is in conformity with the statements of the witnesses regarding the source of water- other co-villagers were not arrayed as parties- held that in these circumstances suit was rightly dismissed. (Para-16)

For the Appellants : Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.
For the Respondents : Mr. Neeraj Gupta, Advocate for respondent No.2.
None for other respondents.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 5.1.2013 rendered by the Addl. District Judge, Fast Track Court, Solan in Civil Appeal No. 10 FTC/13 of 2010.

2. "Key facts" necessary for the adjudication of this appeal are that the appellants-plaintiffs (herein after referred to as 'plaintiffs' for convenience sake) have stated that they are owners-in-possession of the land situated in village Dangheel and Bhuira pargana Pashgaon, Tehsil Kandaghat, District Solan. These villages are adjacent to each other. It is stated that out of land located in village Dangheel and Bhuira, land measuring more than 150 bighas was being irrigated through Kuhal No.5 known as "***Nal Ka Banda***" since time immemorial openly, peacefully, continuously and uninterruptedly. Respondents-defendants (herein after referred to as 'defendants' for convenience sake) have no right to cause any kind of interference in the flow of water from Kuhal No.5 known as "***Nal Ka Banda"*** in any manner. The Kuhal originates from "***Sharatu Ka Nala*** at point 'A' as shown in rough site plan. Besides "***Pataru Ka Nala***" and ***Bagh Ka Nala*** are the tributaries of ***Sharatu Ka Nala***. ***Pataru Ka Nala*** merges in the ***Sharatu Ka Nala*** at point 'B' and ***Bagh Ka Nala*** joins the ***Sharatu Ka Nala*** at point 'C'. It is stated that the defendants who are inhabitants of the villages Sayola and Kharanji threatened to tap the water from ***Sharatu Ka Nala*** and ***Bagh Ka Nala*** with the help of Alkathene pipe to their houses.

3. The suit was contested by defendants No. 3, 4, 6 and 7. Defendant No.2 has filed separate written statement. According to the defendants, plaintiffs have not disclosed Khasra numbers and area which were irrigated by them from different water sources. It was denied that the land of the plaintiffs was being irrigated from Kuhal No.5 since time immemorial. It was also denied that the defendants were interfering with the flow of water of Kuhal No.5. The source of Kuhal No.5 ***Nal Ka Banda*** was also denied. It was denied by defendant No.2 that he was causing interference in the Kuhal. After the death of Sant Ram, he was using the water peacefully, continuously and without any interruption. Defendant No.5 has also stated that the lands were being irrigated as per ***Riwazat Ab Pashi***.

4. Issues were framed by the Civil Judge (Junior Division) on 28.9.1999. She dismissed the suit on 30.3.2010. Plaintiffs filed an appeal before the Additional District Judge, Fast Track Court, Solan. He dismissed the same on 5.1.2013. Hence, the present appeal.

5. Mr. G.D. Verma, learned Senior Advocate, for the appellants, on the basis of the substantial questions of law framed, has vehemently argued that both the courts below have misconstrued and misread the oral as well as documentary evidence. He then contended that in order to ascertain the exact position at the spot, local commissioner ought to have been appointed. He has further contended that the suit was maintainable on behalf of the plaintiffs.

6. Mr. Neeraj Gupta, Advocate, has supported the judgments passed by both the Courts below.

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

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

9. PW-1 Ram Swaroop has proved site plant Ext. PW-1/A. According to him, the original source of water of ***Nal Ka Banda*** was from ***Sharatu Ka Nala***, ***Patru Ka Nala*** and ***Bagh Ka Nala***. According to him, defendants have no right to interfere in ***Sharatu Ka Nala*** and ***Pataru Ka Nala***. According to him, if the water is used by the defendants, the supply of water to their lands would be drastically reduced. The sketch PW-1/A was prepared by his son namely Susheel, who was student of +2 in Chail. However, Ext. DW-4/C relied upon by the defendants has been prepared by DW-4 Dharmender Verma, who was qualified draughtsman. He has prepared Ext. DW-4/A after visiting the spot in the presence of 6-7 villagers. PW-1 has admitted that below Nal Ka Banda, there is ***Bagh Ka Nala*** and there are houses of Kartar and Phulma Devi. There are 3 flour mills, one run by Bhagat Ram second by Phulma Devi and third one by Shiv Ram.

10. PW-2 Sant Ram has placed on record Hindi translation of documents Ext. PW-2/A to Ext. PW-2/C.

11. DW-1 Narender Parkash has led his evidence by filing affidavit Ext. DW-1/A. In his cross-examination, he has denied that ***Sharatu Ka Nala*** emerges into ***Pataru Ka Nala***.

12. DW-2 Hari Krishan has led his evidence by filing his affidavit Ext. DW-2/A. He has denied the suggestion that ***Bagh Ka Nala*** emerges into ***Sharatu Ka Nala***.

13. DW-3 Dharam Dutt has corroborated the statements of DW-1 Narender Parkash and DW-2 Hari Krishan, respectively. He has proved map Ext. DW-4/C. He has placed on record, copy of diploma certificate Ext. DW-4/B.

14. DW-5 Hardev has deposed that they wanted to take water forcibly from ***Sharatu Ka Nala***.

15. There is no specific reference to Khasra numbers in the pleadings of the plaintiffs. The map Ext. PW-1/A is a rough map. The map placed on record by defendants is Ext. DW-4/C. The plaintiffs have also not mentioned Khasra numbers, which are being irrigated through Kuhal No. 5. It is not mentioned from which point, the pipes have been installed by the defendants. The plea of Mr. G.D. Verma, learned Senior Advocate that the local commissioner has not been appointed merits rejection. The plaintiffs, as noticed hereinabove, have not given even the Khasra numbers, which were alleged to have been irrigated from Kuhal No.5. Ext. P1 to Ex. P4 ***Riwazat Ab Pashi*** do not support the case of the plaintiffs. The factual position as shown in Ext. DW-4/C is in conformity with the statements of the witnesses with regard to the source of water. Ext. DW-4/C has been prepared by an expert and PW-1/A has been prepared by the plaintiff and his son. The son of the plaintiff has not appeared in the Court. The plaintiffs have also not added other co-villagers as party.

16. Both the learned Courts below have correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgments and decrees passed by the Courts below.

17. In view of the analysis and discussion made hereinabove, no question of law, much less to say substantial question of law, involved in the present appeal, and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

****

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

Fate Ram and others ....Appellants.
Versus
Smt. Parvati ......Respondent.

RSA No. 156 of 2004
Reserved on 30th March, 2015
Decided on: 8th May, 2015

Hindu Succession Act, 1956- Section 15(2)(b)- Plaintiff pleaded that predecessor-in-interest of the plaintiff was married to 'G'- she succeeded to the property on the death of 'G'- she settled with one 'H' and plaintiff was born out of the wedlock between 'P' and 'H'- defendants claimed that they are tenants in possession on the payment of 1/4th of the produce and plaintiff has no right in the property- plaintiff admitted that he was not born out of the wedlock of 'P' and 'G' but was born to 'H'- held, that when son or daughter begotten by the deceased female not through her husband, whose property was with her during her but from someone else, such son or daughter has no right to inherit such property- such property shall devolve upon heirs of the husband or father-in-law- hence, plaintiff was not competent to file the suit. (Para-14 to 16)

Cases referred:
Omprakash vs. Radhacharan, (2009) 15 Supreme Court Cases 66
Bhagat Ram (D) by L.Rs versus Teja Singh (D) by L.Rs., AIR 2002 Supreme Court (1)
Remco Industries Workers House Building Co-operative Society versus Lakshmeesha M. and others, AIR 2003 Supreme Court 3167

For the appellants: Mr. B.K. Malhotra, Advocate.
For the respondent: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

Challenge herein is to the judgment dated 17.12.2003 passed by learned Additional District Judge, Mandi in Civil Appeal No. 16 of 1999 affirming thereby the judgment and decree passed by learned Sub Judge, 1st Class, Court No.1, Mandi in Civil Suit No. 103/98 (92) on the dismissal of the first appeal.

2. It is the defendants, who are in second appeal before this Court. The complaint is that the judgment and decree passed by both Courts below is against the law and also the facts of the case. Learned lower appellate Court while deciding the appeal has fell into error in not appreciating the facts relating to the status of the defendants as tenants and failure to draw appropriate inferences from the proved facts has vitiated the judgment and decree under challenge. The Courts below allegedly fell into a grave error giving undue weightage to the factum of the non-production of rent receipts of the defendants, because in view of the evidence brought on record by the plaintiff herself, the rent receipts were not being issued by the land-lord hence the non-production thereof should not have been given much importance. The factum of the plaintiff and her mother both are residing for the last more than 40 years at Bajaora, District Kullu has not been taken into consideration. The plea of the defendants that the rent used to be deposited with one Smt. Charan Dassi, maternal aunt of plaintiff is duly proved from the evidence produced by the plaintiff herself. Said Charan Dassi has not been produced to deny this fact, had the rent been not deposited with her. The judgment and decree on account of non-appreciation of the evidence as has come on record by way of own statement of the plaintiff that she is not the daughter of Smt. Padmu born to her from the lions of Sh. Gholu her previous husband, from whom the property in dispute had come to her. The plaintiff, therefore, not born to Smt. Padmu from lions of Sh. Gholu, the previous owner of the suit land is not entitled to claim the same in any manner whatsoever nor has any locus-standi to file the suit. The revenue entries qua the suit land stood duly rebutted were wrongly relied upon. On account of clubbing of the main issues for decision, the judgment and decree under challenge is vitiated and has been sought to be quashed and set aside.

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

a) Whether the courts below erred in law in decreeing the suit for permanent injunction?

b) Whether the succession to the property inherited by a female from her previous husband could not have devolved upon the legal heirs of second husband?

4. If coming to the factual matrix, the suit land is measuring 17-14-8 bighas entered in Khewat No. 10, Khatauni No. 11, Khasra Nos. 266, 313, 316, 337, 381, 383, 390,

427, 428, 474, 488, 514, 518, 525, 581, 586, 589, 592 and 607 Kitas 20 situated at village Tundla/443, Ilaqua Badar, Tehsil Sadar, District Mandi. Its previous owner was one Sh. Gholu. Smt. Padmu, mother of the respondent-plaintiff was married to said Shri Gholu. The suit property came in the hands of Smt. Padmu on the death of her previous husband through Gholu. Said Smt. Padmu settled with one Hukme Ram at village Bajaora, District Kullu. The respondent-plaintiff was born to her from the lions of said Shri Hukme Ram. Smt. Padmu, mother of the plaintiff also died and mutation No. 121 of the suit land came to be sanctioned and attested in favour of the plaintiff on 9.10.1992, as is apparent from the copy of Jamabandi for the year 1990-91, Ext. P-A. The respondent-plaintiff filed the suit for the decree of permanent prohibitory injunction and also for possession of the suit land as a consequential relief on the ground that though it is she who is owner in possession of the suit land, however, the defendants are threatening to take forcible possession thereof form her. Subsequently, by way of amendment, it is pleaded that she was dispossessed forcibly by them from the suit land in November, 1995.

5. In the written statement, the defendants raised the question of maintainability of the suit and locus of the plaintiff to file the same. On merits, they claim themselves to be in possession of the suit land in the capacity of tenant on payment of ¼ of the produce as rent. Smt. Padmu though might be recorded as owner of the suit land, however, it is they who are in possession thereof in the capacity of tenant. The entries to the contrary regarding possession of the suit land have been said to be wrong and against the facts. It is denied that plaintiff is in possession of the suit land, therefore, no question of any interference at their instance does arise. As regards the claim of the plaintiff that she is owner in possession of the suit land, it is specifically averred as under:

> "….In addition to it, it may be added that the plaintiff is claiming herself to be the successor of late. Smt. Padmu wife of Gholu, but as a matter of fact she had left the house of Gholu much earlier during the life time of Gholu and settled in the house of one Sh. Hukme Ram who is her father and as such she has no right in the estate of late Sh. Gholu earlier husband of said Smt. Padmu, Photocopy of Parivar Register, Shajra Nasab, Copy of affidavit, copy of death register, copy of Jamabandi Istemal of Mauja Tundhla and Niul, "report of Kanungo" are attached herewith in proof thereof."

6. It is denied that the plaintiff was dispossessed by them forcibly in the month of November, 1995. Such assertions in the plaint have been claimed to be malafidely raised with the motive to maintain the suit.

7. The plaintiff in replication filed to the written statement has denied the contents of the preliminary objections being wrong and on merits while reasserting the case as set out in the plaint denied the contentions to the contrary in the written statement.

8. On the basis of pleadings of the parties, following issues were framed:

1. Whether the plaintiff is owner in possession of the suit land, as alleged OPP
2. Whether the defendants are threatening to dispossess the plaintiff over the suit land, as alleged? OPP
3. If issues No. 1 and 2 proved in affirmative, whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as prayed for? OPP

3a. Whether the defendant has dispossessed the plaintiff during the pendency of the suit, if so, its effect? OPP

3b. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, if so, what is the correct valuation? OPD

4. Whether the plaintiff has no locus-standi to file the present suit? OPD

5. Whether the suit is bad for non-joinder of necessary parties? OPD

5a. Whether the defendants are tenant in possession of the suit land? OPD.

6. Relief.

9. After taking on record the evidence produced by the parties on both sides and hearing arguments, learned trial Court has decreed the suit. Learned lower appellate Court has dismissed the appeal and affirmed the judgment and decree passed by the trial Court.

10. Shri B.K. Malhotra, learned counsel representing the appellants-defendants has strenuously contended that it was deceased Gholu admittedly was the owner of the suit land. No doubt, Padmu was his wife, however, she left him during his life time and settled with one Hukme Ram at village Bajaora in District Kullu. Also that, the plaintiff who has been born to Smt. Padmu from the lions of said Shri Hukme Ram in terms of Section 15(2)(b) of the Hindu Succession Act is not entitled to claim any right, title or interest in the suit land being not the daughter of said Shri Gholu. The plea to this effect duly raised in the written statement has been ignored by both Courts below, as neither any issue framed to this effect nor any findings recorded. Mr. Malhotra, has, therefore, canvassed that after framing of an additional issue to this effect and quashing the judgment and decree under challenge, the suit deserves to be remanded as a whole.

11. On merits, it is urged that said Smt. Padmu and for that matter the respondent-plaintiff are residing at village Bajaura in District Kullu, whereas, the suit land is situated in District Mandi, there is no question of the plaintiff in possession of the suit land. The defendants rather have been proved to be in settled possession thereof in the capacity of tenant. When the respondent-plaintiff was not in possession of the suit land, decree for permanent prohibitory injunction could have not been passed.

12. Mr. G.R. Palsra, learned counsel representing the respondent-plaintiff has urged that the plea of tenancy raised by the defendants in the written statement is itself sufficient to arrive at a conclusion that they admit the plaintiff to be owner of the suit land. They, rather throughout admitted her mother late Smt. Padmu owner of the suit land and after her death, they admit her to be the owner thereof. Therefore, it is urged that the judgment and decree under challenge being legally and factually sustainable calls for no interference.

13. As noticed hereinabove, interesting questions of law arise for determination in the present appeal. It is to be seen that in the given facts and circumstances, decree for perpetual injunction should have been granted by both Courts below, particularly when the issue of the competency of the respondent-plaintiff to succeed to her mother late Smt. Padmu so far as the suit land is concerned, being not born to her from the lions of late Sh. Gholu, admittedly the previous owner of the suit land is neither discussed nor any issue in this regard framed. As a matter of fact, the issue qua competency of the plaintiff to inherit the suit land being vital one, should have been considered and decided. The Courts below should have not swayed merely by the entries in the revenue record showing the plaintiff to be owner in possession of the suit land. What is important in the given facts and

circumstances was to ascertain the source, whether lawful resulted in sanction and attestation of mutation No. 121 qua the suit land in the name of the plaintiff, without going into such question the decree for permanent prohibitory injunction and as a consequential relief for possession of the suit land could have not been granted.

14. Plaintiff not born to Smt. Padmu from the lions of Gholu stands proved from her own statement while in the witness box as PW-1, because when cross-examined she tells us that her mother Padmu when settled with Hukme Ram, she born to her from the lions of said Shri Hukme Ram. The plaintiff is born from the lions of Hukme Ram is, therefore, proved from her own statement and no other and further evidence is required in this regard. It takes us to Section 15(2) (b) of the Hindu Succession Act, which read as follows:

> "(2) Notwithstanding anything contained in sub-section (1),-
>
> (a).....
>
> (b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section(1) in the order specified therein, but upon the heirs of the husband."

15. It is crystal clear from the bare perusal of the Section ibid that the son or daughter begotten by the deceased female not through her husband, whose property was with her during her lifetime but from someone else, such son or daughter have no right to inherit such property on her death. Object of Section 15(2) is to ensure that the property left by a Hindu female does not loose its real source. If it was the property she had inherited from her parents, the same on her death should go to legal heirs of her father. In case the property was inherited by her from her husband or her father-in-law the same on her death shall devolve upon the heirs of the husband or her father-in-law i.e. the source from which the property was inherited by her. The **Apex Court in (2009) 15 Supreme Court Cases 66** has held that when the property is devolved upon the deceased Hindu female from the parent's side, on her death, the same would go to her parents family and not to her husband's family. Similarly, in case where she had inherited some property from her husband or from her husband's family, on her death, the same would revert back to her husband's family and not to her own heirs. The **Apex Court in Bhagat Ram (D) by L.Rs** versus **Teja Singh (D) by L.Rs., AIR 2002 Supreme Court (1)** has held that the factum of a Hindu female originally had a limited right and later acquired full right, in any way would not alter the rules of Successions given in sub-Section (2) of Section 15 of the Act.

16. As noticed supra, the plaintiff admittedly is born to Padmu from the lions of Sh. Hukme Ram, therefore, she is not the heir of Gholu, the previous husband of said Smt. Padmu. The question of competency of the plaintiff to inherit the suit land on the death of Smt. Padmu was raised in the written statement. Learned trial Court, however, has ignored this vital aspect of the matter because neither any issue has been framed nor is there any adjudication in this regard. Mr. Malhotra, learned counsel has relied upon the judgment of the **Apex Court in Remco Industries Workers House Building Co-operative Society** versus **Lakshmeesha M. and others, AIR 2003 Supreme Court 3167** and on the strength of the ratio thereof has argued that when an issue arises from the pleadings of the parties is not redressed by the trial Court, the appellate Court can remand the suit as a whole. This judgment read as follows:

> "18. From the above resume of facts and the nature of orders of grants of Occupancy rights to the contesting parties, we find that the basic issue of the effect of earlier grant dated 28-5-

> 1965 (Ex. D-3) in favour of the tenant – Muniyappa on the subsequent granted dated 9-12-1969 (Ex. P-1) in favour of plaintiff/respondent was neither addressed to by any of the Courts below nor a decision has been rendered on the same. The issue of effect f Ext. D-3 on Ex. P1 and the identity of the land under the two grants is vital to the just decision of the case. The powers of the appellate Court are not inhibited by the acts or omissions of the parties. Rule 25 of Order 41 of the Code of Civil Procedure empowers the appellate court to frame an issue and remit it for trial which has been omitted to be framed and tried by the trial Court and which appears to the appellate Court essential to the right decision of the case, Rule 23-A. Order 41 introduced by CPC Amendment Act No. 104 of 1976 w.e.f. 1-2-1977 confers powers on the appellate Court to remand whole suit for re-trial. In our considered opinion, this is a fit case where this Court should exercise powers of remand under Order 21, Rule 25 read with Rule 23-A of CPC."

17. On the strength of the ratio of the judgment supra, Mr. Malhotra has urged that after framing of an issue qua competency of the plaintiff to inherit the suit land on the death of her mother Smt. Padmu, the suit as a whole be remanded to the trial Court.

18. It is to be seen from the above quoted plea specifically raised by the defendants in the written statement that mother of the plaintiff had settled with Sh. Hukme Ram perhaps after the death of her previous husband, Gholu, whose property is the subject matter of dispute in the present lis. Also that the plaintiff is born to her mother Smt. Padmu aforesaid from the lions of Hukme Ram. Therefore, she is not entitled to inherit the suit property. The plea so raised being vital one, should have been considered and duly redressed. The trial Court, however, has failed to frame any issue and also to decide the same after affording the parties due opportunity of being heard. This being a vital issue raised by the defendants should have not been ignored. As a matter of fact, without deciding the question of entitlement of the plaintiff to inherit the suit land, a decree for permanent prohibitory injunction or for possession of the suit land could have not at all been granted. No grounds seem to have been raised in this regard in learned lower appellate Court, however, may be that in the lower Courts', the pleadings are notoriously drafted. Before this Court one of the grounds raised for setting aside the impugned judgment and decree pertains to this aspect of the matter. Any how, a specific plea was raised in the written statement, therefore, the trial Court was under an obligation to have framed an issue and decide the same in accordance with law. The parties having not agitated the point raised in the pleadings is hardly of any consequence, as in view of the ratio of the judgment of the Apex Court in ***Remco Industries Worker's*** case supra, the powers of the appellate Court are not inhibited by the acts or omission of parties. Therefore, when in the considered opinion of this Court, a very vital issue having arisen in view of the pleadings on record stand ignored and redressal thereof is essentially required for the just and effective decision of the suit, an additional issue needs to be carved out and the suit remanded as a whole to the trial Court.

19. Consequently, it is deemed appropriate to frame an additional issue, which reads as follows:

> Whether the suit property inherited by Smt. Padmu from her previous husband late Gholu, could have not been devolved upon the plaintiff not born to said Padmu from the lions of

Gholu, the owner thereof but from the lions of one Hukme Ram and if so to what effect? OPD.

20. The judgment and decree under challenge, which does not decide the controversy under the additional issue so framed is, therefore, perverse and not legally and factually sustainable. Consequently, leaving all questions of law open to be considered and decided on merits, the same deserves to be quashed and set aside and the suit remanded as a whole to learned trial Court for fresh disposal in accordance with law.

21. In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. The judgment and decree impugned in the present appeal is quashed and set aside. The suit is remanded to the trial Court for fresh disposal after taking on record the evidence, if any, sought to be produced by the parties on the additional issue carved-out hereinabove in this judgment and also affording them due opportunity of being heard.

22. In view of the suit pertains to the year 1992, it is expected from learned trial Court to decide the same expeditiously, however, not later then 30th September, 2015. The parties through learned counsel representing them are directed to appear in the trial Court on 23rd May, 2015. The Registry to ensure that the record is received in the trial Court well before the date fixed.

23. The appeal stands disposed of accordingly. Pending application(s), if any, shall also stand disposed of.

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

Suraj Bahadur ……Petitioner.

Versus

H.P. State Forest Development Corporation Ltd. and ors. …….Respondents.

CWP No. 4575 of 2012.
Decided on: 08.5.2015.

Constitution of India, 1950- Article 226- Petitioner was appointed as a cleaner on daily wages on 1.10.1986- he was subsequently regularized on 6.11.1997- respondents were shown senior – although they were appointed later- held, that seniority list should have been drawn on the basis of length of service- respondents directed to re-draw the seniority list and to promote the petitioner if otherwise found eligible. (Para-2 to 5)

For the petitioner: Mr. P.D.Nanda, Advocate.
For the respondents: Mr. Pranay Pratap Singh, Advocate, for respondents No. 1 & 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner was appointed on daily waged basis as Cleaner against the vacancy on 1.10.1986. He was regularized as Cleaner on 6.11.1997. The post of cleaner is in the feeder category for promotion to the post of Driver, as per the R & P Rules, framed vide Annexure P-1. According to bye laws 3.4, the *inter-se* seniority of the employees of the respondent-Corporation is to be determined based on the length of service in the grade.

2. The tentative seniority list of Cleaners as it stood on 25.3.2011, was notified on 2.4.2011. The respondent-Corporation has drawn two seniority lists of Cleaners, one is at page 26 and the second is at page 27 of the paper book. The petitioner, as per the seniority list at page 26 of the paper book, is at Sr. No. 1. Respondents No. 3 & 4 are at Sr. Nos. 8 and 9 of seniority list at page 27 of the paper book. Their date of appointment is 3.5.2003 and 14.6.2004, respectively. The date of regularization of the petitioner is 6.11.1997 and his date of appointment as daily waged Cleaner is 1.10.1986. The respondent-Corporation has promoted respondent No. 3 as Driver on 21.11.2011 as per Annexure P-5. Respondent No. 4 has been promoted as Driver on 20.6.2012, vide Annexure P-7.

3. The seniority was to be determined on the basis of the length of service of those persons, who were in the same grade. The petitioner and respondents No. 3 & 4 were in the same grade. However, surprisingly, the respondent-Corporation in defiance of service jurisprudence has drawn two seniority lists, as noticed hereinabove. The explanation given in the reply filed is that the petitioner has been regularized in his personal post and the respondents No. 3 & 4 were appointed in the regular cadre. There is fallacy in the averments contained in the reply. The classification made on the basis of "personal post" and "cadre post" is violative of Articles 14 and 16 of the Constitution of India. All the Cleaners form homogeneous class.

4. The petitioner was working on daily wage basis since 1.10.1986 and regularized on 6.11.1997. He would be deemed to be regularized in the regular cadre. The respondent No. 3 was appointed on compassionate basis, as per seniority list only on 3.5.2003 and respondent No. 4 on 14.6.2004, but they stood promoted to the post of Driver by ignoring the petitioners. The action of the respondents, ignoring the petitioner for promotion and considering respondents No. 3 & 4 as Drivers, is illegal and arbitrary and thus violative of Articles 14 & 16 of the Constitution of India. The petitioner was also in feeder category for promotion to the post of Driver and has a better right vis-à-vis respondents No. 3 & 4, since the post of Driver is a non-selection post. The seniority list should have been drawn, as per the bye laws, on the basis of the length of service. The petitioner has a fundamental right to be considered for promotion in accordance with law.

5. Accordingly, the Writ Petition is allowed. Annexure P-5 dated 21.11.2011 and Annexure P-7 dated 20.6.2012, are quashed and set aside. The respondents are directed to re-draw the seniority list Annexure P-4 on the basis of length of service and to consider the case of the petitioner for promotion to the post of Driver. Needful be done within a period of ten weeks from today. Pending application(s), if any, shall stand disposed of.

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

Cr. Appeal No. 735/2008
With Cr. Appeal No. 31/2009
Reserved on: 8.5.2015
Decided on: 12.5.2015

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1. Cr. Appeal No. 735/2008

Sarla Devi …Appellant

Versus

State of Himachal Pradesh …Respondent

2. Cr. Appeal No. 31/2009

Yashpal ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Indian Penal Code, 1860- Sections 302 and 498-A- Deceased was married to the accused- accused was not satisfied with the dowry given to her- deceased told her parents and her sister that she was being harassed for not bringing sufficient dowry- she gave birth to a daughter but nobody came to see her and her daughter- deceased came back after compromise to her matrimonial home- she was again harassed by accused- she died due to beatings given to her with fist and kick blows - she was carrying pregnancy of 34-36 weeks- post mortem revealed that she had died due to fracture and dislocation of cervical vertebrae- dead body was found at a distance of 200 meters from the house of the accused- accused had not lodged any missing report and had not made any inquiry about his wife- Doctor admitted that fracture and dislocation of cervical vertebrae could be caused by twisting neck with great force with hands- accused had also sustained injuries- accused had made an extra-judicial confession stating that he had given beatings to the deceased- held, that act of the accused fell within the definition of cruelty- relation between accused and deceased did not improve even after convening the panchayat – accused was rightly convicted of the commission of offences punishable under Sections 302 and 498-A of IPC. (Para-21 to 25)

For the Appellant(s) : Mr. N.S. Chandel, Advocate, in both the appeals.

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

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

These appeals are instituted against Judgment dated 10.11.2008 passed by learned Additional Sessions Judge, Fast Track Court, Una, District Una, Himachal Pradesh in Sessions Case No. 25/99 RBT 11/2004, whereby appellant-accused namely Yashpal (hereinafter referred to as 'accused' for convenience sake), was convicted and sentenced under Sections 302 and 498A IPC and acquitted of offences punishable under Section 304-B and 315 IPC. He was sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/-, in default of payment of fine, to further under go simple imprisonment for one year under Section 302 IPC. He was also sentenced to undergo imprisonment for two years and to pay a fine of Rs.2,000/- for offence under Section 498-A IPC and in default of payment of fine, to further undergo imprisonment for two months. Appellant-accused Sarla Devi (hereinafter referred to as 'accused' for convenience sake) was convicted and sentenced to undergo imprisonment for two years and to pay a fine of Rs.2,000/- for the offence punishable under Section 498-A Indian Penal Code In default of payment of fine, she is to further undergo simple imprisonment for two months.

2. Since common questions of law and facts are involved in both the appeals, they were taken up together and are being disposed of vide this common judgment.

3. Case of the prosecution, in a nutshell, is that on 17.1.1999 at about 10.15 PM a telephonic information was received in the Police Station Gagret from Kashmir Singh Up Pradhan Gram Panchayat Oel regarding death of Meena Kumari wife of Yashpal. Thereafter, police from police station Gagret went to the spot. Dead body was found with the help of torch, lying in the bushes at a distance of 200 meters from the house of the accused.

Shri Onkar Singh, PW-4 inspected the body of Meena Kumari. He noticed scars on the face and other parts of the body. Parents of the deceased also came there. PW-14 Onkar Singh recorded the statement of Darshan Singh, brother of the deceased under Section 154 CrPC. He disclosed that Meena Kumari was his younger sister and was married to accused in November 1995. They had given dowry in the marriage according to their capacity but accused were not satisfied. After 3-4 months of marriage when deceased Meena Kumari came to her parental house, she told the complainant and her parents that she was being harassed by her husband Yashpal and her mother-in-law Sarla Devi used to taunt her for not bringing sufficient dowry. On the complaint of Meena Kumari, complainant and parents visited the house of accused many times and requested not to harass her. Thereafter, accused shunted Meena Kumari out of their house. She came to the house of her parents at village Nagnoli and remained there for about 3-4 months where she gave birth to a daughter. Nobody came to look after Meena Kumari and her daughter. Meena Kumari was sent back after convening a Khangi Panchayat, to her matrimonial house. Accused kept on harassing her. On 18.1.1999 a message was received by the complainant through one Jamal Deen of his village that Meena Kumari had died in village Oel. Compromise Ext. PF was taken into possession. Viscera of the deceased was sent to FSL Junga for chemical examination. According to the post-mortem report, deceased died due to fracture and dislocation of cervical vertebrae at level C-1-2 and C-2-3. Death was caused by beatings given to her with fist and kick blows. She was carrying pregnancy of 34-36 weeks. Matter was investigated and challan was put up in the Court after completing all codal formalities.

4. Prosecution has examined as many as 17 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. Accused were convicted and sentenced as notice by us above. Hence, these two appeals.

5. Mr. N.S. Chandel, Advocate has vehemently argued that the prosecution has failed to prove its case against the accused.

6. Mr. M.A. Khan, Additional Advocate General, has supported the judgment of trial court dated 10.11.2008.

7. We have heard the learned counsel for the parties and gone through the judgment and record very carefully.

8. PW-1 Dr. Satinder Chauhan deposed that he alongwith Dr. Umesh Gautam and Dr. Vipan Chaudhary conducted post-mortem on the dead body of Meena Kumari. According to the post-mortem report, there were multiple contusions and abrasions on the face of deceased. Upper part of neck which was reddish in colour with defused swelling on both sides of neck just below angles of mandible corresponding to haemorrahge present subcutaneous. There was no ligature marks on the neck. Rigor mortis was present. There was fracture of cervical vertebrae at C1-2 and C2-3. Post-mortem report is Ext. PB. According to Satinder Chauhan, PW-1, deceased was pregnant and there was no evidence of rape, as per post-mortem report. He did not take swab since rape was not suspected.

9. PW-2 Shri Darshan Kumar is brother of deceased. According to him, Meena was married to Yashpal, accused in the month of November 1995 as per Hindu rites. She was harassed by her in-laws. They used to give beatings to Meena Kumari for bringing insufficient dowry. Accused also demanded money from his sister for the purpose of colour TV, fridge, Scooter etc. 3-4 months after marriage Meena came to their house and told that she was being maltreated and given beatings for bringing insufficient dowry. His sister gave birth to a daughter, however, nobody came from the side of in-laws of Meena to enquire about her well-being. A Khangi Panchayat was convened. He admitted that his sister has

also consumed poison due to maltreatment by the accused. He came to know about death of his sister on 18.1.1999. He went to the spot. Dead body of his sister was also lying there. He noticed scratches and injuries on the face and neck. Blood was oozing from nose and mouth. Neck was swollen.

10. PW-3 Kashmir Singh deposed that he was Up Pradhan of village Oel. On 17.1.1999, at about 7.30-7.45 Pawan Kumar Ward Panch came to him and told that wife of Yashpal had died. Body was in the bushes. He informed the police. He noticed injury on the face of the deceased. Police came to the spot. They took into possession the tooth, Ext. P1, Shawl Ext. P2, pair of Chappal Ext. P3 and broken bangles Ext. P4. House of the accused was also searched. He was declared hostile and cross-examined by the learned Public Prosecutor.

11. PW-4 Amrit Lal deposed that Meena Kumari was his daughter and married in 1995. Her in-laws used to harass her for bringing insufficient dowry including fridge, TV Scooter etc. Accused also gave beatings and tortured his daughter by calling her names. She gave birth to a daughter about 3 years back in their house. No one from the family of her in-laws came at that time to enquire about the welfare of Meena Kumari and her child. His daughter remained in the house only for 4-5 months. He took Jaswant and Jagan Nath with him to the house of accused where a Khangi Panchayat was held. In the Khangi Panchayat, a compromise was effected. He proved Ext. PF, the compromise. It was signed by Meena Kumari and Yashpal. Even after the compromise, she was harassed. In his cross-examination, he has admitted that earlier also, his daughter had taken poison and was saved by her husband Yashpal and his brother by calling his daughter and giving timely treatment.

12. PW-5 Bhagat Singh deposed that he attended the marriage ceremony of Yashpal and Meena Kumari. After marriage Meena Kumari met him many times. She complained to him that her husband and mother-in-law used to demand dowry articles like fridge, TV, Scooter etc. he went to the spot where body of Meena Kumari was lying. There were signs of throttling the neck, injuries on face and blood was oozing out from the nose and mouth.

13. PW-6 Shri Ram deposed that before death of Meena Kumari, a Khangi Panchayat was held in the village in the house of the accused. Father of Meena Kumari alongwith 2-3 persons was present in the Khangi Panchayat on the complaint of the girl.

14. PW-7 Jaswant Singh deposed that the after marriage, Meena Kumari used to meet him in the village. She used to tell him that her husband and mother-in-law used to torture her for touching household articles by saying that these were not brought by her.

15. PW-8 Kamla Devi is mother of deceased. She also deposed the manner in which her daughter was tortured by the accused for bringing insufficient dowry. First child was born to Meena in their house but accused never came to enquire about the wellbeing of Meena or her child. A compromise was also arrived at. Meena was brought back to their house and again wept and told that accused were demanding more dowry and her life was in danger.

16. PW-9, PW-10, PW-11 and PW-12 are all formal witnesses.

17. PW-13 Yog Raj deposed that Onkar Singh SI deposited one sealed parcel containing viscera of Meena Kumari which he kept in the Malkhana. It was sent to FSL Junga through Constable Pardeep on 3.2.1999.

18. PW-14 Onkar Singh has deposed that he received a telephonic information on 17.1.1999. It was recorded in Rojnamcha. He went to the spot and with the help of torch, dead body was inspected by him. He found swelling on the neck of dead body of Meena. He also noticed blood oozing from nose and mouth of deceased. There were blue scars on face and other parts of the body. Statement of brother of the deceased was recorded vide Ext. PC under Section 154 CrPC. Inquest report Ext. PD was prepared. Post-mortem report was obtained.

19. PW-15 Kashmir Singh DSP Vigilance deposed that a compromise Ext. PF was produced by Shashi Pal, which was taken into possession vide memo Ext. PJ. He got accused medically examined on 21.1.1999. He could not get accused examined on 19.1.1999.

20. PW-17 N.K. Bhardwaj has examined the accused and found following injuries on the body of accused:-

> "1. Brown coloured abrasion 1.5 cm x 0.2 cm on right cheek 2cm away from right lower id.
>
> 2. another brownish coloured abrasion present 1cm away from angle or mandible on left side neck."

21. What emerges from the statements of witnesses is that the marriage between Yashpal and deceased Meena Kumari was solemnised in 1995. She was maltreated for bringing insufficient dowry. She was administered beatings by the accused. A Khangi Panchayat was also convened. A compromise Ext. PF was arrived at. Despite that she was tortured and harassed by the accused. Deceased gave birth to a daughter in her parental house. No member from the family of accused came to enquire about welfare of the deceased or her child. Accused used to demand fridge, TV, Scooter etc. as per statement of PW-2 Darshan Kumar, PW-4 Amrit Lal and PW-8 Kamla Devi.

22. Dead body was found at a distance of 200 metres from the house of accused. He has not lodged any missing report with the police or made any enquiry of whereabouts of his wife. According to PW-1, deceased died due to fracture /dislocation of cervical vertebrae at C-1-2 and C-2-3. Deceased was pregnant and was carrying pregnancy of 34-36 weeks. In his cross-examination, he stated that fracture and dislocation of cervical vertebrae could be caused by twisting neck with great force with hands. Accused Yashpal has also received injuries as per statement of Dr. NK Bhardwaj (PW-17). He also opined that injuries were possible in a scuffle.

23. Mr. NS Chandel argued that accused was not medically examined immediately. Merely that the accused was not medically examined immediately would not rule out the injuries received by the accused. PW-5 Bhagat Singh has deposed that the accused has made extra-judicial confession before him. Yashpal said that an altercation between him and Meena. There was a scuffle in the kitchen of the accused. Broken bangles of Meena Kumari were in the kitchen. Yashpal told that he was not given food by Meena Kumari. He further told that at 5.00 pm Meena had gone out to ease herself. He followed her and gave her beatings severely out of anger. She died due to beatings. Deceased has taken poison earlier. It further strengthens the prosecution case that the deceased was tortured and harassed by accused. Otherwise there was no occasion for a young lady like Meena Kumari to consume poison or to convene a Khangi Panchayat as Ext. PF. Ext. PF also suggests that the deceased was maltreated and harassed and tortured by the accused.

24. Mr. NS Chandel also argued that in fact somebody has tried to rape her since her string was found loose. PW-1 Dr. Satinder Chauhan has categorically opined that there

was no evidence of rape as per post-mortem report. Deceased has died due to fist and kick blows given by the accused. Police has taken into possession tooth Ext. P1, blood stained Shawl Ext. P2, a pair of Chappals Ext. P-3 and broken bangles Ext. P4. Mr. N.S. Chandel has lastly argued that prosecution has attributed no motive to the accused. It is true that in a case based on circumstantial evidence, motive plays an important role. However, when the chain of events is complete, motive is not very important. In this case, though there is no eye-witness but the prosecution has completed the entire chain of events pointing exclusively to the guilt of the accused. There is sufficient material on record to prove that deceased was tortured and harassed by both the accused for bringing insufficient dowry. Neither Yashpal nor his mother have visited the house of deceased at the time of child birth. Meena Kumari was also forced to consume poison earlier. PW-5 Bhagat Singh, PW-7 Jaswant have deposed categorically that as and when Meena Kumai used to meet them, she used to complain about being harassed by her in-laws for bringing insufficient dowry. Acts of the accused fall under the ambit of 'cruelty'. Relation between accused and deceased did not improve even after convening the Khangi Panchayat. Depositions have been made by witnesses only against accused and not against other family members of the accused.

25. Accordingly, the prosecution has fully proved its case against the accused Yashpal under Section 302 and 498-A IPC and accused Sarla Devi under Section 498-A. There is no occasion for us to interfere in the well-reasoned judgment of the trial Court. Consequently, both the appeals fail and are dismissed, so also the pending applications, if any, in both the appeals. Bail bonds are cancelled.

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

The Presiding Officer, Motor Accident Claims Tribunal. ... Appellant.

Versus

Jitwar Singh deceased through his LRs Sadhna Devi and others ... Respondents.

RSA No. 351 of 2011.
Decided on: 12th May, 2015.

Code of Civil Procedure, 1908 - Section 79- An award was passed for the sum of Rs.1,78,000/- as compensation- awarded amount was partly ordered to be released to the plaintiffs, however, a sum of Rs. 1,25,000/- was ordered to be invested in Kisan Vikas Patras - this amount was not deposited by the employee of the Court- this fact came to the notice when an application for release of the amount was filed- FIR was registered and the employee was convicted – Civil Writ Petition was filed for the recovery of the amount which was disposed of with liberty to the plaintiffs to seek appropriate remedy in accordance with law- plaintiff filed a civil suit for recovery of Rs. 3,57,500/-- held, that employee was a government servant and the State and the employer are liable for the acts of the employees - therefore, defendant No. 1 and 2 were rightly held liable to pay amount - however, they are at liberty to recover the amount from the employee in accordance with law. (Para-15 to 18)

Cases referred:

Chairman, Railway Board and others v. Chandrima Dass and others, AIR 2000 SC 988
Achutrao Haribhau Khodwa and others v. State of Maharashtra and others, AIR 1996 SC 2377
Saheli, a Women's Resources Centre through Ms. Nalini Bhanot and others v. Commissioner of Police, Delhi and others, AIR 1990 SC 513

For the appellant : Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For respondents: Mr. V.D. Khidtta, Advocate, for respondents No.1(a), 1(b), 2 and 3.
Mr.D.S. Nainta, Additional Advocate General, with Mr. Pushpinder Jaswal, Deputy Advocate General, for respondent No.4.
Mr. Satyen Vaidya, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (Oral)

Defendant No.2, the Presiding Officer of Motor Accident Claims Tribunal, Kinnaur Civil and Sessions Division at Rampur Bushahr, is in second appeal before this Court.

2. Facts in brief giving rise to file the present appeal, in a nutshell, are that one Ravi Kant son of respondent No.1 Jitwar Singh Negi (since dead) and respondent No.2 Smt. Dolma, (hereinafter to be referred to as 'the plaintiffs'), was travelling in a jeep bearing registration No.HP02-4716, on 24th July, 1995. The vehicle met with an accident near Sanarsa (Jhakari) and said Shri Ravi Kant died in the said accident.

3. The plaintiffs filed a petition under Section 166 of the Motor Vehicles Act before learned Motor Accident Claims Tribunal at Rampur Bushahr. Appellant herein, defendant No.2 passed an award and awarded a sum of Rs.1,78,000/- as compensation together with interest to the plaintiffs. The insurer, National Insurance Company subsequently deposited the awarded amount before learned Motor Accident Claims Tribunal. The awarded amount was partly ordered to be released to the plaintiffs, however, a sum of Rs.1,25,000/- was ordered to be invested in Kisan Vikas Patras.

4. Defendant No.3, who was holding the post of Daftri in the office of appellant-defendant No.2 and looking after the work of Naib Nazir under the authority of defendant No.2, had withdrawn a sum of Rs.1,25,000/- from State Bank of India, Rampur on 22nd May, 1998. Defendant No.3, however, did not invest the amount in question in the post-office in the form of Kisan Vikas Patra. This fact came to notice on 19th April, 2004, when the plaintiffs filed an application for release of the amount so invested in Kisan Vikas Patra. The matter was brought to the notice of the High Court. On the direction of the High Court, a criminal case came to be registered against defendant No.3. He was tried by learned Sub Divisional Judicial Magistrate, Rampur Bushahr and convicted.

5. In a Civil Writ Petition filed by the plaintiffs seeking the relief of recovery of the amount in question, the High Court ordered to initiate disciplinary proceedings against defendant No.3. Liberty was also reserved in favour of the plaintiffs to seek appropriate remedy available to them in accordance with law. This has led in filing Civil Suit No.75-1 of 2009 in the Court of learned Civil Judge (Senior Division), Rampur, District Shimla, for the recovery of Rs.3,57,500/- against the defendants jointly and severally.

6. Learned trial Court has decreed the suit vide judgment dated 1st May, 2009, for the recovery of Rs.2,50,000/- together with interest at the rate of 9% per annum against defendant No.3 alone. Defendants No.1 and 2 were not held liable to pay the decretal amount with the following observations:

> "Further-more, it is expressly made clear that since defendants No.1 and 2 have no active role in the present suit. More-so-over, it is no where pleaded from the side of plaintiffs that defendants are jointly and severally liable to pay the suit amount to the plaintiffs. It is

> expressly admitted by PW-1 as well as DW-1 that Government of Himachal Pradesh through Secretary Home or learned MACT Tribunal is not involved in the present suit. It is proved to the satisfaction of this Court rather from the Criminal Court that has been convicted for commission of offence punishable under Sections 409 and 420 of IPC. He had misappropriated a sum of Rs.1,25,000/- after embezzling a sum being government servant, therefore, this Court is of the considered opinion that it is the defendant No.3 who is himself liable and responsible to re-pay the suit amount to the plaintiffs. As a sequent effect, issue No.1 is answered affirmative in favour of the plaintiffs and against the defendants."

7. The plaintiffs aggrieved by that part of the judgment and decree whereby defendants No.1 and 2 were exempted from liability to pay the decretal amount, have preferred Civil Appeal No.1-AR/13 of 2009/10 in District Courts at Rampur Bushahr, which came to be decided by learned Additional District Judge, Kinnaur at Rampur vide judgment and decree dated 30th April, 2011, under challenge in the present appeal. Learned lower appellate Court while reversing findings on issue No.1 to the extent of defendants No.1 and 2 discharged from the liability, has held that defendants are jointly and severally liable to pay the decretal amount and has partly allowed the appeal and modified the judgment and decree of the trial Court to the extent that the suit stands decreed against defendants No.1 to 3 jointly and severally.

8. Defendants No.1 and 3 have not preferred any appeal against the judgment and decree passed by learned lower appellate Court. The judgment and decree passed by learned lower appellate Court qua them have thus attained finality.

9. It is, however, defendant No.2, who has assailed the judgment and decree passed by learned lower appellate Court in the present appeal on the grounds *inter alia* that, learned lower appellate Court has not appreciated the evidence available on record in its right perspective and to the contrary based its findings on the surmises and conjectures. It is defendant No.3, who allegedly was liable to pay the decretal amount because this amount was entrusted to him with a direction to purchase the Kisan Vikas Patra. He, however, failed to do so and to the contrary embezzled the amount in question. He was convicted for the offence so committed. It is contended that the appellant was not supposed to accompany defendant No.3 to post-office for deposit of the amount in question and to purchase Kisan Vikas Patra.

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

1. Whether the learned lower appellate court has erred by ignoring the finding rendered as Ex.PW-1/J whereby the respondent No.5 was convicted on account of misappropriation of Rs.1,25,000/-?
2. Whether the learned lower appellate Court has been wrong in applying the principle of Master and Servant under the given facts and circumstances of the present case?

11. Mr. G.D. Verma, learned Senior Advocate has argued that no liability could have been fastened upon appellant-defendant No.2, as according to Mr. Verma, appellant-defendant No.2 has no role to play in embezzlement of the amount in question. It is rather defendant No.3, who is liable to pay the decretal amount. Learned trial Court has rightly saddled him with the said liability and the findings so recorded could have not been quashed by learned lower appellate Court.

12. On the other hand, Mr. V.D. Khidtta, learned Counsel representing the respondents-plaintiffs, has urged that learned lower Court has rightly held all the defendants jointly and severally liable to pay the decretal amount in view of there being Master-Servant relationship in existence. Similar are the arguments on behalf of defendant No.3.

13. The questions of law need adjudication are that in view of the conviction of defendant No.3, he alone is liable to satisfy the decree and that Master-Servant relationship has nothing to do in this case and as such appellant should have not been saddled with liability.

14. Keeping in view questions so raised in this appeal, elaboration of the facts and evidence available on record is not required, as it is only the legal questions, having been raised, need to be redressed.

15. Section 79 of the code of Civil Procedure deals with the suits by or against the Government or public Officer in connection with any act done in their official capacity. Law on the issue is no more *res-integra*, as the Apex Court in such cases of omission of employees has held the Master, i.e., the State liable. Reference can be made to a judgment of the Apex Court in ***Chairman, Railway Board and others*** v. ***Chandrima Dass and others, AIR 2000 SC 988***. In this case some railway employees subjected a woman to sexual intercourse in Yatri Niwas at railway-station. The Apex Court, while holding that the employees, who were deputed to manage the establishment including the railway-station and Yatri Niwas, were essential components of the government machinery. Carrying commercial activity, if any, such employee committed an act of tort the Union Government of which they are employees on satisfaction of other legal requirement can be held vicariously liable for damages to the persons wronged.

16. In ***Achutrao Haribhau Khodwa and others*** v. ***State of Maharashtra and others, AIR 1996 SC 2377***, a case where the staff of Government Medical Hospital while operating upon a patient left mop in the body of the patient resulting in formation of pus and ultimately death of the patient, held the State liable by applying the doctrine of *res* ipsa loquitur.

17. In ***Saheli, a Women's Resources Centre through Ms. Nalini Bhanot and others*** v. ***Commissioner of Police, Delhi and others, AIR 1990 SC 513***, where a nine years old child died on account of beatings given by the police officer, the State was held liable for tortuous acts of its employees, i.e., police officer and to pay the compensation to the dependents of the child.

18. Applying the above principles in the present case, defendant No.3 was an employee of defendants No.1 and 2. He was entrusted a sum of Rs.1,25,000/- to deposit the same in post-office and purchase the Kisan Vikas Patra in the names of the plaintiffs. He neither deposited the amount in the post-office nor purchased the Kisan Vikas Patra and rather embezzled the amount in question. In a criminal case he has been held guilty and convicted under Sections 409 and 420 of the Indian Penal Code, vide judgment dated 14th May, 2007, Ext.PW-1/J. Defendants No.1 and 2 being the Masters of defendant No.3 have, therefore, been rightly held jointly and severally liable to pay the decretal amount. Learned lower appellate Court has, therefore, not committed any illegality or irregularity while decreeing the suit against all the defendants. Defendants No.1 and 2, if so advised, may recover the amount in question from defendant No.3 in accordance with law.

19. In view of above, no legal questions muchless to speak of substantial questions of law as formulated, arise for determination in the present appeal. The judgment

and decree passed by learned lower appellate Court is legally and factually sustainable and as such deserves to be upheld.

20. For all the reasons hereinabove, this appeal fails and the same is accordingly dismissed. No order as to costs.

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

Vinod Kumar. …Petitioner.

Versus

Varinder Kumar Sood. …Respondent.

Civil Revision No.60/2013
Reserved on : 30.4.2015
Decided on: 13.5.2015

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- Landlord sought eviction on the ground that building had become unfit and unsafe for human habitation and the building is required bonafide by landlord for re-construction – landlord had entered into an agreement for reconstruction of the building- there is no requirement of approval or sanction of building plan for seeking eviction- in these circumstances, tenant directed to handover the vacant possession to the landlord- tenant shall have a right to be re-inducted in the premises after re-construction of the building. (Para-16 to 22)

Cases referred:

Hari Dass Sharma vs. Vikas Sood and others, (2013) 5 SCC 243,
Joginder Singh and another vrs. Smt. Jogindero and ors., AIR 1996 SC 1654
Syed Jameel Abnbas and others vs. Mohd. Yamin alias Kallu Khan, (2004) 4 SCC 781

For the Petitioner: Mr. Bharat Bhushan Vaid, Advocate.
For the Respondent: Mr. Ashok Kumar Sood, Advocate.

The following judgment of the Court was delivered:

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

This revision petition is directed against the order dated 9.1.2013 passed by the learned Appellate Authority, Shimla in Rent Appeal No. 54-S/14 of 2012.

2. "Key facts" necessary for the adjudication of this petition are that respondent-landlord (hereinafter referred to as the "landlord" for convenience sake) filed eviction petition under section 14 of the H.P. Urban Rent Control Act, 1987 against the petitioner-tenant (hereinafter referred to as the 'tenant' for convenience sake). The landlord has sought the eviction of the tenant from the demised premises firstly on the ground that the building in question has become unsafe and unfit for human habitation; the building is more than 100 years old, it was constructed of Dhajji wall and with the passage of time the construction material has decayed rendering the building unsafe and unfit for human habitation and secondly the building is required bona fide by the landlord for building and rebuilding.

3. Petition was contested by the tenant. According to the tenant, the building was owned by two different persons, namely, Varinder and Keshav Ram. The ground floor and first floor of the building were owned by Keshav Ram since 1993. The building could not be reconstructed without sanction accorded by the Municipal Corporation, Shimla. The building is not in a dilapidated condition. The construction could be carried without eviction of premises by the tenant.

4. Issues were framed by the Rent Controller. He allowed the petition on 16.5.2012 by ordering the eviction of the tenant. However, according to the Rent Controller the eviction would become available to the landlord only when the building plans are sanctioned by the competent authority. Tenant feeling aggrieved by the order dated 16.5.2012 filed an appeal bearing Rent Appeal No.54-S/14 of 2012 before the Appellate Authority. Landlord preferred an appeal against the order dated 16.5.2012 bearing Rent Appeal No.55-S/14 of 2012 before the Appellate Authority. The appeal filed by the tenant bearing Rent Appeal No.54-S/14 of 2012 was partly accepted by the appellate authority on 9.1.2013 by ordering re-entry of the tenant after the completion of rebuilding equivalent to the area to original premises. The appeal bearing Rent Appeal No.55-S/14 of 2012 filed by the landlord was dismissed. Hence, the present petition.

5. Mr. Bharat Bhushan Vaid, learned counsel for the petitioner, has vehemently argued that the landlord has failed to prove that the building has become unsafe and unfit for human habitation. He has further argued that the courts below have come to a wrong conclusion that the building in question was required bona fide for the purpose of building and rebuilding. He has also contended that there are two owners of the building and in these circumstances, the building cannot be reconstructed. He has lastly contended that till the maps are not approved, eviction order would not become effective.

6. Mr. Ashok Kumar Sood, learned counsel for the respondent, has supported the order dated 9.1.2013.

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

8. Firstly, the Court will advert to the question whether the building has become unsafe and unfit for human habitation. Landlord Varinder Kumar has appeared as AW-1. According to him, the building is 100 years old. He intends to reconstruct building on the basis of RCC structure after demolishing building on old lines. Reconstruction was not possible without eviction of tenant. He is owner of ground floor. He has further stated that Keshav Ram is owner of basement floor and sub-basement floor. The agreement was executed *inter se* the parties jointly vide Ext.AW-1/B. The Building plan was approved by Municipal Corporation, Shimla vide Ext.AW-1/C. He has proved sanction order Ext.AW-1/D and AW-1/E. According to him, floors have developed cracks and foundation of the building was weak. He has sufficient funds for the purpose of building and re-building. He wanted to reconstruct the building for better economic use.

9. AW-2 Keshav Ram has testified that he has purchased two floors from the landlord in the year 1993. He intends to reconstruct building alongwith landlord Varinder Kumar. He executed agreement for the purpose of reconstruction Ext. AW-1/A. The building is in dilapidated condition.

10. AW-3 B.C. Sharma is most material witness. He has proved report Ext. AW-3/A. He has proved photographs Ext. AW-3/A-1 to Ext. AW-3/A-4. He has visited the spot on 25.6.2008. He has found the condition of the building dilapidated. According to him, the building was made of Dhajji walls. The building has developed cracks. The main load

bearing wall has developed cracks. He has proved that the building has become unsafe and unfit for human habitation and the same is required to be reconstructed. Reconstruction was not possible without evicting the tenant.

11. AW-4 Gurvir has proved sanction letter Ext. AW-1/D. According to him, the extension was granted on 19.7.2000 vide Ext. AW-4/A. The construction of two storeys was sanctioned from road level and two storeys were sanctioned below road level.

12. AW-5 Pardeep Gupta has proved Ext.AW-1/C. According to him, sanction letter Ext. AW-1/D was correct as per original record.

13. Tenant Vinod Kumar has appeared as RW-1. According to him, towards eastern side there is a building of Rajesh Khanna and towards eastern side there is a building of Kulbhushan Sood. The landlord has instituted eviction petition with intention to enhance rent. Reconstruction was possible without his eviction. Some other person was owner of the basement portion. He has denied the suggestion that wood used in the premises was damaged completely. He has denied the suggestion that the building is 100 years old.

14. RW-2 Rajesh Khanna has deposed that his father Dharam Pal was owner of building and after his death in the year 2005, he and his brother have become owners. The wall of the building was common. Half portion of common stairs was owned by him and other half was owned by Varinder Kumar.

15. What emerges from the statements of the witnesses is that the building is 100 years old. It has out lived its life. It has become unsafe and unfit for human habitation as per report Ext. AW-3/A prepared by AW-3 B.C. Sharma. AW-3 B.C. Sharma has visited the spot on 25.6.2008. According to him, the main load bearing wall has developed cracks. According to him, rebuilding was not possible without evicting the tenant. The landlord has proved that he has sufficient funds for reconstruction of the building since he wanted to put the building for better use after reconstruction. He has proved the sanction letter/AW-1/D. Though the same has expired but it was extended vide Ext. AW-4/A dated 19.7.2000. The building is situated in the core area. The construction in core area can also be carried out after getting sanction from the competent authority.

16. Mr. Bharat Bhushan Vaid has argued that the building is owned by two owners and rebuilding can not be carried out. Suffice it to say that landlord has entered into an agreement with AW-2 Keshav Ram, for reconstruction of the building vide Ext. AW-1/A. Agreement Ext. AW-1/A has been proved by AW-1 Varinder Kumar and AW-2 Keshav Ram. The tenant has not produced any witness to prove the condition of the building.

17. Now, as far as approval of sanction of building plan is concerned, their lordships of Hon'ble Supreme Court have held while interpreting section 14 of the HP Urban Rent Control Act that the approval of sanction of building plan is not *sine qua non* seeking eviction of the tenant.

18. Their Lordships of the Hon'ble Supreme Court in ***Hari Dass Sharma*** vs. ***Vikas Sood and others***, (2013) 5 SCC 243, have held that under section 14 (3) (c) of the H.P. Urban Rent Control Act, 1987 duly sanctioned building plan is not a condition precedent for entitlement of landlord for eviction of tenant. Their Lordships have held as under:

> 17. In fact, the only question that we have to decide in this appeal filed by the appellant is whether the High Court could have directed that only on the valid revised/renewed building plant being sanctioned by the competent authority, the order of eviction shall be available for execution. The High

> Court has relied on the decision of this Court in Harrington House School v. S.M. Ispahani & Anr. (supra) and we find in that case that the landlords were builders by profession and they needed the suit premises for the immediate purpose of demolition so as to construct a multi-storey complex and the tenants were running a school in the tenanted building in which about 200 students were studying and 15 members of the teaching staff and 8 members of the non-teaching staff were employed and the school was catering to the needs of children of non-resident Indians. This Court found that although the plans of the proposed construction were ready and had been tendered in evidence, the plans had not been submitted to the local authorities for approval and on these facts, R.C. Lahoti, J, writing the judgment for the Court, while refusing to interfere with the judgment of the High Court and affirming the eviction order passed by the Controller, directed that the landlords shall submit the plans of reconstruction for approval of the local authorities and only on the plans being sanctioned by the local authorities, a decree for eviction shall be available for execution and further that such sanctioned plan or approved building plan shall be produced before the executing court whereupon the executing court shall allow a reasonable time to the tenant for vacating the property and delivering the possession to the landlord and till then the tenants shall remain liable to pay charges for use and occupation of the said premises at the same rate at which they are being paid.
>
> 18. In the present case, on the other hand, as we have noted, the Rent Controller while determining the bonafides of the appellant-landlord has recorded the finding that the landlord had admittedly obtained the sanction from the Municipal Corporation, Shimla, and has accordingly passed the order of eviction and this order of eviction has not been disturbed either by the Appellate Authority or by the High Court as the Revision Authority. In our considered opinion, once the High Court maintained the order of eviction passed by the Controller under Section 14(4) of the Act, the tenants were obliged to give vacant possession of the building to the landlord and could only ask for reasonable time to deliver vacant possession of the building to the landlord and hence the direction of the High Court that the order of eviction could only be executed on the revised plan of the building being approved was clearly contrary to the provisions of Section 14(4) of the Act and the proviso thereto."

19. Mr. Bharat Bhushan Vaid has also contended that there are two common walls and thus reconstruction is not possible. Whether the construction is possible on common wall is to be seen when the building is to be reconstructed and it is between the neighbours and landlord to resolve this issue at the time of building and rebuilding. The tenant is estopped from disputing title of the landlord as per section 116 of the Indian Evidence Act, 1872.

20. In the case of ***Joginder Singh and another*** vrs. ***Smt. Jogindero and ors***., reported in AIR 1996 SC 1654, their lordships of the Hon'ble Supreme Court have held that tenant cannot deny the title of land lord. It has been held as follows:

> "6. Late Surain Singh and Respondent Bur Singh did not seriously dispute that they were not tenants under Smt. Soman in respect of the land in dispute and adduced no evidence in that behalf. On the contrary Khasra Girdawari Ext.P.6 clearly indicated that the deceased Surain Singh (who is

represented by his legal representatives in this appeal) and Bur Singh were tenants under Smt. Soman with regard to the land in suit. This being the position the tenants could not be permitted to deny or dispute the title of the owner. This is a settled view that having regard to the provisions of Section 116 of the Evidence Act no tenant of immovable property or person claiming through such tenant shall, during the continuance of the tenancy, be permitted to deny the title of the owner of such property. In this connection it would be relevant to make a reference to the decision of this Court in Veerraju Vs. Venkanna [1966 (1) SCR 831 (839) = AIR 1966 SC 629] wherein this Court, with reference to the decision of Privy Council took the view as under:-

"A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord"

21. The Appellate authority has rightly come to the conclusion that the tenant has a right to re-entry after building is reconstructed and rent would be as agreed between the parties after taking into consideration the rent prevalent in the area.

22. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed. Tenant is now directed to handover the vacant possession to the landlord within a period of three months from today. Tenant shall be re-inducted in the demised premises after one month of the construction of the building in the same place, location and area equivalent to the area which was in occupation of the tenants before the orders were passed by the Rent Controller. The rate of rent after the induction of the tenant by the landlord would be determined as per the law laid down by their Lordships of the Hon'ble Supreme Court in ***Syed Jameel Abnbas and others*** vs. ***Mohd. Yamin alias Kallu Khan***, (2004) 4 SCC 781. Pending application(s), if any, also stands disposed of. No costs.

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

Jagdish Chand ……Petitioner.
Versus
State of H.P. & another ……Respondents.

CWP No. 10568 of 2012.
Decided on: 14.5.2015.

Constitution of India, 1950- Article 226- Petitioner was engaged on daily wages on 22.3.1983- he was regularized as electrician on 1.4.1995- he was re-designated as Technician Grade-I and his pay was fixed at Rs. 4,550/-- he was informed subsequently that Rs. 4,68,300/- was wrongly released to him- his pay was re-fixed as per audit para- held, that it was not permissible for the respondent to recover the amount or to re-fix his pay after a long time - respondent had not taken into consideration the representation filed by the petitioner assailing the combined seniority list- petition allowed and the order re-fixing the salary set aside. (Para-4 to 8)

Cases referred:

State of Punjab and others etc. versus Rafiq Masih (White Washer) etc., JT 2015 (1) SC 95

For the petitioner: Mr. Narender Singh Thakur, vice counsel Sh. R.R.Rahi, Advocate.

For the respondents: Mr. Parmod Thakur, Addl. AG, with Mr. Neeraj K. Sharma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner was initially engaged in the department of Agriculture on daily wage basis on 22.3.1983. He was regularized w.e.f. 1.4.1995 as Electrician. In sequel to the notification dated 1.9.1998 issued by the Government of Himachal Pradesh, the petitioner was re-designated as Technician Grade-I (Electrician) w.e.f. 1.1.1996 and put in the pay scale of Rs.4020-7220/- vide a letter dated 20.6.2003. The petitioner's pay was fixed at Rs.4550/- (at the minimum of the scale) with date of next increment as 1.1.1997, vide office order dated 23.6.2003. The petitioner was served with notice dated 12.10.2012 whereby he was informed that an amount of Rs.4,68,300/- was wrongly released to him w.e.f. 1.1.1996 to 1.1.2012. On the basis of audit para, his pay was re-fixed as per his entitlement in accordance with the Rules. The petitioner was informed and requested to settle audit para No.3. He was granted merely 3 days' time to file the reply. The petitioner was served with notice dated 9.11.2012 whereby he was granted opportunity to explain his position before the withdrawal of office order dated 20.6.2003. The petitioner submitted reply vide Annexure P-14 on 24.11.2012 informing that since Sh. Gita Ram did not possess qualification of ITI, he was not qualified and he also belonged to a different category, though petitioner was possessing qualification of ITI. However, the fact of the matter is that vide office order dated 29.11.2012, the petitioner's placement order made on 20.6.2003 was withdrawn and his pay was re-fixed vide office order dated 6.12.2012. Hence, this petition.

2. The petitioner was re-designated as Technician Gr-I (Electrician) and placed in the pay scale of Rs. 4020-7220 w.e.f. 1.1.1996. His pay was fixed at Rs. 4550/- with date of next increment as 1.1.1997. He was also allowed higher pay scale on the recommendation of the DPC and put in pay scale of Rs. 5000-8100 w.e.f. 1.1.2004. The petitioner was informed, as noticed hereinabove, of the audit para No.3 and he was requested to settle the same vide Annexure P-11 dated 12.10.2012. The petitioner was granted only three days' time to file the reply. According to the averments contained in notice dated 9.11.2012, the petitioner was not eligible to be re-designated as Technician Gr-I (Electrician), whereas his name was at Sr. No. 3 of the seniority list. In the placement orders, it was mentioned that placement along with the scale was subject to the decision of any representation made in that behalf/verification by audit and in case any over-payment was paid, the same would be recovered from the official concerned. It is also stated that the case of the petitioner did not fall in 20% category. The fact of the matter is that the petitioner has neither misrepresented nor concealed any relevant facts at the time of his placement in cadre of Technician on 20.6.2003, which led to fixation of his pay at Rs. 4550/- as per Annexure P-4, dated 23.6.2003. The petitioner has also been put in the higher pay scale of Rs. 5000-8100 w.e.f. 1.1.2004 on the basis of the recommendation made by the DPC.

3. Mr. Parmod Thakur, learned Additional AG has vehemently argued that one Sh. Dila Ram has filed CWP No. 5479 of 2012 in this Court. It is specifically averred in the present petition that Sh. Dila Ram has not challenged the placement of the petitioner as Electrician Gr-I. He has only sought his promotion as Technician Gr-II.

4. Now as far as Sh. Dila Ram is concerned, he does not fulfill even the basic qualification of ITI. The Court has gone through order dated 29.11.2012 with reference to

CWP No. 5479 of 2012. It is evident that the CWP filed is still pending and despite that the placement of the petitioner has been withdrawn. There is no final adjudication on the writ petition filed by his senior. There is no tangible material placed on record that the petitioner was heard before the matter was looked into by the Deputy Controller (F&A). If the petitioner had been given an opportunity, he would have narrated the circumstances before the Deputy Controller, the manner in which he was put in the higher pay scale and that too on 20.6.2003. The respondents have further reduced the pay of the petitioner vide Annexure P-16 dated 6.12.2012 on the basis of order dated 29.11.2012. It is not that the petitioner's salary has been reduced but recovery amounting to Rs. 4,68,300/- has also been ordered.

5. Their lordships of the Hon'ble Supreme Court, in a recent judgment, in the case of ***State of Punjab and others etc. versus Rafiq Masih (White Washer) etc.,*** reported in ***JT 2015 (1) SC 95,*** have laid down the following principles governing the situation where recovery by the employers would be impermissible in law. It has been held as follows:

> "12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:
>
> (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
>
> (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
>
> (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
>
> (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
>
> (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

6. In the instant case also, the respondents cannot be permitted, at this belated stage, to re-fix the petitioner's pay on the basis of office order dated 29.11.2012 as well as to recover an amount of Rs. 4,68,300/- from the petitioner.

7. The respondents have also not taken into consideration the representation which has already been filed by the petitioner assailing the combined seniority list. The respondents have also overlooked Annexure P-5 whereby the petitioner was granted higher pay scale of Rs. 5000-8100 on the basis of Annexures P-3 and P4 dated 20.6.2003 and 23.6.2003, respectively.

8. Accordingly, the Writ Petition is allowed. Annexure P-11 dated 12.10.2012, Annexure P-13 dated 9.11.2012, Annexure P-15 dated 29.11.2012 and Office Order Annexure P-16, dated 6.12.2012 are quashed and set aside. Pending application(s), if any, shall stand disposed of.

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

CWP No. 160/2011 alongwith CWPs No. 161, 162, 164, 166, 167, 168, 169, 170, 171 and 172 of 2011
Reserved on: 13.5.2014
Decided on: 14.5.2015

1. CWP No. 160/2011

Raj Bala Gaur. ...Petitioner.
Versus
H.P. University and others. ...Respondents.

2. CWP No. 161/2011

Veena Bhadwal. ...Petitioner.
Versus
H.P. University and others. ...Respondents.

3. CWP No. 162/2011

Bandna Kumari. ...Petitioner.
Versus
H.P. University and others. ...Respondents.

4. CWP No. 164/2011

Hans Raj Sharma. ...Petitioner.
Versus
H.P. University and others. ...Respondents.

5. CWP No. 166/2011

Neeta Ahluwalia. ...Petitioner.
Versus
H.P. University and others. ...Respondents.

6. CWP No. 167/2011

Sunita Gupta. ...Petitioner.
Versus
H.P. University and others. ...Respondents.

7. CWP No. 168/2011

Suresh Verma. ...Petitioner.
Versus
H.P. University and others. ...Respondents.

8. CWP No. 169/2011

Reena Dhawan. ...Petitioner.
Versus
H.P. University and others. ...Respondents.

9.CWP No. 170/2011

Sunita Sharma. ...Petitioner.
Versus
H.P. University and others. ...Respondents.

10.CWP No. 171/2011

Rakesh Kumar Sharma. ...Petitioner.
Versus
H.P. University and others. ...Respondents.

11.CWP No. 172/2011

Avneeta Vaid. ...Petitioner.

Versus

H.P. University and others. ...Respondents.

Constitution of India, 1950- Article 226- Petitioner was appointed on ad hoc basis on a consolidated salary of Rs. 1500/- per month in H.P.U. Model School on 31.5.1997 – a committee recommended creation of regular posts of Headmaster and teachers in the regular pay scale- these recommendations were accepted subject to the approval of Executive Council- petitioners were put in a regular pay scale but the increment was not released to them- held, that petitioners were appointed after completing all the codal formalities – therefore, they should have been granted annual increments from the initial date of appointment - Vice Chancellor had created posts subject to the approval by Executive Council and appointment on such post is valid until set aside- since, appointments were regularized by Executive Council- therefore, the appointees are entitled to annual increment as well as GPF at par with regular employees. (Para-2 to 15)

Cases referred:

Shakir Husain vs. Chandoo Lal and others, AIR 1931 Allahabad 567

Mohammad Ali vs. The State of Uttar Pradesh and others, AIR 1958 Allahabad 681

U.P. Avas Evam Vikas Parishad and another vs. Friends Coop. Housing society Limited and another, 1995 (Supp) 3 SCC 456

(In all the petitions)

For the Petitioners: Mr. Anil God, Advocate.

For the Respondents: Mr. J.L. Bhardwaj, Advocate for respondents No.1 and 2.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge

Since common questions of law and facts are involved in all these petitions, the same were taken up together and are being disposed of by a common judgment. However, in order to maintain clarity, facts of CWP No. 160/2011 have been taken into consideration.

2. Petitioner was appointed on ad hoc/tenure basis on a consolidated salary of Rs. 1500/- per month in H.P.U. Model School on 31.5.1997. A meeting comprising of Prof. Suresh Kapoor, Dean of Studies, Dr. S.K. Garg, Dean, CDC and Prof. J.B. Nadda, Registrar was conveyed on 1.8.2002 in the Chambers of Registrar was held on 1.8.2002 at 3.00 P.M. The Committee made the following recommendations:

> 1. The post of Head Master be got created in the regular pay scale of Rs.7000-22-8100-275-10,300-340-10980 and against which Mr. Umesh Modgil who fulfils the requisite qualification maybe considered for his regularization after he completes 4 years service as such with prospective effect.
>
> 2. The posts of the following teachers may be got created in the regular pay scale of Rs.4550-150-5000-160-5800-200-7000-220-7280 and against which the mentioned below teachers who have completed 4 years or more service as such may be considered for their regularization with prospective effect.

	NAME & DESIGNATION TEACHERS	ACADEMIC QUALIFICATION	DATE OF JOINING
1.	Mrs. Avneeta Vaid	MA B.Ed. Prabhakar	10.7.1992
2.	Mrs. Neeta Ahluwalia	BA B.Ed. NTT	26.10.1992
3.	Mrs. Bandana Sharma	-do MA	1.3.1993
4.	Mrs. Sunita Gupta	BA B.Ed.	26.7.1993
5.	Mrs. Vena Badhwal	BA B.Ed. M.Ed. M.Phil. PhD. (Education0	10.5.1995
6.	Mrs. Sunita Sharma	BA B.Ed. M.Ed. M. Phil (Pol. Sc)	25.5.1995
7.	Mrs. Raj Bala Gaur	BA MA, B.Ed.	5.6.1997
8.	Sh. Pushpender Sharma Arts Teacher	BA Diploma in Painting	21.7.1997
9.	Mrs. Reena Dhawan Teacher	B.Sc. B.Ed.	22.7.1997
10.	Teacher Sh. Suresh Verma	PGDCA, MA (Eco.) B.Ed.	9.9.1998
11.	Ms. Anjali Sharma	B.Sc. B.Ed.	21.10.1998
12.	Sh. Hans Raj Sharma	-do-	26.10.1998
13.	Sh. Rakesh Sharma	B.Sc. B.Ed. M.Com	26.10.1998

Their regularization and inter-se seniority will be regulated in accordance with the date of their initial appointment. After their regularization the head master and teaching staff of the school may be allowed.

3. The posts of the non-teaching staff i.e. Aya and peon of the school may be got created in the regular scale of Rs.2520-100-3220-110-3660-120-4140 (with initial start of Rs.2620/-) and against which the following may be considered for their regularization on completion of 8 years service as per instructions of the state Govt.

	NAME & DESIGNATION TEACHERS	ACADEMIC QUALIFICATION	DATE OF JOINING
1.	Mrs. Pushpa Thakur Aya	Matric	3.1.1992
2.	Sh. Geeta Ram Sharma, Peon	Middle	26.9.1994

> The financial liabilities of the above mentioned staff would be borne on the staff-strength of the University for first five years and thereafter the such liabilities shall be met out of the resources of the school as there is a proposal to construct a new building for the school for which the revenue /income of the school has been kept reserved for its utilization. In order to met the expenditure on account of salary etc. of the teachers/ staff, it was recommended that 10% hike in fee may be made every year.
>
> The service conditions of the staff of the school will be governed as per Act, Statutes and Ordinances of the University vis-à-vis rules, regulations and instructions as amended from time to time and as applicable to the teaching staff of the State Govt. The school will observe the vacation schedule at par with the State govt. The teaching staff including head master shall form their own separate cadre with a separate entity. The appointing authority of the teaching staff including the head master shall be the vice-chancellor of this University and their service record shall be maintained by the establishment branch."

3. In sequel to the recommendations made by the high power committee, the Vice Chancellor of the respondent-university was pleased to create the posts of Headmaster and teachers in the regular pay scale of Rs. 7000-10980 and Rs. 4500-7200, respectively, subject to the approval from the Executive Council vide notification dated 5.9.2002.

4. Petitioners and similarly situate persons were appointed to the posts of school teachers and Head Master in H.P.U. Model School in the running pay scale mentioned against their post on 9.9.2002. Petitioners joined their duties vide office order dated 30.9.2002. Though the petitioners were put in the regular pay scale but the increments were not released to them. They made several representations, which led to issuance of letter dated 4.11.2008 whereby the petitioners were granted annual increment with effect from 1.9.2003 but on notional basis.

5. Petitioners made several representations seeking G.P.F. account number. The Executive Council vide resolution No.9 in its meeting held on 27.9.2008 approved the creation of one post of Head Master and 13 posts of Teachers in the pay scale given in the notifications dated 5.9.2002 and 13.9.2002. The notification to this effect was issued on 6.2.2009.

6. Mr. Anil God, learned counsel for the petitioner, has vehemently argued that his clients are entitled to regular increments from their initial date of appointment. The petitioners are required to be issued G.P.F. account number instead of C.P.F. account number. He then contended that the appointments of his clients have already been made on regular basis after the creation of posts by the Vice Chancellor.

7. Mr. J.L. Bhardwaj has placed strong reliance upon notification dated 6.2.2009.

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

9. Petitioner in CWP No. 160/2011 was appointed on ad hoc/ tenure basis on 31.5.1997. A conscious decision has been taken vide Annexure R-1/A to regularize the petitioners and similarly situate persons in the running pay scale of Rs. 4550-7220. An observation has also been made in Annexure RA-1/C that the petitioners possessed more

than the required educational qualification, as laid down by the Government for the posts of JBTs/TGTs. Thereafter, the Vice Chancellor created the posts as per Annexure P-2 dated 5.9.2002 in the regular pay scale. Petitioners were appointed against these posts in the running pay scale vide office order dated 9.9.2002. They joined their duties on 30.9.2002. Since the petitioners have been appointed/regularized after completing all the codal formalities, that too, after approval by the Executive Counsel, they should have been granted annual increments from their initial date of appointment, i.e. 9.9.2002. Petitioners have been granted annual increments only vide Annexure P-6 dated 4.11.2008, that too, on notional basis after the decision dated 27.9.2008. It is true that the posts were earlier created on ad hoc/tenure basis but thereafter the petitioners were regularized in the regular pay scale after the posts were created by the Vice Chancellor, subject to the approval from the Executive Council. The approval from the Executive Council was only ministerial act since all the codal formalities for the creation of posts have been complied with. The posts have been created by the Vice Chancellor on the basis of the recommendations made by the high power committee vide Annexure P-2. The petitioners have been regularized with effect from 9.9.2002 and the approval of the posts by the Executive Council vide notification dated 27.9.2008 would relate back to the date of creation of posts by the Vice-Chancellor on 5.9.2002. The petitioners possessed the essential qualification. Their suitability has been adjudged by a duly constituted Selection Commission.

10. The posts are created by the Executive Council as per Statute 10 (iii). In the instant case, the posts have been created by the Vice Chancellor, subject to approval of the Executive Council. The Vice Chancellor can take immediate action as per section 12 (c) (7) of the Himachal Pradesh University Act, 1970, but the same is required to be approved by the Executive Council. The Vice Chancellor has created the posts on 5.9.2002, subject to approval by the Executive Council. The Executive Council has approved the same on 27.9.2008.

11. Full Bench of Allahabad High Court in ***Shakir Husain*** vs. ***Chandoo Lal and others***, AIR 1931 Allahabad 567 has defined the difference between approval and permission as under:

> "Ordinarily the difference between the approval and permission is that in the first the act holds good until disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently obtained may all the same validate the previous act."

12. This judgment was relied upon by the Division Bench of Allahbad in ***Mohammad Ali*** vs. ***The State of Uttar Pradesh and others***, AIR 1958 Allahabad 681. The Division Bench has held that an appointment which is to be made with the permission of a higher authority or the Government cannot be made unless the permission is first obtained, but an appointment which can be made subject to the approval of a higher authority or the Government may be made and will be rendered invalid only when it is disapproved by the higher authority. The Division has held as under:

> "[1] This special appeal is directed against an order dated 22-11-1957 passed by a learned Single Judge of this Court by which Civil Miscellaneous Writ Petition No. 3023 of 1957 had been rejected. The appellant was employed by the Municipal Board of Maunath Bhanjari in the district of Azamgarh as an overseer. Under the provisions of Section 68(2) of the U. P. Municipalities Act the appointment and the salary and other conditions attached thereto are required to be subjected to the approval of the State Government. The matter in the present case appears never to have been sent up to the State

Government for approval. It came to the notice of the District Magistrate of Azamgarh that the appellant was performing duties as an overseer without the approval of the State Government. Consequently he brought it to the notice of the State Government.

The State Government after carefully considering the matter refused to approve of the appointment and sent a direction to the District Magistrate with a copy to the President of the Municipal Board, Maunath Bhanjan, that the retention of the appellant was wholly unjustified and that his services may be terminated at once. In compliance with the instructions of the Government the President of the Board passed an order on 19-11-1957 terminating the services of the appellant with immediate effect; and that order was communicated to the appellant by the officiating Secretary of the Board on 20-11-1957. In the writ petition two prayers had been made. The first prayer was that a writ in the nature of certiorari be issued quashing the decision of the President of the Board and that of the State Government.

The second prayer was that a writ in the nature of mandamus be issued directing the State Government to accord recognition and approval to the appointment of the appellant as overseer. So far as the second prayer is concerned Mr. M. H. Beg, appearing on behalf of the appellant, has conceded that such a writ in the nature of mandamus cannot be issued to the State Government. We are therefore concerned with the first prayer enunciated above. For the disposal of the matter we have got to look to Section 68 of the U. P. Municipalities Act. That section says that a Board may, and, if so required by the State Government shall by a special resolution appoint the principal officers of its technical departments such as ..... a qualified overseer or sub-Overseer ..... Sub-clause (2) of that section says that each such appointment and the salary and other conditions attached thereto shall be subject to the approval of the State Government.

The view taken by the learned Single Judge was that since the approval of the State Government was not obtained by the Board at the time of appointing the appellant and when the matter came to their knowledge they refused to approve the appointment, there was in fact no valid appointment of the appellant and the result was that the appointment was automatically terminated by the refusal of the State Government to give its approval. The learned Single Judge was further of the opinion that what was done by the President and by the Secretary under the orders of the President was not to dismiss or punish the appellant so as to bring into picture the operation of Section 69 of the U. P. Municipalities Act, but to inform the appellant that in view of the refusal by the State Government to approve of his appointment the appointment had lapsed. In our opinion the view taken by the learned Single Judge was correct.

When a person is employed under a power which is to be exercised subject to the approval of a higher authority or the Government, the appointment holds good so long as the higher authority or the Government has not disapproved of it. There is a distinction between an appointment with the permission of a higher authority or the Government, and an appointment subject to the approval of the higher authority or the Government. An appointment which is to be made with the permission of a higher authority or the Government cannot be made unless the permission is first obtained, but an appointment which can be made subject to the

approval of a higher authority or the Government may be made and will be rendered invalid only when it is disapproved by the higher authority. This distinction was pointed out by a Full Bench of this Court in Shakir Hu-sain v. Chandoolal, AIR 1931 All 567 (A). Sir Shah Sulaiman, Acting Chief Justice, as he then was, observed:

"Ordinarily the difference between the approval and permission is that in the first the act holds good until disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently obtained may all the same validate the previous act."

13. Their Lordships of the Hon'ble Supreme Court in ***U.P. Avas Evam Vikas Parishad and another*** vs. ***Friends Coop. Housing society Limited and another***, 1995 (Supp) 3 SCC 456 have held that the difference between approval and permission is that in the first case the action holds good until it is disapproved, while in the other case it does not become effective until permission is obtained. Their Lordships have further held that permission subsequently granted may validate the previous Act. Their Lordships have held as under:

"[5] This Court in Life Insurance Corpn. of India v. Escorts Ltd., (1986) 1 SCC 264 : (AIR 1986 SC 1370), considering the distinction between "special permission" and "general permission", "previous approval" or "prior approval" in paragraph 63 held that "we are conscious that the word "prior" or "previous" may be implied if the contextual situation or the object and design of the legislation demands it, we find on such compelling circumstances justifying reading any such implication into S. 29(1) of the Act". Ordinarily, the difference between approval and permission is that in the first case the action holds good until it is disapproved while in the other case it does not become effective until permission is obtained. But permission subsequently granted may validate the previous act. As to the word "approval" in S. 33 (2) (b) of the Industrial Disputes Act, it was stated in Lord Krishna Textiles Mills Ltd. v. Workmen, (1961) 1 Lab LJ 211 at 215-16: (AIR 1961 SC 860 at p. 863) that the management need not obtain the pervious consent befor taking any action. The requirement that the management must obtain approval was distinguished from the requirement that it must obtain permission, of which mention is made in S. 33(1). It is seen that approval envisaged under exception (iii) of S.59 (1) (a), is to enable the Parishad to proceed further in implementation of the scheme framed by the Board. Until approval is given by the Government, the Board may not effectively implement the scheme. Neverthless, once the approval is given, all the previous acts done or actions taken in anticipation of the approval get validated and the publications made under the Act thereby become valid."

14. The respondent-University has not permitted the petitioners to opt for G.P.F. account number and were forced for giving option for C.P.F. account number and their case has been rejected on 24.4.2010 vide Annexure P-8. Since the petitioners have been regularized before the cut-off date, i.e. 15.5.2003, the respondent-university was bound to permit them to opt for G.P.F. account number instead of coercing the petitioners to opt for C.P.F. account number. The respondent-University has discriminated against the petitioners since similarly situate persons, who were working on ad hoc basis in the school, their services were regularized alongwith petitioners have been given regular increments and they have been allotted G.P.F. account number. Equals cannot be treated unequals. Action of the respondent-University not to grant effective increments to the petitioners from 9.9.2002 is unreasonable and arbitrary. Their appointments have been made against the

regular pay scale and they should have been granted annual increments from the date of their regularization. Since the appointment of the petitioners is before the cut-off date, i.e. 15.5.2003, they are entitled to opt for G.P.F. account number. Since the petitioners have been appointed after completing all the codal formalities, their services are required to be counted from the initial date of appointment followed by regularization for all intents and purposes, including pension.

15. Accordingly, in view of the analysis and discussion made hereinabove, all the writ petitions are allowed. Annexures P-6 and P-8 dated 4.11.2008 and 24.4.2010, respectively, are quashed and set aside. Respondent-University is directed to release the petitioners annul increments from the initial date of appointment with interest @ 9% per annum. The respondent-University is also directed to permit the petitioners to opt for G.P.F. account number by treating their appointments on regular basis with effect from 9.9.2002. The respondent-University is further directed to pay and release the revised pay scales to the petitioners from the due date. It is made clear that the services rendered by the petitioners on ad hoc basis followed by regularization shall also be counted for all intents and purposes, including pension. Needful be done within a period of four weeks from today. Pending application, if any also stands disposed of.

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

Bajaj Allianz General Insurance Company Ltd. …Appellant
Versus
Smt. Gohdi Devi & others …Respondents

FAO No. 142 of 2008
Date of decision: 15.05.2015

Motor Vehicle Act, 1988- Section 166- Insurance Company pleaded that brother and sister are not the legal representatives and cannot file a Claim Petition- held, that persons who were dependent upon the deceased at the time of accident can file a Claim Petition - brother & sister if dependent upon the deceased can file a Claim Petition- they were minor at the time of accident and will fall within the definition of dependent. (Para12 to 19)

Cases referred:

Gujarat State Road Transport Corporation, Ahmedabad versus Ramanbhai Prabhatbhai and another, AIR 1987 Supreme Court 1690
Gian Singh and others versus Ram Krishan Kohli and others, AIR 2002 J & K 82
United India Insurance Co. Ltd. versus N. Appi Reddy and others, 2013 ACJ, 545
Manjuri Bera versus Oriental Insurance Company Limited, AIR 2007 Supreme Court 1474
Montford Brothers of St. Gabriel and Anr. versus United India Insurance & Anr. etc., 2014 AIR SCW 1051
Samantra Devi & others vs. Sanjeev Kumar & others, ILR 2014 (IX) HP 1, Page-861

For the appellant : Mr. Neeraj Gupta, Advocate.
For the respondents : Mr. Malay Kaushal, Advocate vice Mr. Vinod Thakur, Advocate, for respondents No. 1 to 5.
Mr. Vijay Chaudhary, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

By the medium of this appeal, the appellant-Bajaj Allianz General Insurance Company has questioned the award, dated 3rd December, 2007, passed by the Motor Accident Claims Tribunal, Chamba Division, Chamba (hereinafter referred to as "the Tribunal") in MAC Petition No. 24 of 2007/2006, whereby compensation to the tune of Rs.4,22,000/- with interest at the rate of 9% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants-respondents No. 1 to 5, (for short, the "impugned award"), on the grounds taken in the memo of appeal.

2. The claimants, driver and owner have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

Brief Facts:

3. The claimants, being victims of the motor vehicular accident, had filed the claim petition before the Tribunal for grant of compensation to the tune of Rs.8,00,000/-, as per the break-ups given in the claim petition. It is averred in the claim petition that on 25.12.2005, Pawan Kumar was traveling in vehicle (Taxi Cab) bearing registration No. JK-08A-3145, which was being driven by driver, namely, Kishan Chand, rashly and negligently and at about 12.30 a.m., near Biana Mor Tehsil Salooni, District Chamba, caused the accident, in which Pawan Kumar sustained injuries and succumbed to the injuries.

4. The claim petition was resisted by the respondents on the grounds taken in their memo of objections.

5. Following issues came to be framed by the Tribunal:

> "*1. Whether Shri Pawan Kumar died due to the rash and negligent driving of vehicle No. JK-8A-3145 by its driver (Late Sh. Kishan Chand), as alleged? …OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioners are entitled to the compensation as claimed. If so, its quantum and from whom? ….OP Parties.*
>
> *3. Whether late Shri Kishan Chand was not holding and possessing a valid and effective driving licence to drive the vehicle in question at the desired time. If so, its effect? OPR-2*
>
> *4. Whether the vehicle was being plied in violation of the terms and conditions of the insurance policy, as alleged. If so, its effect? …OPR-2*
>
> *5. Whether the vehicle was not having a valid registration certificate. If so, its effect? …OPR-2*
>
> *6. Relielf."*

6. The claimants have examined Dr. Subhash Chauhan (PW-2), Diwan Chand (PW-3), Head Constable Shish Pal (PW-4) and statement of claimant Smt. Gohdi Devi was recorded. The respondents have not led any evidence. Thus, the evidence led by the claimants has remained unrebutted.

7. The Tribunal, after scanning the evidence, oral as well as documentary, passed the impugned award, whereby the insurer-Insurance Company was asked to satisfy the impugned award.

8. There is no dispute on issue No. 1. Accordingly, the findings returned by the Tribunal on the aforesaid issue are upheld.

9. Onus to prove issues No. 3 to 5 was upon the insurer. The insurer has not led any evidence. Thus, it has failed to discharge the onus. Accordingly, the findings recorded by the Tribunal on the aforesaid issues are upheld.

10. Learned Counsel for the appellant-Insurance Company argued that the claim petition was not maintainable so far as it relates to respondents No. 2 and 5, who are brothers and sisters of the deceased.

11. The argument addressed by the learned Counsel for the appellant is misconceived for the following reasons.

12. Dependant or legal representative of the deceased, who has died in a motor vehicular accident, can file a claim petition. Claimants No. 2 to 5 were minors at the relevant time i.e. the date of accident, are legal representatives of the deceased and were dependants.

13. The Apex Court in a case titled as **Gujarat State Road Transport Corporation, Ahmedabad versus Ramanbhai Prabhatbhai and another,** reported in **AIR 1987 Supreme Court 1690,** held that brother of a deceased is also a legal representative, provided he is dependent.

14. The same view has been taken by a Division Bench of the Jammu and Kashmir High Court in a case titled as **Gian Singh and others versus Ram Krishan Kohli and others,** reported in **AIR 2002 Jammu and Kashmir 82,** while holding that sisters and brothers of a person, who dies in accident, are entitled to maintain petition under Section 166 of the MV Act, if they are legal representatives of the deceased.

15. The Andhra Pradesh High Court in a case titled as **United India Insurance Co. Ltd. versus N. Appi Reddy and others,** reported in **2013 ACJ, 545,** has also laid down the same principle.

16. The Apex Court in a case titled as **Smt. Manjuri Bera versus Oriental Insurance Company Limited,** reported in **AIR 2007 Supreme Court 1474,** held that even a married daughter of a deceased, though not dependant on deceased, is entitled to compensation, if she is 'legal representative' of the deceased.

17. The Apex Court in a latest case titled as **Montford Brothers of St. Gabriel and Anr. versus United India Insurance & Anr. etc.,** reported in **2014 AIR SCW 1051,** has taken note of various judgments and held that brothers, sisters, brothers' children and some times, the foster children are entitled to maintain claim petition, provided they are dependent. It is apt to reproduce paras 10, 11, 15 and 16 of the judgment herein:

> *"10. From the aforesaid provisions it is clear that in case of death of a person in a motor vehicle accident, right is available to a legal representative of the deceased or the agent of the legal representative to lodge a claim for compensation under the provisions of the Act. The issue as to who is a legal representative or its agent is basically an issue of fact and may be decided one*

way or the other dependent upon the facts of a particular case. But as a legal proposition it is undeniable that a person claiming to be a legal representative has the locus to maintain an application for compensation under Section 166 of the Act, either directly or through any agent, subject to result of a dispute raised by the other side on this issue.

11. Learned counsel for the Insurance Company tried to persuade us that since the term `legal representative' has not been defined under the Act, the provision of Section 1-A of the Fatal Accidents Act, 1855, should be taken as guiding principle and the claim should be confined only for the benefit of wife, husband, parent and child, if any, of the person whose death has been caused by the accident. In this context, he cited judgment of this Court in the case of Gujarat State Road Transport Corporation, Ahmedabad vs. Raman Bhai Prabhatbhai & Anr., AIR 1987 SC 1690. In that case, covered by the Motor Vehicles Act of 1939, the claimant was a brother of a deceased killed in a motor vehicle accident. The Court rejected the contention of the appellant that since the term `legal representative' is not defined under the Motor Vehicles Act, the right of filing the claim should be controlled by the provisions of Fatal Accident Act. It was specifically held that Motor Vehicles Act creates new and enlarged right for filing an application for compensation and such right cannot be hedged in by the limitations on an action under the Fatal Accidents Act. Paragraph 11 of the report reflects the correct philosophy which should guide the courts interpreting legal provisions of beneficial legislations providing for compensation to those who had suffered loss.

"11. We feel that the view taken by the Gujarat High Court is in consonance with the principles of justice, equity and good conscience having regard to the conditions of the Indian society. Every legal representative who suffers on account of the death of a person due to a motor vehicle accident should have a remedy for realisation of compensation and that is provided by Sections 110-A to 110-F of the Act. These provisions are in consonance with the principles of law of torts that every injury must have a remedy. It is for the Motor Vehicles Accidents Tribunal to determine the compensation which appears to it to be just as provided in Section 110-B of the Act and to specify the person or persons to whom compensation shall be paid. The determination of the compensation payable and its apportionment as required by Section 110-B of the Act amongst the legal representatives for whose benefit an application may be filed under Section 110-A of the Act have to be done in accordance with well-known principles of law. We should remember that in an Indian family brothers, sisters and brothers' children and some times foster children live together and they are dependent upon the bread-winner of the family and if the bread-winner is killed on account of a motor vehicle accident, there is no justification to deny them compensation relying upon the provisions of the Fatal Accidents Act, 1855 which as we have already held has been substantially modified by the provisions contained in the

Act in relation to cases arising out of motor vehicles accidents. We express our approval of the decision in Megjibhai Khimji Vira v. Chaturbhai Taljabhai, (AIR 1977 Guj.195) and hold that the brother of a person who dies in a motor vehicle accident is entitled to maintain a petition under Section 110-A of the Act if he is a legal representative of the deceased."

12. ....

13. ....

14. ....

15. On coming to know about the High Court judgment the appellants filed a review petition in which they gave all the relevant facts including the constitution of the society appellant no.1 in support of their claim that a `Brother' of the Society renounced his relations with the natural family and all his earnings and belongings including insurance claims belonged to the society. These facts could not have been ignored by the High Court but even after noticing such facts the review petition was rejected.

16. A perusal of the judgment and order of the Tribunal discloses that although issue no.1 was not pressed and hence decided in favour of the claimants/appellants, while considering the quantum of compensation for the claimants the Tribunal adopted a very cautious approach and framed a question for itself as to what should be the criterion for assessing compensation in such case where the deceased was a Roman Catholic and joined the church services after denouncing his family, and as such having no actual dependents or earning? For answering this issue the Tribunal relied not only upon judgments of American and English Courts but also upon Indian judgments for coming to the conclusion that even a religious order or organization may suffer considerable loss due to death of a voluntary worker. The Tribunal also went on to decide who should be entitled for compensation as legal representative of the deceased and for that purpose it relied upon the Full Bench judgment of Patna High Court reported in AIR 1987 Pat. 239, which held that the term `legal representative' is wide enough to include even "intermeddlers" with the estate of a deceased. The Tribunal also referred to some Indian judgments in which it was held that successors to the trusteeship and trust property are legal representatives within the meaning of Section 2(11) of the Code of Civil Procedure."

18. This Court in **FAO No. 71 of 2007,** titled **Smt. Samantra Devi & others versus Sanjeev Kumar & others,** decided on 17th October, 2014, also laid down the same principle.

19. In view of the ratio laid down by the apex Court, Andhra Pradesh High Court and this Court in the aforesaid judgments, the argument addressed by the learned Counsel for the appellant is turned down.

20. Learned Counsel for the appellant also argued that the amount of compensation is excessive.

21. Claimant No.1 has lost her son and respondents No. 2 to 5, who were minors at the time of accident and dependant upon the deceased, have lost their brother. The Tribunal after taking into consideration the claim petition, pleadings and the evidence on the file, has rightly assessed the compensation, cannot be said to be excessive, in any way. Accordingly, the findings returned by the Tribunal on issue No. 2 are upheld.

22. Learned Counsel for the appellant-insurer has also argued that the Tribunal has fallen in error in rejecting the application under Order 6 Rule 17 of the Code of Civil Procedure for amendment of the reply filed on behalf of the insurer.

23. I have gone through the pleadings and the record. I am of the considered view that the Tribunal has rightly rejected the aforesaid application.

24. Having said so, the impugned award is upheld and the appeal is dismissed.

25. The Registry is directed to release the award amount in favour of claimants, strictly as per the terms and conditions, contained in the impugned award.

26. Send down the records after placing a copy of the judgment on the file of the claim petition.

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

Vikram Verma. ….Revisionist

Versus

Smt. Manju Verma. ….Non-Revisionist.

Cr. Revision No. 346 of 2014
Decided on: 15.5.2015.

Code of Criminal Procedure, 1973- Section 401- Counsel submitted that in view of compromise executed between the parties, revisionist does not want to continue with the present petition - hence, in view of statement; Revision Petition dismissed as withdrawn.

For the revisionist : Mr. Anirudh Sharma, Advocate.
For the non-revisionist : Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Advocate appearing on behalf of the revisionist submitted that in view of the compromise executed inter-se the parties in divorce petition No. 37-S/3/2012 titled Vikram Verma vs. Manju Verma decided on 2.5.2015 revisionist does not want to continue the revision petition and same be dismissed as withdrawn. In view of the submission of learned Advocate appearing on behalf of the revisionist petition is dismissed as withdrawn. Petition disposed of. Pending applications if any also disposed of.

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

National Insurance Co. Ltd. ……Appellant.
Versus
Sh. Hanogi Mata Sansthan & ors. …….Respondents.

RSA No. 492 of 2003.
Reserved on: 16.5.2015.

Torts - Plaintiff filed a civil suit for recovery of the compensation against the defendants on the ground that widening work of NH at point 229/0 was carried out by defendant No. 1 - heavy blast was done as a result of which heavy boulders and rocks were thrown on the temple and other buildings causing damages to them- Insurance Company pleaded that the plaintiff was a stranger to the contract- held, that work was executed by 'G' who had taken the insurance policy- insurance company had undertaken to indemnify the 'G' for any loss, hence, suit could have been filed against the Insurance Company also. (Para-15)

For the appellant(s): Mr. Ashwani K. Sharma, Advocate.
For the respondent: Mr.C.N.Singh , Advocate for respondent No. 1.
Mr**.** Sanjeev Kuthiala, Advocate, for respondent No.2.
Mr. Parmod Thakur, Addl. AG with Mr. Neeraj K. Sharma, Dy. AG for respondents-State.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge, Mandi, H.P. dated 21.10.2000, passed in Civil Appeal No. 83 of 1995.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff) has filed a suit for payment of damages/compensation against the appellant-defendant No. 5 and respondents-defendants No. 2 to 4 (hereinafter referred to as the defendants). According to the plaintiff, Shrimata Hanogi Sansthan is a Society registered under the Society Registration Act, 1860. The Sansthan manages the affairs including its immovable property which includes Satsang Bhawan, Kitchen, Canteen building and Dharamshala constructed by the trust for the benefit of pilgrims and visitors. Sh. Pawan Kumar, was authorized to file the suit on behalf of the Sansthan. In the last week of December, 1987, widening work of NH at point 229/0 was carried out by defendant No. 1 through Gopal Sharma. During the widening work, heavy blasting was done as a result of which, heavy boulders and rocks/muck were thrown on the temple and other buildings. The damage was caused to the temple and buildings. The necessary remedial measures were not taken to avoid damage to the temple. The plaintiff had to re-construct and re-build the damaged building by spending Rs. 85,000/-.

3. The suit was contested by defendants including the appellant-defendant Insurance Company. According to defendant No. 1 Gopal Sharma, work was allotted to him vide letter dated 4.12.1987. This work was insured with the National Insurance Company. It is denied that heavy blasting was carried out. Inspite of the best efforts by the deendant and keeping in view the nature of the site on the spot, some damage has been caused to the

temple. According to the State Government, the widening work was completed in the year 1978-79. The temple and other buildings were constructed after completion of the widening work. There existed loose boulders on the hill side for which temple authority approached Public Works Department, which in the interest of safety of public and the temple premises engaged defendant No. 1 for removal of loose boulders on contract. The payment of Mr. Gopal Sharma was withheld. It was released only after he produced no-objection certificate from the plaintiff. No damage has been caused to the plaintiff by the defendants. Only defendant Gopal Sharma, was responsible to the loss. There was vertical slope ranging from 70 degree to 80 degree. The appellant-Insurance Company also filed the written statement. They have shown ignorance about the damage caused to the temple while executing the widening work.

4. The learned Senior Sub Judge, Mandi, H.P., framed the issues on 16.3.1992. The suit was dismissed by the learned Senior Sub Judge, Mandi, H.P. on 8.6.1995. The plaintiff, preferred an appeal before the learned Addl. District Judge, Mandi. The learned Addl. District Judge, Mandi, allowed the appeal and suit was decreed partly against appellant-defendant No. 5 i.e Insurance Company for recovery of Rs. 68,590/-. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 19.3.2004:

> "1. Whether the suit filed by the plaintiff claiming damages/ compensation is maintainable against the appellant/insurance company when there was no privity of contract between the two and whether a stranger to the contract can enforce the same even the contract may have been entered for his benefit?"

6. Mr. Ashwani Sharma, Advocate, for the appellant has vehemently argued that the suit was not maintainable against the Insurance Company. On the other hand, Mr. R.L.Chaudhary, Advocate, has supported the judgment of the first appellate Court. Mr. Sanjeev Kuthiala, Advocate, for respondent No. 2 has argued that the National Insurance Co. alone was liable to indemnify the plaintiff.

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

8 The work in question was awarded to the defendant Gopal Sharma vide letter dated 15.12.1987. The widening of the road was taken up by the Public Works Department in the year 1978-79. The work was allotted to Gopal Sharma in larger public interest to protect the public at large including the property of the temple. Gopal Sharma has insured the work against the loss on 5.12.1987.

9. PW-1 Pawan Kumar testified that the damage was caused to the property of the temple. He was looking after development work of the Sansthan. Sh. Gopal Sharma DW-1 started the execution of the work in front of the temple in the year 1987. The work continued up to 3-4 months, as a result of which, the Satsang Bhawan, office building and front portion of the temple was damaged including canteen and kitchen. The damage resulted due to blasting without adopting safety measures. The offerings in the temple were also reduced. He has prepared estimate vide Ext. PW-1/C. He wrote letters to Gopal Sharma about the possible damage vide Ext. PW-1/D and PW-1/G. The reply of the same is Ext. PW-1/H. He also wrote letter to Ex. Engineer vide Ext. PW-1/I and the reply of the Public Works Department is Ext. PW-1/K. He has also proved copy of notices Ext. PW-1/M and Ext. PW-1/N, receipt Ext. PW-1/O and acknowledgement Ext. PW-1/R.

10. PW-2 Yadvinder Sharma, testified that Gopal Sharma was executing the cutting work near Shrimata Hanogi Temple, as a result of which, huge damage was caused to Satsang Bhawan, Dispensary, temple and canteen. The damage was caused due to blasting work. No safety measures were taken.

11. PW-3 Jai Ram, testified that he was working as mason in the temple. The cutting work was undertaken in front of the temple. The damage was caused to the Satsang Bhawan, office and temple. After that re-construction work was carried out by the temple authority. He worked as mason.

12. PW-4 T.D.Sharma, testified that he is founder member and patron of plaintiff. According to him, the trust is looking after movable and immovable property of the plaintiff. According to him also, while executing the work, blasting was undertaken. It resulted in damage caused to Satsang Bhawan, kitchen and canteen. He is Civil Engineer by profession. He has retired as Ex. Engineer from H.P. PWD. The estimates of damage were prepared by Pawan Kumar PW-1.

13. Gopal Sharma, DW-1 has testified that in the year 1987, he undertook contract to remove the boulders and loose strata near the temple. he has taken insurance policy from National Insurance Company for Rs.5,00,000/-. He has proved insurance cover note Ext. DB. According to him, if any damage has been caused, it was to be indemnified by the Insurance Company. He executed the work from December 1987 to March 1988. In the year 1988, he also paid a sum of Rs.15,000/- to the plaintiff. He handed over the Insurance Policy to the plaintiff and thereafter no objection certificate Ext. DA was issued by the plaintiff.

14. DW-2 Suresh Patyal, has proved the insurance policy bearing No. 179894. It was valid between 5.12.1987 to 14.5.1988. He also proved on record the terms and conditions vide Ext. PW-5/A.

15. What emerges from the facts enumerated hereinabove is that the work was allotted to Gopal Sharma on 4.12.1987. He has executed the work between December, 1987 to March, 1988. The insurance cover note of policy was duly proved. it was valid between 5.12.1987 to 14.5.1988. The work in question was insured for a sum of Rs. 5,00,000/-, as per Ext. DB dated 5.12.1987. There was privy between the National Insurance Company and defendant No. 1 whereby the Insurance Company had to indemnify defendant No. 1 Gopal Sharma for the damage caused to the plaintiff while executing the work awarded on 4.12.1987.

16. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Union of India and others. …Petitioners.
Versus
Tripta Sharma …Respondent.

CWP No. 2463/2015
Reserved on : 1.5.2015
Decided on: 16.5.2015

Constitution of India, 1950- Article 226- Petitioner was an employee of BCB - she was declared surplus and was redeployed to the NSSO (FOD)- she claimed grant of higher pay scale with ACP- Government of India had taken a decision in the year 1986-1987 to afford fresh option to Ex-BCB employees but she was not given a chance to exercise the option- respondent stated that she was placed in Punjab Government pay-scale - similarly situated person had approached Central Administrative Tribunal and the judgment passed by the Tribunal was upheld by the High Court as well as by the Apex Court- held, that similarly situated person should be treated similarly irrespective of the fact that only one person had approached the Court- denying the benefits to the person who had not approached the Court is unjustified. (Para-4 to 6)

Cases referred:
State of Karnataka and others versus C. Lalitha, (2006) 2 SCC 747
K.T. Verrappa and others versus State of Karnataka and others, (2006) 9 SCC 406

For the Petitioners: Mr. Ashok Sharma, Assistant Solicitor General of India.
For the Respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge (oral).

This petition is instituted against the judgment dated 22.7.2014 rendered by the learned Central Administrative Tribunal, Chandigarh Bench, Chandigarh in O.A. No. 332/HP/2012.

2. "Key facts" necessary for the adjudication of this petition are that the respondent has filed O.A. No. 332/HP/2012 before the Central Administrative Tribunal, Chandigarh Bench, Chandigarh, being an Ex-BCB employee. She was declared surplus in the year 1984. She was redeployed to the NSSO (FOD) against the post of a Clerk in the pay scale of Rs. 260-400. She sought the grant of pay scale of Rs. 1350-2200 with effect from 1.1.1986 revised to Rs. 4500-7000 with effect from 1.1.1996, including other benefits such as financial upgradation under the ACP scheme in the pay scale of Rs. 5000-8000 (as first upgradation) and Rs. 5500-9000 (as second upgradation) with arrears of pay and allowance with further revision with effect from 1.1.2006 on the recommendations of 6th Pay Commission alongwith interest @ 18% per annum. According to her, the Government of India has taken a decision in the year 1987 to afford fresh option to Ex-BCB employees, who had opted for the Central Pay scales, but she was not given any opportunity to exercise the option. She was not given option even after letter dated 31.3.1992 on the basis of judgment rendered in O.A. No. 159/1987 titled as ***O.P. Jaswal and others*** Vs. ***Union of India and others***. She has placed strong reliance on O.A. No. 253/CH/1991, titled as ***Bharat Bhushan and others*** vs. ***Union of India and others*** decided on 9.2.2011. The DOPT has already given advice on 4.11.2005 to extend the benefit of related judgments even to the non-petitioners. She made a representation in the year 2006. It was decided on 27.9.2006. She again made representation on 19.11.2011. It was rejected on 6.3.2012.

3. The original application was resisted by the petitioners on the ground of limitation. According to the petitioners, respondent has failed to exercise her option. Thus, she was not entitled to the relief.

4. Respondent has become surplus employee in the year 1984 and was redeployed to the NSSO (FOD. She was put up in the pay scale of Rs. 260-400 in the central pay pattern in lieu of Rs. 400-600 of Punjab Government scale of pay in view of her option to switch over to the Central Pay Scale under the provision of O.M. dated 27.2.1985. Similarly situate persons had approached the Central Administrative Tribunal by way of O.A. No.253/CH/1991. It was decided on 9.2.2000. The judgment was upheld by the High Court and also the Apex Court. Case of the respondent was similar to the case filed by Bharat Bhushan and others with only difference that Bharat Bhushan and others were placed in the pay scale of Rs. 510-800 and the respondent was put in the pay scale of Rs. 400-600. Since the respondent was suffering financial loss every month for non-fixation of pay on the basis of Bharat Bhushan's case, the petition could not be stated to be barred by limitation. She has rather continuous cause of action since non-fixation of her pay has also affected her retiral/pensionary benefits. Moreover, the Government of India has also issued instruction on 11.4.2005 to extend the benefits of judgment even to non-petitioners. The petitioners should have granted the benefits to the respondent instead of coercing her to file the original application before the Central Administrative Tribunal. The earlier judgment is *rem* and not in *personam*. The benefit could not be denied to the respondent on the ground that she was not party in the earlier *lis*.

5. Their Lordships of the Hon'ble Supreme Court in ***State of Karnataka and others*** versus ***C. Lalitha***, (2006) 2 SCC 747 have held that all persons similarly situated should be treated similarly irrespective of the fact that only one person has approached the court. Their Lordships have held as under:

> "29. Service jurisprudence evolved by this Court from time to time postulates that all persons similarly situated should be treated similarly. Only because one person has approached the court that would not mean that persons similarly situated should be treated differently. It is furthermore well-settled that the question of seniority should be governed by the rules. It may be true that this Court took notice of the subsequent events, namely, that in the meantime she had also been promoted as Assistant Commissioner which was a Category I Post but the direction to create a supernumerary post to adjust her must be held to have been issued only with a view to accommodate her therein as otherwise she might have been reverted and not for the purpose of conferring a benefit to which she was not otherwise entitled to."

6. Their Lordships of the Hon'ble Supreme Court in ***K.T. Verrappa and others*** versus ***State of Karnataka and others***, (2006) 9 SCC 406 have held that grant of revised pay scale to the 23 employees who had earlier approached the High Court but denying the same benefit to appellants similarly placed employees by the University was unjustified. Their Lordships have held as under:

> "9. In the counter-affidavit filed by the State of Karnataka, it is admitted that the Government of Karnataka has revised the pay scales of its employees with effect from 1-1-1977 and this revision was also extended to the employees of the universities, including the University of Mysore, Respondent 2. Grant of benefit of revised pay scales by the University to its 23 employees, who had succeeded in the earlier writ petitions, is admitted. It is stated that the order of the Division Bench impugned in these appeals has only directed the implementation of the first order of the Division Bench in its true spirit. The State, for the first time, has taken wholly untenable stand that pursuant to the order earlier passed by the Division Bench, the action of the University granting pay scales to the 23 employees was not in

accordance with the provisions of the Karnataka State Universities Act, 1976 as the pay scales of the employees of the University are to be fixed by framing or amending the existing statute of the University.

16. The defence of the State Government that as the appellants were not the petitioners in the writ petition filed by 23 employees of the respondent University to whom the benefit of revised pay scales was granted by the Court, the appellants are estopped from raising their claim of revised pay scales in the year 1992-94, is wholly unjustified, patently irrational, arbitrary and discriminatory. As noticed in the earlier part of this judgment, revised pay scales were given to those 23 employees in the year 1991 when the contempt proceedings were initiated against the Vice-Chancellor and the Registrar of the University of Mysore. The benefits having been given to 23 employees of the University in compliance with the decision dated 21-6-1989 recorded by the learned Single Judge in WPs Nos. 21487-506 of 1982, it was expected that without resorting to any of the methods the other employees identically placed, including the appellants, would have been given the same benefits, which would have avoided not only unnecessary litigation but also the movement of files and papers which only waste public time."

7. Accordingly, there is no merit in the present petition and the same is dismissed. Pending application(s), if any, also stands disposed of. No costs.

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

Vinay Bodh. …Plaintiff

Versus

Smt. Dolekar & others …Defendants

Civil Suit No. 56 of 2006.
Reserved on: 16.4.2015.
Date of decision: May 16, 2015.

Specific Relief Act, 1963- Section 20- Plaintiff sought specific performance of the contract by execution of a sale deed, cancellation of the sale deed executed by defendant No. 1 in favour of defendants No. 2 and 3 and cancellation of subsequent sale deed executed by defendants No. 2 and 3 in favour of defendant No. 4- defendant No. 1 stated that she had taken friendly loan from the plaintiff and had executed sale agreement as per past practice – this agreement was not to be acted upon and was executed towards security for securing the repayment of the loan- defendants No. 2 to 4 claimed that they were bonafide purchasers for consideration- defendant No. 1 examined only herself to prove her assertion, any custom, usage or practice is required to be established by leading cogent and convincing evidence - the plea of the defendants No. 2 and 3 that they were bonafide purchasers for consideration was not proved while the plea of the defendant No. 4 that he was bona fide purchaser for consideration was proved, therefore, plaintiff cannot be held entitled for the decree of specific performance and cancellation- plaintiff granted the relief of the refund of entire sale consideration along with interest @ 18% per annum. (Para-7 to 23)

Code of Civil Procedure, 1908- Section 34- Interest is in the nature of the compensation for the loss of money by one who is entitled to the same. (Para-18 to 22)

Cases referred:
Secretary, Irrigation Department, Government of Orissa and others versus G.C.Roy (1992) 1 SCC 508
Riches versus Westminster Bank Ltd., 1947 AC 390 : (1947) 1 All ER 469 (HL)
CIT versus Dr.Sham Lal Narula AIR 1963 Punj 411
Dr.Sham Lal Narula versus CIT, AIR 1964 SC 1878

For the Plaintiff: Mr.Sunil Mohan Goel, Advocate.
For the Defendants: Mr.Atul Jhingan, Advocate, for defendant No. 1.
Mr. K.D. Sood, Senior Advocate with Ms. Ranjana Chauhan, Advocate, for defendants No.2 and 3.
Mr. Ramakant Sharma, Advocate, for defendant No. 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The plaintiff has filed the present suit claiming therein the following reliefs:-

"(i) Pass a decree for specific performance of the contract dated 27.9.2005, directing the defendant No. 1, to execute a legal valid and proper sale deed in favour of the plaintiff and to get the same registered in the office of Sub Registrar Manali in respect of land comprised in Khatauni No. 308(old) 505/660 (new) Khasra No. 686 measuring 0-07-23 hectares alongwith two houses as detailed in agreement to sell in village Shuru, Phati Prini, Kothi Jagatsukh Tehsil Manali District Kullu.

(ii) To cancel sale deed executed and registered on 25.11.2005 by defendant No. 1 in favour of defendants No. 2 & 3 and declaring the same null and void and not binding upon the rights of parties.

(iii) To cancel subsequent sale deed executed and registered on 29.9.2006, by defendant No. 2 & 3 in favour of defendant No. 4 and declare the same null and void and not binding upon the rights of the plaintiff.

(iv) To grant damages to the tune of Rs.20,00,000/- to the plaintiff against the defendants jointly and severally as also in the alternative the refund of entire sale consideration i.e. Rs.15,00,000/- with interest.

(v) To grant injunction in favour of the plaintiff and against the defendants restraining them from transferring, alienating, mortgage the demised property to make any addition or alterations or change the nature of the same or lease out the same to any third party or encumber the said demised property in any manner till the final disposal of the suit.

(vi) Any other equitable relief in addition to relief of specific performance which this Hon'ble Court deems fit just and equitable in the facts and circumstances of the case in the interest of justice"

2. The facts as pleaded in the plaint are that the plaintiff is permanent resident of village Bhuntar, Phati & Kothi Khokan Tehsil and District Kullu and is a bonafide Himachali and is an agriculturist within the meaning of H.P. Tenancy & Land Reforms Act, 1972. Defendant No. 1 is resident of village Shuru, Phati Prini, Kothi Jagatsukh, Tehsil Manali District Kullu and was well known to the plaintiff. She wanted to sell her land and house standing thereupon and after negotiations, defendant No. 1 agreed to sell the two

houses along with land comprised in Khewat No. 308(old) 505/660 (new), Khasra No. 3201/2665 (old) now Khasra No.686 (new), measuring 0-07-23 hectares. An agreement to sell was entered into by the parties on 27.9.2005, on which date the plaintiff paid full sale consideration of Rs.15,00,000/-. In terms of this agreement time for defendant No. 1 to remove her personal belongings was given and the sale deed was agreed to be executed before or latest by 31st March, 2006. Defendant No.1 encashed the cheque on 1.10.2005, but thereafter when the plaintiff contacted her and requested her to execute the sale deed in his favour and deliver physical possession of the demised premises, as agreed to be sold, defendant No.1 kept evading the matter on one pretext or the other and stated that she would get the sale deed executed well before 31st March, 2006. Even on 31st March, 2006, defendant No. 1 failed to appear in the office of Sub Registrar, though the plaintiff reached there at 10:00 A.M. and remained there till 4.30 P.M. An affidavit evidencing the presence of the plaintiff was got attested on 31.3.2006 before the Executive Magistrate, Manali. The plaintiff thereafter contacted defendant No. 1 who still assured him that she would get the sale deed executed and it was only on account of certain unavoidable circumstances that she was compelled to remain at Chandigarh. When defendant No. 1 despite a passage of time failed to execute the sale deed, the plaintiff got a legal notice dated 31.8.2006 served upon defendant No.1, both on her residential address in Tehsil Manali as also the address at Chandigarh. But these notices were received back undelivered. It is then averred that the plaintiff came to know that defendant No.1 had got executed a sale deed and got the same registered in favour of defendants No. 2 and 3 on 25.11.2005 of the same property in the office of Sub Registrar, Manali for a sale consideration of Rs.20,00,000/-. This sale deed was stated to be illegal, void and not binding upon the rights of the plaintiff. It is thereafter averred that defendants No. 2 and 3 after realizing that the sale deed executed in their favour by defendant No. 1 was likely to be cancelled being illegal and void, sold the suit land to defendant No. 4 vide sale deed dated 29.9.2006 for a sale consideration of Rs.20,00,000/-. The plaintiff states that he was ready and willing to perform his part of contract and is still ready and willing to perform his part of contract and even has sufficient funds with him for purchase of stamp papers. It is lastly claimed that the suit is within time, since the cause of action has arisen on 27.9.2005. It is in this background that the present suit has been filed claiming therein the reliefs as mentioned herein above.

3. Defendant No.1 resisted the suit of the plaintiff by filing written statement, wherein preliminary objections regarding the form of suit as also the plaintiff being suppressio veri and suggestio falsi were raised. On merits, specific defence of defendant No. 1 is that she had sought a friendly loan from the plaintiff and as per general practice had executed a sale agreement with him. The sale agreement was not to be acted upon and was actually executed towards security for securing the loan amount. It was implied that the suit land would remain in possession and ownership of defendant No. 1 and as and when the loan amount would be retuned, the sale agreement would be destroyed and not acted upon. Defendant No. 1 did not deny the receipt of notice, but averred that since she was unable to pay the plaintiff friendly loan, she was constrained to sell the suit land in favour of defendants No. 2 and 3 for a sale consideration of Rs.20,00,000/- vide sale deed dated 25.11.2005. Defendants No. 2 and 3 were made fully aware of the fact that the land was being sold, so that defendant No. 1 could repay back the money to the plaintiff. Defendants No. 2 and 3 agreed to purchase the land and undertook to indemnify defendant No. 1 from any claims or litigations, if initiated by the plaintiff with respect to the suit property.

4. Defendants No.2 and 3 have filed separate written statement and have claimed themselves to be bonafide purchasers for consideration, having no knowledge regarding any agreement having been entered into between the plaintiff and defendant No.1. It is claimed that the property in dispute had been agreed to be sold by defendant No.

1 in pursuance to the agreement to sell dated 25.5.2005 for a sale consideration of Rs.20,00,000/-, which sale deed was executed and registered in their favour on 25.11.2005. The suit property was purchased jointly by defendants, but owing to differences between them, they chose to dispose of the property in favour of defendant No. 4 for a sale consideration of Rs.20,00,000/- on 29.9.2006. Neither defendants No. 2 and 3 nor defendant No. 4 was ever aware of any agreement having been entered into between the plaintiff and defendant No. 1 and therefore, claimed that they were bonafide purchasers for consideration.

5. Defendant No. 4 filed separate written statement, wherein she claimed to be a bonafide purchaser for consideration, as she had no knowledge of any agreement having been entered into between the plaintiff and defendant No. 1.

6. On 28.3.2008, this Court framed the following issues:-

"(1) Whether the plaintiff is entitled to a decree for specific performance of the agreement to sell dated 27.9.2005 executed by defendant No. 1 qua suit property as described in the plaint? …OPP.

(2) Whether the plaintiff is entitled to the other reliefs, as prayed for, namely, damages to the extent of Rs.20 lacs and refund of the entire sale consideration of Rs.15 lacs or any other amount, as prayed for? …OPP.

(3) Whether the plaintiff is entitled for a decree declaring the sale deed executed and registered on 25.11.2005 by defendant No. 1 in favour of defendants No. 2 and 3 to be null and void and not binding on the interest of plaintiff? …Onus of proof on plaintiff, defendants 1, 2 and 3

(4) Whether the plaintiff is entitled to a decree declaring the sale deed registered on 29.9.2006 by defendants No. 2 and 3 in favour of defendant No. 4 to be null and void and inoperative on the rights of the plaintiff?

…Onus of proof on the parties.

(5) Whether the plaintiff is entitled to a decree for permanent prohibitory injunction restraining the defendants from transferring, alienating, encumbering or mortgaging the suit property? ….OPP.

(6) Whether the plaint as filed is neither competent not maintainable, as alleged? …OPD-1.

(7) Whether the plaintiff is guilty of suppressio veri and suggestio falsi, as alleged? …OPD-1.

(Both issues objected to by learned counsel appearing for the plaintiff on the ground that complete particulars as required by Order 6 Rule 2 of the Code of Civil Procedure have not been given).

(8) Whether the amount of Rs.15 lacs was paid as sale consideration by the plaintiff to the defendant or was in the nature of a land, as alleged? …OPD-1.

(9) Whether defendants No. 2 and 3 had knowledge of the fact that a valid agreement to sell to the suit property had been executed between the plaintiff and defendant No. 1 such knowledge having been imparted by defendant No. 1 as alleged? ….OPD-1.

(10) Whether defendants No. 2 and 3 had agreed with defendant No. 1 that they would be responsible for any litigation/suit which may be brought against defendant No. 1 and would defend the same at very risk, costs and consequences? …OPD-1.

> *(11) Whether defendants No. 2 and 3 are bonafide purchaser of the suit property for a consideration of Rs.20 lacs, as alleged*? *…OPD-2 & 3.*
>
> *(12) Whether defendant No. 4 is the bonafide purchaser of the property for valuable consideration, as alleged? …OPD-4.*
>
> *(13) Relief."*

ISSUES NO. 6 & 7.

7. No evidence in support of these issues was led by defendant No.1 apparently because the objections are legal one. However, even the pleadings are wholly deficient and defendant No.1 has failed to establish how the plaint was neither competent nor maintainable, save and except for these bald averments, there is nothing on record to substantiate this plea. Accordingly, these issues are decided against defendant No.1.

ISSUE NO. 8.

8. The defendant No. 1 in order to prove this issue has examined herself as DW-1 and has stated that she is an illiterate and had entered into an agreement with the plaintiff, which was executed on 27th September, 2005. She had taken a loan of Rs.15,00,000/- from the plaintiff. She had no intention to sell the land and the house and the same was only kept as security against the aforesaid loan. After the payment of loan amount she was to get back the land and the house. The loan amount was required to be paid within 4-5 months but when the plaintiff began demanding the amount even before the date, she went to defendant No. 2, Nimat Ram, who is her husband's friend and showed him the agreement and told him that she had to pay the plaintiff Rs.15,00,000/-. Defendant No. 2 told her that he would make the payment to plaintiff and that she should transfer the land and the house in his name. Defendant No. 2 neither made the payment to the plaintiff nor to her. She further states that she had transferred the land and house in the name of defendant No.2 by registered sale deed and had borne the expenses of stamp papers and registration charges. Prior to this sale deed no agreement was executed between her and Nimat Ram and Balak Ram, defendants. After seeing agreement Ex.D-1, she denied that the same contained her signatures at E-1 and E-2 respectively. She specifically denied having received the consideration amount from Sh.Nimat Ram.

9. The defendant No.1 save and except for this bald and uncorroborated statement has led no other evidence to prove this issue. It is more than settled that any custom, usage or practice is required to be established and proved by leading cogent and convincing evidence. Having failed to do so, this issue is decided against defendant No.1.

ISSUES NO. 9 & 10.

10. The defendant No.1 has led no evidence whatsoever in support of these issues and, therefore, the issues are decided against the defendant No.1.

ISSUE NO. 11.

11. The defendants No.2 and 3 have filed common written statement wherein it has been alleged that they jointly bought the property in dispute in pursuance to the agreement to sell dated 25.05.2005. But, when defendant No.3 appeared in the witness box as DW-3 he has nowhere stated that the agreement dated 25.05.2005 had been executed jointly by defendants No.2 and 3 with defendant No.1 rather he claims that the agreement was executed by him with defendant No.1 on 25.05.2005. Similarly, when defendant No.2 entered into the witness box as DWR/1 he has stated that he had entered into an agreement with defendant No.1 vide agreement Ex.D-1. Nowhere in his statement he makes a mention of defendant No.3 or that this agreement was jointly executed by him alongwith defendant No.3. Thus, the agreement dated 25.05.2005 Ex.D-1 has not at all been proved on record.

Now in case the agreement dated 25.05.2005 is ignored, then it was the agreement of the plaintiff Ex.P-2 which was prior in point of time. No evidence has been led by defendants No.2 and 3 to show that they were bonafide purchasers of the suit property. Accordingly, this issue is decided against defendants No.2 and 3.

ISSUE NO.12.

12. Though the defendant No.4 has not appeared in the witness box, however, her husband Pawan Kumar has appeared as DW-4/1. In examination in chief, he has stated that he is the Power of Attorney holder of defendant No.4 and placed on record its original Ex.DW-4-1/A. He states that the land and building was purchased by defendant No.4 from defendants 2 and 3 vide sale deed Ex.P-12 dated 29.09.2006. He goes on to state that prior to entering into sale deed, he alongwith his wife had checked the revenue records and had found that the defendants 2 and 3 were the recorded owners of the land. Defendants No.2 and 3 were not only in possession of the title deed, but even the mutation in the revenue records had been attested in their favour. He states that he alongwith his wife and children are now in possession of the property which they had purchased for a sale consideration of Rs.20,00,000/-.

13. In cross-examination by defendant No.1, this witness has stated that before purchasing the property, his wife had conducted an inquiry in the local area. He denied the suggestion that the plaintiff and defendant No.1 had informed her prior to execution of the sale deed Ex.P-12 that the property was already under an agreement to sell in favour of the plaintiff.

14. In cross-examination by the plaintiff, the witness states that he is residing both at Delhi and Manali. He admitted his address as given in the plaint to be correct. He further stated that his wife before marriage was a resident of Bhunter and after filing of the suit he came to know that even the plaintiff was a resident of Bhunter. He denied the suggestion that his wife was knowing the plaintiff before the property had been purchased by her. He states that the sale deed executed in favour of defendant No.1 was also inspected by him at the Tehsil Office. He denied the suggestion that he was aware of the agreement to sell between the plaintiff and defendant No.1 and clarified that the defendants 2 and 3 were introduced to him by one friend Rupesh, who negotiated the deal.

15. Thus, from the statement of DW-4/1, it is proved beyond reasonable doubt that defendant No.4 is a bonafide purchaser of property for a valuable consideration as he has virtually not been cross-examined on any material aspects with regard to either the sale or its consideration and even his bonafides either by the plaintiff or defendant No.1. The issue is decided accordingly.

ISSUES NOs.1,3,4 & 5.

16. These issues are inter-connected and are, therefore, taken up together for consideration. As the defendant No.4 has proved on record that she is a bonafide purchaser for consideration, therefore, the plaintiff cannot be held entitled to a decree for specific performance of the agreement to sell dated 27.09.2005. It is for this precise reason that the plaintiff cannot be held entitled for a decree of declaration that the sale deed executed and registered on 25.11.2005 by defendant No.1 in favour of defendants No.2 and 3 be declared as null and void and not binding on the interest of the plaintiff. Similarly, the plaintiff cannot also be held entitled to a decree declaring the sale deed registered on 29.09.2006 by defendants 2 and 3 in favour of defendant No.4 to be null and void and inoperative on the rights of the plaintiff. Now, once the plaintiff cannot be accorded the aforesaid declaration, therefore, he also cannot be held entitled to the decree for permanent prohibitory injunction. Accordingly, all these issues are answered against the plaintiff.

ISSUE NO.2.

17. The plaintiff has duly proved on record that he had paid a sum of Rs.15,00,000/- to defendant No.1. However, since defendant No.4 has simultaneously proved on record that she is a bonafide purchaser for a consideration and also in possession of the suit land, therefore, the suit of the plaintiff for specific performance though cannot be decreed, but then the plaintiff cannot be deprived of his right to claim this amount of Rs.15,00,000/-.

18. Since the plaintiff has been deprived of the use of money to which he is entitled, he has a right to be compensated for the deprivation, whether it be by interest, compensation or damages. A Constitution Bench of the Hon'ble Supreme Court in ***Secretary, Irrigation Department, Government of Orissa and others*** *versus* ***G.C.Roy (1992) 1 SCC 508***, held that:-

> "43...(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator."

19. Black's Law Dictionary (7th Edition) defines 'interest' inter alia as:

> '3. The compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; especially, the amount owed to a lender in return for the use of [the] borrowed money.**'**

20. According to Stroud's Judicial Dictionary of Words And Phrases (5th Edition) interest means, inter alia, compensation paid by the borrower to the lender for deprivation of the use of his money.

21. The essence of interest in the opinion of Lord Wright, in ***Riches*** *versus* ***Westminster Bank Ltd., 1947 AC 390 : (1947) 1 All ER 469 (HL)*** (AC at p.400: All ER at p.472-E-F) is that:-

> '.....it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation';
>
> the money due to the creditor was not paid, or, in other words,
>
> 'was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation, whether the compensation was liquidated under an agreement or statute'.

22. At this stage, it may be relevant to note that the following observations made by a Division Bench of the High Court of Punjab in ***CIT*** *versus* ***Dr.Sham Lal Narula AIR 1963 Punj 411*** on the concept of 'interest' were duly approved by the Hon'ble Supreme Court in ***Dr.Sham Lal Narula*** *versus* ***CIT, AIR 1964 SC 1878***, in an appeal preferred against this decision and it was held as under:-

> "8. The words "interest" and "compensation" are sometimes used interchangeably and on other occasions they have distinct connotation.

> "Interest" in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. In its narrow sense, "interest" is understood to mean the amount which one has contracted to pay for use of borrowed money……
>
> In whatever category "interest" in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable."

23. Though, plaintiff has claimed damages to the extent of Rs.20,00,000/-, apart from refund of the entire sale consideration of Rs.15,00,000/-. But, I find no basis upon which the plaintiff has laid such a claim. The ends of justice would subserve if the plaintiff is granted refund of the entire sale consideration of Rs.15,00,000/- with interest at the rate of 18% per annum to be paid by defendant No.1. The issue is accordingly answered.

Relief.

24. In view of my issues-wise findings recorded hereinabove, the suit of the plaintiff is decreed to the extent that he is held entitled to the refund of entire sale consideration of Rs.15,00,000/- and is further held entitled to an interest thereupon at the rate of 18% per annum with effect from the date of execution of the agreement i.e. 27.09.2005 till the time the same is not paid by the defendant No.1. Decree sheet be prepared accordingly. Parties are left to bear their costs.

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

Jyoti Kumari & ors. ……Petitioners.
Versus
The Secretary Education & anr. …….Respondents.

CWP No. 2958 of 2009.
Reserved on: 15.5.2015.
Decided on: 18.5.2015.

Constitution of India, 1950- Article 226- Names of the petitioners were sponsored by District Employment Officer, Hamirpur, for interview to the post of TGT (Med.) under the quota reserved for wards of ex-servicemen- petitioners were not interviewed on the ground that married daughters were not eligible to get the benefit- held, that son of ex-serviceman was eligible for consideration as the ward of ex-servicemen, even though he is married, however, the daughters were not being considered to be the wards of ex-servicemen- this amounted to discrimination on the basis of sex and is violative of the constitution- it has no nexus with the object sought to be achieved – petition allowed and respondents directed to interview the petitioners for the advertised post. (Para-2 to 5)

Cases referred:

Savita Samvedi (Ms) and another versus Union of India and others, (1996) 2 SCC 380
C.B. Muthamma, I.F.S. versus Union of India and others, (1979) 4 SCC 260

For the petitioners: Mr. Nitin Thakur, Advocate, vice Mr. J.R.Thakur, Advocate.
For the respondents: Mr. Parmod Thakur, Addl. AG with Mr. Neeraj Sharma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioners are wards of ex-servicemen. Their names were sponsored by the District Employment Officer, Hamirpur, for interview to the post of TGT (Med.) under the quota reserved for wards of ex-servicemen. They were issued call letters for batch-wise interview for the post of TGT (Med.), vide Annexure P-1. The petitioners were to be interviewed w.e.f. 31.7.2009 to 1.8.2009. However, the date was later on shifted to 5.8.2009. The fact of the matter is that the petitioners were not interviewed on the basis of the note appended to Annexure P-1 to the effect that married daughters were not eligible to get the benefit under the ward of ex-servicemen. There is reference to Annexure R-1 dated 22.2.2003, whereby the married daughters cannot be considered as dependent on ex-servicemen for employment against quota reserved for ex-servicemen.

2. The action of the respondents of not considering the petitioners as wards of ex-servicemen, is wholly unreasonable and arbitrary. There is discrimination on the basis of sex. The son of ex-serviceman is eligible to be considered for the quota under the category "wards of ex-servicemen" even though married, but not the married daughters. It is violative of Articles 14, 15 and 16 of the Constitution of India. There is no nexus with the object sought to be achieved by incorporating the note appended to Annexure P-1 read with Annexure R-1 dated 22.2.2003. The primary object to provide employment to wards of ex-servicemen is to recognize the outstanding services rendered by the ex-servicemen to the Nation and also to ensure that the children who suffers due to long absence of his/her father are given benefit towards employment by making reservation to them under the category of "wards of ex-servicemen". The daughter, even if married, would be eligible for public employment under the category "wards of ex-servicemen". She would be considered by legal fiction dependent upon her father, if she gets married.

3. In a similar situation, their Lordships of Hon'ble Supreme Court in ***Savita Samvedi (Ms) and another versus Union of India and others, (1996) 2 SCC 380*** have held as under (paras 5 to 10):-

> "5. As is obvious from the plain reading of the Circular, the married daughter of a retiring official is eligible to obtain regularization if her retiring father has no son. She thus has a foothold, not to be dubbed as an outcaste outright. In case he has a son, she shall not be in a position to do so, unless he is unable to maintain the parents, e.g. like a minor son, but then she should be the only person who is prepared to maintain her parents. It is thus plain that a married daughter is not altogether debarred from obtaining regularization of a railway quarter, but her right is dependent on contingencies. The authorities concerned as also the Central Administrative Tribunal seemed to have overlooked the important and predominant factor that a married daughter would be entitled to regularization only if she is a railway employee as otherwise, she by mere relationship with the retiring official, is not entitled to regularization. Logically it would lead to the conclusion that the presence of a son or sons, able or unable to maintain the parents, would again have to be railway employees before they can oust the claim of the married daughter. We are not for the moment holding that they

would be capable of doing so just because of being males in gender. Only on literal interpretation of the Circular, does such a result follow, undesirable though.

6. A common saying is worth pressing into service to blunt somewhat the Circular. It is

> "A son is a son untill he gets a wife. A daughter is a daughter throughout her life."

7. The retiring official's expectations in old age for care and attention and its measure from one of his children cannot he faulted, or his hopes dampened, by limiting his choice. That would be unfair and unreasonable. If he was only one married daughter, who is a railway employee, and none of his other children are, then his choice is and has to be limited to that railway employee married daughter. He should be in an unfettered position to nominate that daughter for regularization of railway accommodation. It is only in the case of more than one children in Railway service that he may have to exercise a choice and we see no reason why the choice be not left with the retiring official's judgment on the point and be not respected by the railways authorities irrespective of the gender of the child. There is no occasion for the railways to be regulating or bludgeoning the choice in favour of the son when existing and able to maintain his parents. The railway Ministry's Circular in that regard appears thus to us to be wholly unfair, gender biased and unreasonable, liable to be struck down under Article of the Constitution. The eligibility of a married daughter must be placed at par with an unmarried daughter (for she must have been once in that state), so as to claim the benefit of the earlier part of the Circular, referred to in its first paragraph, above-quoted.

8. The Tribunal took the view that when the Circular dated 11.8.1992 had itself not specifically been impugned before it and ex-facie the conditions contained in the said Circular had not been satisfied in the present case, no relief need be given to the appellants. The Tribunal viewed that when there were two major sons of the second appellant, gainfully employed, the fact that they were not railway employees, not residing in Delhi, did not alter the situation that the terms of the Circular dated 11.8.1992 had not been satisfied, under which alone regularization was permissible. As brought about before, the Tribunal overlooked this aspect that the Circular was meant only to enlist the eligibles, who could claim regularization, but the important condition of one being a railway employee had to be satisfied before claim could be laid. In the instant case, the first appellant, on that basis, alone was eligible (subject to gender disqualification going). So the second appellant could exercise his choice/option in her favour to retain the accommodation, obligating the railway authorities to regularise the quarter in her favour, subject of course to the fulfillment of other conditions prescribed. The error being manifest is hereby corrected, holding the first appellant in the facts and circumstances to be the sole eligible for regularization of the quarter.

9. It was also pointed out before us that the Central Administrative Tribunal, Bombay Bench in one of its decisions in OA 314 of 1990 decided on 12.2.1992 (Ann. P-8) relying upon its own decision in Ms. Ambika R. Nair and another vs. Union of India and others (T.A. No. 467 of 1986) in which the earlier Circular of the railway board dated 27.12.1982 had been

questioned, held that the same to be unconstitutional per se as it suffered from the twin vices of gender discrimination and discrimination inter se among women on account of marriage. We have also come to the same view that the instant case is of gender discrimination and therefore should be and is hereby brought in accord with Article 14 of the Constitution. The Circular shall be taken to have been read down the deemed to have been read in this manner from its initiation in favour of the married daughter as one of the eligibles, subject, amongst others, to the twin conditions that she is (i) a railway employee; and (ii) the retiring official has exercised the choice in her favour for regularization. It is so ordered.

10. For the reasons stated above, this appeal is allowed and direction is issued to the respondents to grant regularization of the quarter in favour of the first appellant with effect from the date of retirement of the second appellant and regulate/re-adjust the charges on account of house rent accordingly. There shall be no order as to costs."

4. Their Lordships of Hon'ble Supreme Court in ***Miss C.B. Muthamma, I.F.S.*** versus ***Union of India and others, (1979) 4 SCC 260*** have held that sex-discrimination in service Rules would be unconstitutional unless justified by the peculiarities and nature of the employment. Their Lordships have held as under (paras 4 to 7):-

"What is more manifest as misogynist in the Foreign Service is the persistence of two rules which have been extracted in the petition. Rule 8(2) of the Indian Foreign Service (Conduct & Discipline) Rules, 1961, unblushingly reads:

"Rule 8(2) : In cases where sub-rule (1) does not apply, a woman member of the service shall obtain the per- 671 mission of the Government in writing before her marriage is solemnized. At any time after the marriage, a woman member of the Service may be required to resign from service, if the Government is satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service."

Discrimination against women, in traumatic transparency, is found in this rule. If a woman member shall obtain the permission of government before she marries, the same risk is run by government if a male member contracts a marriage. If the family and domestic commitments of a woman member of the Service is likely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of a male member. In these days of nuclear families, inter-continental marriages and unconventional behaviour, one fails to understand the naked bias against the gentler of the species. Rule 18 of the Indian Foreign Service (Recruitment Cadre, Seniority and Promotion) Rules, 1961, run in the same prejudicial strain:

(1)…………

(2)………….

(3)………….

(4) No married woman shall be entitled as of right to be appointed to the service."

At the first blush this rule is in defiance of Article 16. If a married man has a right, a married woman, other things being equal, stands on no

worse footing. This misogynous posture is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thraldom. Freedom is indivisible, so is Justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-a-vis half of India's humanity, viz., our women, is a sad reflection on the distance between Constitution in the book and Law in Action. And if the Executive as the surrogate of Parliament, makes rules in the teeth of Part III, especially when high political office, even diplomatic assignment has been filled by women, the inference of die-hard allergy to gender parity is inevitable.

We do not mean to universalise or dogmatise that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the 672 handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern. This creed of our Constitution has at last told on our governmental mentation, perhaps partly pressured by the pendency of this very writ petition. In the counter affidavit, it is stated that Rule 18(4) (referred to earlier) has been deleted on November 12, 1973. And, likewise, the Central Government's affidavit avers that Rule 8(2) is on its way to oblivion since its deletion is being gazetted. Better late than never. At any rate, we are relieved of the need to scrutinise or strike down these rules.”

5. Accordingly, the writ petition is allowed. Note appended to Annexure P-1 on the basis of Annexure R-1 dated 22.2.2003, is quashed and set aside. The respondents are directed to interview the petitioners for the post of TGT(Med.), against their respective batch and to issue appointment letters to them with all consequential benefits within six weeks. Pending application(s), if any shall stand disposed of.

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

CWP Nos.8738, 8916, 9002, 9003 of 2014,
1379, 1380 and 1928 of 2015.
Date of decision: 18.05.2015

CWP No.8738 of 2014

Lal Chand Prasad ……Petitioner
Versus
State of H.P. and others ….. Respondents

CWP No.8916 of 2014

Ramesh Kumar Joshi ……Petitioner
Versus
State of H.P. and others ….. Respondents

CWP No.9002 of 2014

Ashwani Kumar Kapila ……Petitioner
Versus
HIMUDA and another ….. Respondents

CWP No.9003 of 2014

Jagat Ram Azad ......Petitioner

Versus

HIMUDA and another ..... Respondents

CWP No.1379 of 2015

Y.S. Thakur ......Petitioner

Versus

State of H.P. and another ..... Respondents

CWP No.1380 of 2015

Lal Chand Chauhan ......Petitioner

Versus

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

CWP No.1928 of 2015

Nirmala ......Petitioner

Versus

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

Constitution of India, 1950- Article 226- State Government had granted extension of one year of service to some of the employees- extension was withdrawn subsequently by the State- held, that policy was promulgated by the State Government in exercise of executive powers and the Policy was withdrawn by exercising the same power and authority – it was specifically mentioned in the policy that it was conditional and could be withdrawn at any stage - once employee accepted the extension in terms of policy, he cannot complain, however, it is directed that any adverse remarks will not affect the petitioners and such remarks are expunged. (Para-5 to 11)

For the petitioner(s): M/s Bipin Negi, J.L. Bhardwaj, Dinesh Bhanot, Archana Dutt, R.S. Gautam and Ajay Vaidya, Advocates.

For the respondents: Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma and Mr.Anup Rattan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G., for the respondents/State.

Mr.Rajnish Maniktala, Advocate, for respondents No.2 and 3 in CWP No.8738 of 2014.

Mr.Bhupender Pathania, Advocate, for respondent No.2 in CWP No.1379 of 2015.

Mr.C.N. Singh, Advocate, for the respondent/HIMUDA.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

These writ petitions are the outcome of a conditional Policy promulgated by the respondent-State, whereby extension of one year in service was granted to some of the employees.

2. The State Government has now withdrawn the said Policy.

3. In some of the writ petitions, the petitioners have questioned the action of the respondent-Authorities, whereby extension in service was not granted in their favour and in some of the writ petitions, the petitioners have challenged the cancellation of the

extension orders, while in some of the writ petitions, the petitioners have challenged the notification whereby the said Policy has been withdrawn.

4. The moot question is – Whether the writ petitions are maintainable?

5. The writ petitions are not maintainable for the reason that the Policy was promulgated by the State Government by exercising executive powers and the Policy has been withdrawn by exercising the same power and authority. Thus, the petitioners are not within their rights to question the action of the State Government of withdrawing the said Policy.

6. A perusal of the Policy notified vide notification, dated 28th May, 2014, clearly shows that the same was conditional and could be withdrawn at any stage. It is apt to reproduce the last clause of the Policy hereunder:

> *"(iv) The extension in service will be subject to satisfaction of the State Government and the State Government may withdraw the extension given at any stage."*

7. While going through the above clause, the State Government was within its power to withdraw the extension at any stage. Once the employee accepted the extension in terms of the said Policy, cannot blow hot and cold in the same breath.

8. The Government has withdrawn the said Policy and also passed the cancellation orders by exercising the power vested in it. Therefore, all the writ petitions have become infructuous.

9. Having said so, the writ petitions are not maintainable.

10. The learned counsel for the petitioners in CWP Nos.1379 and 1380 of 2015 have submitted that while withdrawing/denying the extension granted in favour of the petitioners, the respondents have made some adverse remarks, which are adversely affecting the petitioners. Therefore, it is made clear that any such observation shall not affect the petitioners in any way, and rather, the same are expunged.

11. With these observations, all the writ petitions are disposed of. However, the petitioners are at liberty to seek appropriate remedy, if any, available.

12. Pending CMPs, if any, also stand disposed of.

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

Cr.M.P.(M) No. 395 of 2015 with Cr.M.P.(M) Nos. 396, 397, 398, 399, 400, 401, 402, 403 of 2015.
Reserved on 15.5.2015.
Date of decision: 18.5.2015

1. Cr.M.P.(M) No. 395 of 2015

Nikhil …Petitioner

Versus

State of Himachal Pradesh. …Respondent

2. Cr.M.P.(M) No. 396 of 2015

Vishal …Petitioner

Versus

State of Himachal Pradesh. …Respondent

3. Cr.M.P.(M) No. 397 of 2015
Sandeep alias Kaku ...Petitioner
Versus
State of Himachal Pradesh ...Respondent
4. Cr.M.P.(M) No. 398 of 2015
Sunil ...Petitioner
Versus
State of Himachal Pradesh. ...Respondent
5. Cr.M.P.(M) No. 399 of 2015
Dalip Singh ...Petitioner
Versus
State of Himachal Pradesh. ...Respondent
6. Cr.M.P.(M) No. 400 of 2015
Pardeep Kumar alias Ritu ...Petitioner
Versus
State of Himachal Pradesh. ...Respondent
7. Cr.M.P.(M) No. 401 of 2015
Devinder ...Petitioner
Versus
State of Himachal Pradesh. ...Respondent
8.Cr.M.P.(M) No. 402 of 2015
Prince Mohan ...Petitioner
Versus
State of Himachal Pradesh. ...Respondent
9. Cr.M.P.(M) No. 403 of 2015
Man Singh ...Petitioner
Versus
State of Himachal Pradesh. ...Respondent

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioners for the commission of offences punishable under Sections 147, 148, 149, 302, 323, 354, 364, 436, 452 and 506 IPC- held that in case a person is suspected of a crime of an offence punishable with death or imprisonment for life, there must be ground to negate the existence of reasonable grounds for believing that such a person is guilty of an offence punishable with sentence of death or imprisonment for life - Court must record reasons for prima facie concluding as to how bail was granted- the heinous nature of the crime warrants more caution and there is a greater chance of rejection of bail- mere fact that accused surrendered themselves will not entitle them to bail- investigation is at initial stage- many accused are yet to be arrested- release at this stage would be a serious threat to the peace and tranquility as well as threat to the safety of the complainant and her family members- release at this stage will also affect the investigation- application dismissed. (Para-10 to 22)

Cases referred:

Ash Mohammad Vs. Shiv Raj Singh, (2012) 9 SCC 446
Ram Govind Upadhyay Vs. Sudarshan Singh and others, (2002) 3 SCC 598
Dwarku Devi Vs. State of Himachal Pradesh 2014 (2) Shim. LC 882

For the Petitioner(s): Mr.Ajay Kochar, Advocate with Mr.Vivek Sharma, Advocate.

For the Respondent: Mr.V.K. Verma, Ms.Meenakshi Sharma, Mr.Rupinder Singh, Additional Advocate Generals.
Mr.Munish Dhadwal, HPS, Dy. S.P./SDPO, Chopal and Mr. Gulam Akbar, SI/SHO P.S. Chopal, District Shimla present with records.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The above mentioned nine bail petitions have been filed for grant of regular bail in case FIR No. 14 of 2015, dated 11.3.2015 registered under Sections 147, 148, 149, 302, 323, 354, 364, 436, 452 and 506 IPC at Police Station, Chopal, District Shimla, H.P.

2. In the application(s), it has been pleaded that on 11.3.2015 a marriage ceremony of Manoj Mehta was being solemnized at Village Tuil, Post Office Chambi, Tehsil Chopal, District Shimla, H.P. A few guests had started returning to their respective places after having food. While crossing a village path above the house of one Narvir an altercation took place between the said Narvir and one Bharat Bhushan. Narvir was holding a double barrel gun in his hand and he without any provocation fired at Bharat Bhushan. Bharat Bhushan received gun shot on his stomach and he immediately fell on the field. Narvir threw his gun on the spot and ran downwards. Bharat Bhushan was immediately lifted by the people present on the spot, but he succumbed to the injuries and died. The matter was reported to the police and the police registered a case vide FIR No. 13/2015.

3. When the police reached on the spot with a purpose to investigate the case registered vide FIR No. 13 of 2015, Smt. Virendra Devi, wife of Narvir got recorded a false statement to the police with the purpose to save her husband. She alleged that her husband was assaulted with lethal weapons by a mob.

4. On the basis of the statement of Smt. Virendra Devi, the police has registered a case vide FIR No. 14 of 2015 under Sections 147, 148, 149, 302, 323, 354, 364, 436, 452 and 506 of the Indian Penal Code against 35 persons, who have been falsely named by the aforesaid complainant.

5. It is the case of the bail petitioners that they had been falsely implicated and many of them being innocent have themselves surrendered before the police, who are now in judicial custody. It is claimed that the petitioners have been falsely implicated in the case, which was a counter blast to the FIR No. 13 of 2014 registered with the sole purpose of saving her husband and herself from the clutches of law.

6. The respondent after having put to notice, have produced the records of the investigation and have also filed the status report.

7. The record discloses that on 11.3.2015, complainant got recorded her statement under Section 154 Cr.P.C. to ASI Partap Singh disclosing therein that she along with her husband and three children is residing in village Tuil. As about 3.00 P.M., on 11.3.2015, she along with her husband was present in her house. Meanwhile, a stone was thrown on the head of her husband, upon which, the husband told her that people are pelting stones upon them, upon which the complainant along with children got into the house. Her husband also came inside the house. The people were pelting stones on the roof of the house. They also proclaimed that if Narvir would come out, they will not spare him. Then, the accused Bantu son of Sunder Singh, Dalip son of Jalam Singh, Bhupinder son of Sh. Roop Singh, Pappu, Kaku son of Joban Dass, Rakesh son of Lachhi Ram, Sunil

son of Sant Ram, Manu son of Beer Singh, Gulshan son of Lachhi Ram, Ritu son of Joban Dass, Joban Dass, Sanu son of Bhupinder, Rajinder son of Balak Ram, Dinesh Mehta son of Masat Ram, Manu alias Sachin son of Rajinder entered in the house. After entering the house, Bhupinder son of Sh. Bhoop Singh caught hold the complainant from her hair, Rinku and Kaku caught hold the complainant from her arms. Rajinder, Sunil and Pappu tore the clothes of the complainant and they have also proclaimed to molest her. Ritu was having stone in his hand and he inflicted injuries on the face of the complainant. Those persons were proclaiming to the deceased Narvir that he could save his wife if he can. The husband of the complainant was having a gun in his hand. He tried to save the complainant, then the persons who came there inflicted Darat blow on the head of her husband. They also snatched the gun. In that process, the bullet got fired and hit Bantu son of Sh. Sunder Singh. Thereafter, all those persons dragged the husband of the complainant out of the house along with the person who sustained the bullet injuries. Apart from the above persons, women were also present there. All of them have beaten the husband of the complainant. One Surinder Nepali had inflicted the axe blow on the husband of the complainant. They dragged the husband of the complainant towards the fields. She also got recorded the names of the accused Rama Nand son of Mahi Ram, Bantu son of Rama Nand, Yashu son of Ram Lal, Yashu son of Gian Singh, Man Singh son of Kumbia, Prince Mohan son of Man Singh, Dimple son of Man Singh, Dimple son of Ishri Nand, Virender son of Sh. Roshan Lal, Devinder son of Roshan Lal, Inder Singh son of Sh.Roshan Lal, Pankaj son of Daulat Ram, Sanjay son of Daulat Ram, Ravi son of Mangat Ram, Vishal son of Sandeep, Sandeep son of Sh. Sohan Singh, Nikhil son of Sh. Sandeep, Pinku son of Bhindru, Kundan Singh son of Jalam Singh, Vir Singh son of Sh. Mehar Singh, Sunder Suingh son of Sh. Mehar Singh. She further recorded that when her husband was dragged by the above persons, then after sometime, the accused Daleep, Pradeep, Bhupinder, Surinder Nepali, Sunil, Manoj, Rajinder came to the house of the complainant and told her that they had killed her husband and thrown his dead body in the rivulet. They have also proclaimed that they will burn the complainant as well as her children. They also sprinkled kerosene oil on the grass and wood lying on the rear side of the house and set the same on fire. On all these allegations the complainant prayed that action be taken against them.

8. On the said statement of the complainant, the police machinery swung into motion and registered F.I.R. No. 14/2015 under Sections 302, 147, 148, 149, 452, 364, 436, 354, 323 and 506 of the Indian Penal Code.

9. The police searched for Narvir Thakur on 11/12.3.2015, but he was not found. On 12.3.2015, the spot was videographed. The other codal formalities were completed on the spot. On 12.3.2015, the dead body of Narvir was found in the jungle. The dead body was taken into possession and the same was sent for postmortem examination. On 16.3.2015, the bail applicants have surrendered before the police. They were arrested and were medico legally examined. During the course of investigation on 19.3.2015, the accused Kundan Singh and Dalip Singh made a statement under Section 27 of the Indian Evidence Act and Kundan Singh got recovered the Axe and Dalip Singh got recovered the clothes which he had worn at the time of incident.

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

10. It is well settled that the matters to be considered in an application for bail are:-

(i) whether there is any *prima facie* or reasonable ground to believe that the accused has committed the offence;

(ii) nature and gravity of the charge;
(iii) severity of the punishment in the event of conviction;
(iv) danger of the accused absconding or fleeing, if released on bail;
(v) character, behaviour, means position and standing of the accused;
(vi) likelihood of the offence being repeated;
(vii) reasonable apprehension of the witnesses being tampered with; and
(viii) danger, of course, of justice being thwarted by grant of bail.

11. It is also more then settled that if a person was suspected of a crime of an offence punishable with death or imprisonment for life, then there must explaining grounds which specifically negate the existence of reasonable grounds for believing that such an accused is guilty of an offence punishable with sentence of death or imprisonment for life. The jurisdiction to grant bail must, therefore, be exercised on the basis of well settled principles having regard to the circumstances of each case. The discretion to be exercised in such matters must be exercised in a judicious manner and not as a matter of course. It may not be necessary to do detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, but there is a need to indicate reasons for *prima facie* concluding why bail was being granted, particularly where the accused is charged of having committed a serious offence. The heinous nature of the crime warrants more caution and there is a greater chance of rejection of bail, though, however dependent on the factual matrix of the matter.

12. In ***Ash Mohammad Vs. Shiv Raj Singh,*** *(2012) 9 SCC 446,* the legal position was summed up in the following manner:-

> *"**7**. The centripodal issue that emerges for consideration is: whether the order passed by the High Court is legitimately acceptable and legally sustainable within the ambit and sweep of the principles laid down by this Court for grant of regular bail under Section 439 of the Code?*
>
> ***8**. In Ram Govind Upadhyay V. Sudarshan Singh (2002) 3 SCC 598, it has been opined that the grant of bail though involves exercise of discretionary power of the Court, such exercise of discretion has to be made in a judicious manner and not as a matter of course. The heinous nature of the crime warrants more caution and there is greater chance of rejection of bail, though, however dependent on the factual matrix of the matter. IN the said case the learned Judges referred to the decision in Prahlad Singh Bhati V. NCT, Delhi (2001) 4 SCC 280 and stated as follows: (Ram Govind case (2002) 3 SCC 598, SCC p. 602, para 4)*
>
> > *"(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.*
> >
> > *(b) Resonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.*
> >
> > *(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prma facie satisfaction of the court in support of the charge.*

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

9. *In Chaman Lal V. State of U.P. (2004) 7 SCC 525 this court while dealing with an application for bail has stated that certain factors are to be considered for grant of bail, they are: (SCC p. 525)*

"…(i) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence, (ii) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant, and (iii) prima facie satisfaction of the court in support of the charge."

10. *In Mansroor v. State of U.P. (2009) 14 SCC 286, while giving emphasis to ascribing reasons for granting of bail, however, brief it may be, a two-Judge Bench observed that: (SCC p. 290, para 15)*

"15. There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case."

Bearing in mind the well settled principles of law, I proceed to deal with the merits of the bail applications.

13. Learned counsel for the petitioners has strenuously argued that the present complaint was a counter blast to FIR No. 13 of 2015, which was registered prior in point of time against the deceased husband of the complainant. He further contended that as per the contents of FIR the names of the persons who have entered the house of the complainant are:

(1) Bantu S/o Sunder Singh (Deceased in FIR No. 13/15
(2) Dalip S/o Jalam Singh (bail applicant)
(3) Bhupinder S/o Roop Singh
(4) Pappu S/o Joban Dass
(5) Kaku S/o Joban Dass (Sandeep) bail applicant.
(6) Rakesh S/o Lachhi Ram
(7) Sunil S/o Sant Ram (bail applicant)
(8) Mannu S/o Vir Singh
(9) Gulshan S/o Lachhi Ram
(10) Ritoo S/o Joban Dass (bail applicant)
(11) Joban Dass, S/o Bhupinder
(12) Rajinder S/o Balak Ram
(13) Dinesh Mehta S/o Mast Ram
(14) Mannu @ Sachin S/o Rajinder
(15) Sonu S/o Bhupinder

While the persons who are alleged to be present outside the house are:

(1) Rama Nand S/o Mohi Ram (father of person at Sr. No. 2)
(2) Bantoo S/o Rama Nand
(3) Yashu S/o Rama Nand
(4) Yashu S/o Gian Singh
(5) Maan Singh S/o Kumb Dass (bail applicant)
(6) Prince S/o Maan Singh (bail applicant)
(7) Dimple S/o Maan Singh
(8) Dimple S/o Ishwari Nand
(9) Varinder S/o Roshan Lal
(10) Devinder S/o Roshan Lal (bail applicant)
(11) Inder S/o Roshan Lal
(12) Pankaj S/o Daulat Ram
(13) Sanjay S/o Daulat Ram
(14) Ravi S/o Mangat Ram
(15) Sandeep S/o Sohan Singh
(16) Vishal S/o Sandeep (bail applicant)
(17) Nikhil S/o Sandeep (bail applicant)
(18) Pinku S/o Bhupinder
(19) Kundan S/o Jhalam Singh
(20) Dalip S/o Jalam Singh
(21) Lachi Ram S/o Jhalam Singh
(22) Veer Singh S/o Mehar Singh
(23) Sunder Singh S/o Mehar Singh
(24) Along with all the ladies of the village.

Whereas there is yet a third set of persons, who proclaimed to have killed the husband of the complainant, who are:

(1) Dalip
(2) Pradeep
(3) Bhupinder
(4) Surinder (Gorkha)
(5) Sunil
(6) Manoj
(7) Rajinder

Therefore, each of the accused cannot be made to stand on equal pedestal, as the seriousness of the allegations against one of the accused cannot be taken as a ground to deny bail to all accused against whom allegations may not so serious. It is also contended that one of the accused Mannu @ Sachin S/o Rajinder was not at the scene of the incident on the relevant date and time and was in fact in Shimla, which fact is duly proved from the withdrawal made by him from the ATM. It is also contended that some of the accused have been stated to be present at the spot when admittedly they were accompanying Bantu S/o Sunder Singh (deceased) in FIR No. 13 of 2015 and their names find mentioned in the receipt obtained at the time of handing over of the body. He further argued that the petitioners being innocent had of their own surrendered to the police, which proved their innocence.

14. Before proceeding any further, it would be relevant to note that the learned Sessions Judge has rejected the bail applications of the petitioners on the following grounds:-

(i) Mere fact that the bail applicants are in judicial custody does not mean that the investigation qua them is complete. The investigation was at a crucial juncture where number of accused were yet to be arrested.

(ii) The FIR at the instance of the complainant could not be held to be a counter blast to the accused registered against her deceased husband vide FIR No. 13 of 2015.

(iii) The release of the bail applicants would send wrong signal to the society that after commission of such heinous offence, the applicants are moving freely in the society.

(iv) Since it was a heinous offence, the Court has to maintain a delicate balance between the individual liberty and the larger interest of the society.

(v) In teeth of specific allegation of constitution of unlawful assembly, the petitioner could not be treated to be innocent.

15. The grounds now canvassed before me are virtually the same which had been canvassed before the Learned Sessions Judge. It is not that the accused do not have a right to make successive bail applications, but then the Court entertaining such subsequent applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such case, the Court also has a duty to record what are the sufficient grounds which persuade it to take a different view from the one taken in the earlier application. This was so held by the Hon'ble Supreme Court in ***Ram Govind Upadhyay Vs. Sudarshan Singh and others,*** *(2002) 3 SCC 598*:-

> "**9**. *Undoubtedly, considerations applicable to the grant of bail and considerations for cancellation of such an order of bail are independent and do not overlap each other, but in the event of non- consideration of considerations relevant for the purpose of grant of bail and in the event an earlier order of rejection available on the records, it is a duty incumbent on to the High Court to explicitly state the reasons as to why the sudden departure in the order of grant as against the rejection just about a month ago. The subsequent FIR is on record and incorporated therein are the charges under Sections 323 and 504 IPC in which the charge-sheet have already been issued ---- the Court ought to take note of the facts on record rather than ignoring it. In any event, the discretion to be used shall always have to be strictly in accordance with law and not dehors the same. The High Court thought it fit not to record any reason, far less any cogent reason, as to why there should be a departure when in fact such a petition was dismissed earlier not very long ago. The consideration of the period of one year spent in jail cannot in our view be a relevant consideration in the matter of grant of bail, more so by reason of the fact that the offence charged is that of murder under Section 302 IPC having the punishment of death or life imprisonment --- it is a heinous crime against the society and as such the court ought to be rather circumspect and cautious in its approach in a matter which stands out to be a social crime of very serious nature."*

16. Leaned counsel for the petitioners has vehemently argued that it was not the police who arrested them, but they of their own volition surrendered, which proved their innocence. Mere fact that the petitioners have surrendered of their own volition, to my mind does not in itself lead to an inference, much less proves their innocence. If such a plea were to be accepted, then in all crimes where the accused surrenders, he would plead innocence only on the sheer strength of his having surrendered, and therefore, this plea cannot be countenanced. The petitioners admittedly have been named as accused in the FIR and definite role has been ascribed to them. This is an exceptional case where allegations have been made against a large number of people, who are claiming themselves to be innocent, but then the investigation is only at the stage of infancy and arming the petitioners with bail at this stage would seriously prejudice and hamper the investigation.

17. It is more then settled that at this stage the examination of the evidence is to be avoided, lest it amounts to prejudging and prejudicing either of the parties. However, a prima facie examination of the record does disclose the commission of offence and the involvement of the petitioners in the commission of the same. In so far as the absence of some of the accused at the time of commission of offence or scene of occurrence is concerned, they admittedly are not the bail petitioners and therefore, no finding on this aspect is being recorded lest it prejudices the case of those accused or the investigating agency.

18. The learned counsel for the petitioners would then contend that the Hon'ble Supreme Court has time and again held that the personal liberty of an individual is a Constitutional guarantee and he cannot be deprived of the same. What has probably been overlooked by the learned counsel is the fact that lawful detention cannot be questioned as being violative of Article 21 of the Constitution, since the same is authorized by law.

19. The question of "liberty" has come up for consideration repeatedly before the Hon'ble Supreme Court and the position has been summed up by the Hon'ble Supreme Court in ***Ash Mohammad's*** case (supra), wherein it was held:-

> *"**17**. We are absolutely conscious that liberty of a person should not be lightly dealt with, for deprivation of liberty of a person has immense impact on the mind of a person. Incarceration creates a concavity in the personality of an individual. Sometimes it causes a sense of vacuum. Needless to emphasize, the sacrosanctity of liberty is paramount in a civilized society. However, in a democratic body polity which is wedded to Rule of Law an individual is expected to grow within the social restrictions sanctioned by law. The individual liberty is restricted by larger social interest and its deprivation must have due sanction of law. In an orderly society an individual is expected to live with dignity having respect for law and also giving due respect to others' rights. It is a well accepted principle that the concept of liberty is not in the realm of absolutism but is a restricted one. The cry of the collective for justice, its desire for peace and harmony and its necessity for security cannot be allowed to be trivialized. The life of an individual living in a society governed by Rule of Law has to be regulated and such regulations which are the source in law subserve the social balance and function as a significant instrument for protection of human rights and security of the collective. It is because fundamentally laws are made for their obedience so that every member of the society lives peacefully in a society to achieve his*

individual as well as social interest. That is why Edmond Burke while discussing about liberty opined, "it is regulated freedom".

***18**. It is also to be kept in mind that individual liberty cannot be accentuated to such an extent or elevated to such a high pedestal which would bring in anarchy or disorder in the society. The prospect of greater justice requires that law and order should prevail in a civilized milieu. True it is, there can be no arithmetical formula for fixing the parameters in precise exactitude but the adjudication should express not only application of mind but also exercise of jurisdiction on accepted and established norms. Law and order in a society protect the established precepts and see to it that contagious crimes do not become epidemic. In an organized society the concept of liberty basically requires citizens to be responsible and not to disturb the tranquility and safety which every well-meaning person desires. Not for nothing J. Oerter stated:*

> *"Personal liberty is the right to act without interference within the limits of the law."*

***19**. Thus analyzed, it is clear that though liberty is a greatly cherished value in the life of an individual, it is a controlled and restricted one and no element in the society can act in a manner by consequence of which the life or liberty of others is jeopardized, for the rational collective does not countenance an anti-social or anti-collective act.*

***20**. Having said about the sanctity of liberty and the restrictions imposed by law and the necessity of collective security, we may proceed to state as to what is the connotative concept of bail. In Halsbury's Laws of England 4th Edn., Vol. 11, para 166 it has been stated thus: -*

> *"166. Effect of bail.---The effect of granting bail is not to set the defendant [(accused) at liberty], but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned….."*

***21**. In Sunil Fulchand Shah v. Union of India and others (2000) 3 SCC 409 Dr. A.S. Anand, learned Chief Justice, in his concurring opinion, observed: (SCC pp. 429-30, para 24)*

> *"24…..Bail is well understood in criminal jurisprudence and Chapter 33 of the Code of Criminal Procedure contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word 'bail' is surety."*

> ***22.*** *As grant of bail as a legal phenomenon arises when a crime is committed it is profitable to refer to certain authorities as to how this Court has understood the concept of crime in the context of society. In P.S.R. Sadhanantham v. Arunachalam, (1980) 3 SCC 141, R.S. Pathak, J. (as His Lordship then was), speaking for himself and A.D. Kaushal, J., referred to Mogul SS Co. Ltd. v. McGregor Gow & Co. (1989) 23 QBD 598, and the definition given by Blackstone and opined thus: (SCC p. 150, para 24)*
>
> > *"24…..A crime, therefore, is an act deemed by law to be harmful to society in general, even though its immediate victim is an individual."*
>
> ***23****. In Mrs. Harpreet Kaur Harvinder Singh Bedi v. State of Maharashtra (1992) 2 SCC 177 a two-Judge Bench, though in a different context, has observed: (SCC p. 186, para 24)*
>
> > *"24. Crime is a revolt against the whole society and an attack on the civilization of the day. Order is the basic need of any organized civilized society and any attempt to disturb that order affects the society and the community."*
>
> ***24****. In T.K. Gopal alias Gopi v. State of Karnataka (2000) 6 SCC 168 it has been held that: (SCC p. 176, para 11)*
>
> > *"11….Crime can be defined as an act that subjects the doer to legal punishment. It may also be defined as commission of an act specifically forbidden by law; it may be an offence against morality or social order."*

20. To be fair to the learned counsel for the petitioners, he has canvassed that this Bench in ***Dwarku Devi Vs. State of Himachal Pradesh*** *2014 (2) Shim. LC 882* had granted bail to the petitioners who too were accused of an offence punishable under Sections 302, 376, 202 read with Section 34 IPC and therefore, the petitioners ought to be released.

21. I have gone through the judgment and find that in that case the shield anchor of the prosecution case was the statement of Kumari Anjana Kashyap recorded under Section 161 Cr.P.C. A perusal whereof revealed that nothing contained therein, even remotely suggested, the complexity or involvement of the petitioners therein. While, this is not the fact situation obtaining in the present case, as the petitioners have been specifically named by the complainant in her statement under Section 154 Cr.P.C.

22. The petitioners are accused of serious and heinous offence and their liberty at this stage cannot be placed at a high pedestal, which would bring in anarchy or disorder in the society. Their release at this stage would be a serious threat to the peace and tranquility and above all would be a threat to the safety of the complainant and her family members. Moreover, their release at this stage may hamper the investigation and they may also coerce the witnesses.

In view of the aforesaid discussion, I find no merit in these petitions and the same are accordingly dismissed.

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

Rajan Chopra …Petitioner.
Versus
Uttam Chand …Respondent.

Cr. MMO No. 4018 of 2013
Judgment reserved on: 15.5.2015
Date of decision : May 18, 2015

Code of Criminal Procedure, 1973- Section 482- Matter was compromised before Lok Adalat- petitioner claimed that he had never authorized Advocate to appear before Lok Adalat or to make any statement on his behalf- held, that the proceedings before Lok Adalat cannot be challenged before the High court by filing a petition- statement of facts as to what transpired in the hearing is conclusive regarding the facts so recorded in the judgment and no one can contradict such statement by filing affidavit or by leading evidence- further, petitioner had not placed any material to show that he had taken action against either of the counsel- therefore, in these circumstances, petition dismissed. (Para-4 to 10)

For the Petitioner : Mr. B. S. Attri, Advocate.
For the Respondent : Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This petition under Article 227 of the Constitution of India read with Section 482 Cr.P.C. has been preferred by the petitioner with a prayer to quash and set-aside the order dated 16.3.2013 passed by the Lok Adalat, Kullu whereby his complaint under Section 138 of the Negotiable Instruments Act, (for short 'Act') was compounded.

2. The facts as pleaded are that the petitioner filed a complaint under Section 138 of the Act against the respondent for dishonouring cheque of Rs.50,000/- which was returned with the remarks "funds insufficient". After issuing the statutory notice, the proceedings under Section 138 of the Act were initiated and the respondent came to be convicted and sentenced to undergo simple imprisonment of one year and the petitioner was awarded compensation to the tune of Rs.80,000/-. In default of payment, the respondent was further directed to undergo imprisonment of two months.

3. The respondent preferred an appeal before the learned Sessions Judge, Kullu, and upon the notice, the petitioner engaged the services of Sh. Vivek Thakur, Advocate. The criminal appeal came to be listed before the Lok Adalat on 16.3.2013. The statement of the respondent was recorded and on behalf of the petitioner, the statement of one Sudhir Bhatnagar, Advocate was recorded. On the basis of the statement recorded, the appeal was disposed of as having been compromised and the offence was compounded.

4. Now, the grievance of the petitioner is that he had never engaged/ instructed Sh. Sudhir Bhatnagar, Advocate to appear on his behalf much less make a statement before the Lok Adalat regarding the compromise. The petitioner had never instructed him to receive a sum of Rs.25,000/- as had been reflected in the impugned statement dated 16.3.2013. The petitioner also placed on record the power of attorney executed by him in favour of Sh.Vivek Thakur, Advocate. It is also the grievance of the petitioner that the amount of Rs.25,000/- which was alleged to have been received by Sh. Sudhir Bhatnagar, Advocate

was never remitted to the petitioner and further that the awarded compensation of Rs.80,000/- was never deposited or paid to the petitioner. Lastly, it is contended that the statement as arrived at was not only against the settled position of law but also contrary to the provisions of the Act.

5. On the other hand, Mr. N.K. Bhardwaj, learned counsel for the respondent has vehemently argued that his client cannot be made to suffer for no fault on his part because the respondent had duly paid the settled amount of Rs.25,000/- to the counsel for the petitioner and that fact stands reflected in the order of the Lok Adalat dated 16.3.2013.

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

7. A perusal of the grounds of the petition would show that the petitioner is more aggrieved by the fact that he had not engaged Sh. Sudhir Bhatnagar as his Advocate and had engaged Sh. Vivek Thakur, Avocate and, therefore, Sh. Sudhir Bhatnagar had no authority to appear and then compromise the matter with the opposite party. Admittedly, it was on the representation of Sh. Sudhir Bhatnagar, Advocate that the matter was compromised and in case Sh. Sudhir Bhatnagar, had been authorized then no illegality, impropriety or infirmity can be found with the impugned order.

8. In case the petitioner felt that the happenings in the Court (Lok Adalat) had been wrongly recorded in the judgment, then it was incumbent upon him to report the matter to the members of the Lok Adalat and bring this fact to their notice.

9. The happenings in Court (Lok Adalat) cannot be challenged before this Court as it is settled law that statement of facts as to what transpired in the hearing recorded in the judgment of the Court (Lok Adalat), are conclusive of the facts so stated and none can contradict such statement by affidavit or the evidence. Though, the petitioner would contend that the order is not in conformity with the provisions of the Negotiable Instruments Act and the settled position of law, but then it has to be remembered that in cases of compromise, neither rigors of procedure nor the rigors of law would apply.

10. This Court cannot launch an inquiry as to what transpired before the Lok Adalat. Public Policy and judicial decorum do not permit it. The matters of judicial record in that sense are unquestionable. This Court is not a play field where judicial officers can be roped into settle individual claims. This is simply not done especially when the petitioner himself has failed to place on record any material which may even remotely suggest that he had taken action against either of the counsels.

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

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

CWP No. 8337 of 2014
a/w CWPs No. 8338, 8340,
8341, 8350 to 8353 of 2014
Decided on: 19.05.2015

1. CWP No. 8337 of 2014

Smt. Anu Mahindru …Petitioner.

Versus

State of Himachal Pradesh & others …Respondents.

2. CWP No. 8338 of 2014
Sh. Ajay Lotheta ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.
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3. CWP No. 8340 of 2014
Sh. Rajesh Chauhan ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.
....

4. CWP No. 8341 of 2014
Dr. Shyam Chand ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.
....

5. CWP No. 8350 of 2014
Sh. Balvir Singh ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.
....

6. CWP No. 8351 of 2014
Sh. Akshay Bhardwaj ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.
....

7. CWP No. 8352 of 2014
Sh. Praveen Kumar Sharma ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.
....

8. CWP No. 8353 of 2014
Sh. Sunil Kumar ...Petitioner.
Versus
State of Himachal Pradesh & others ...Respondents.

Constitution of India, 1950- Article 226- It was stated on behalf of petitioner that Writ Petition was disposed of in terms of reply- counsel for the respondent stated that he has no objection for adopting this course- hence, petition disposed of in terms of para-14 (I to IX) of the reply and respondent directed to do needful within 8 weeks. (Para-1 to 4)

For the petitioner(s): Mr. M.L. Sharma, Senior Advocate, with M/s. B.L. Soni & Aman Parth Sharma, Advocates.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondent No. 1.
Mr. J.L. Bhardwaj, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Mr. B.L. Soni, learned counsel for the writ petitioners stated at the Bar that respondents No. 2 and 3 have filed reply in CWP No. 8337 of 2014 and prayed that all these writ petitions may be disposed of in terms of the reply contained in para 14 (I to IX), with all just exceptions, with a direction to respondents No. 2 and 3 to do the needful within four weeks. His statement is taken on record.

2. Mr. J.L. Bhardwaj, learned counsel for respondents No. 2 and 3, stated at the Bar that he is not averse to the said proposition, however, sought three months' time to do the needful. His statement is also taken on record.

3. Keeping in view the submissions made, we deem it proper to dispose of these writ petitions in terms of para 14 (I to IX) (supra) of the reply filed by respondents No. 2 and 3, with all just exceptions, with a direction to do the needful within eight weeks and report compliance before the Registrar (Judicial).

4. The writ petitions are disposed of accordingly alongwith all pending applications. Copy dasti.

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

Vishan Dass & anr. ……Petitioners.
Versus
State of H.P. & ors. …….Respondents.

CWP No. 6604 of 2014.
Reserved on: 12.5.2015.
Decided on: 19.5.2015.

Constitution of India, 1950- Article 226- Respondent No. 6 started work of the widening the road by cutting and excavating the hill rock - it resulted in massive amount of boulders rolling down the hills causing damage to the plants and land of the petitioners- damage assessment report was prepared but compensation was not paid- held, that respondents should have redressed the grievances of the petitioners on their own level and should have paid the compensation- State has vicarious liability to pay compensation for acts of its employees- a person cannot be deprived of the use of his property except in accordance with law- respondent No. 6 directed to pay compensation of Rs.15,00,000/- along with interest @ 9% p.a. from the date of filing of the petition. (Para-7 to 14)

Cases referred:

Collector L.A.C. Mandi vs. Karam Singh and others and connected matters, Latest HLJ 2000 (2) (HP) 694

Nilabati Behera (Smt) alias Lalita Behera (through the Supreme Court Legal Aid Committee) Vs. State of Orissa and others (1993) 2 Supreme Court Cases 746

Chairman, Railway Board and others Vs. Chandrima Das (Mrs) and others (2000) 2 Supreme Court Cases 465

For the petitioners: Mr. P.P.Chauhan, Advocate.
For the respondents: Mr. Shrawan Dogra, AG with Mr. Romesh Verma, Mr. Anup Rattan, Addl. AGs and Mr. J.K Verma, Dy. AG, for respondents No. 1 to 5.
Mr. Ajay Mohan Goel, Advocate for respondents No. 6 & 7.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioners are owner-in-possession of land comprised in Kh. Nos. 619/548/386, measuring 00-44-88 hectares, Bagicha Kullahu Aval, Kh. No. 630/548/384 measuring 00-03-91 hectares, Bagicha Kullahu Aval, Kh. No. 500/386 measuring 00-15-60 hectares, Bagicha Kullahu Aval and Kh. No. 506/469 measuring 00-16-29 hectares, Banjar Kadim situated in Patwar Circle Kothi, Mauja Up-Mohal Ragura, Pargana Shua, Tehsil Kalpa, Distt. Kinnaur, H.P., as per jamabandi for the years 2003-04 and 2008-09 (Annexures P-1 and P-2).

2. The respondent No. 6 has undertaken the widening work of road called Pangi Intake road between 2006 to 2009. The Contractors employed by respondent No. 6 indiscriminately used explosives for cutting and excavation of the hill rock. It resulted in creation of massive amount of huge boulders rolling down the hills causing total damage to the plants and land of the petitioners. The petitioner No. 1 visited the office of respondent No. 6-Corporation on many occasions but his grievance was not redressed. The petitioners made representations vide Annexure P-4, P-4/A and P-5 on 19.5.2009, 27.12.2010 and 29.12.2010, respectively. The petitioners also approached the revenue authorities in order to get the damage assessed by visiting the spot.

3. The Kanungo submitted the report to the Tehsildar on 31.3.2011, stating therein that he has visited the site in the presence of the petitioners and it was found that the land owned by the petitioners stand littered with huge boulders during the construction of road for Kashang Hydro Electricity Project. The muck has also filled the fields of the petitioners. The Tehsildar submitted the report to the SDM concerned on 6.5.2011. The recommendations were also made by the SDM to the Deputy Commissioner vide letter dated 13.5.2011. The matter was taken up with respondent No. 6 vide Annexure P-9 by the Deputy Commissioner. However, the grievance of the petitioners was not redressed. The District Agriculture Officer has submitted the report of assessment for the loss caused to the crop of the petitioners to the tune of Rs. 6,50,000/- vide Annexure P-15 dated 13.9.2012. The damage to the landed property of the petitioners was also assessed, as per Annexure P-16. It was assessed at Rs.27,59,216/-. As a matter of fact, around 500 apple plants and 18 chilgoza trees were damaged, as per the averments made in the petition. The joint inspection was carried out by SDO, HPPWD in-charge with Asstt. Engineer (Dev.)-cum-Member Secretary, Technical Committee for Hydro Electric Projects alongwith Junior Engineer LADC, in the presence of Asstt. Engineer Integrated Kashang Hydro Electric Project and his staff. The demarcation was also undertaken by the Field Kanungo and Patwari of the Patwar Circle Kothi. They prepared the damage report as per HP PWD Schedule or rate 2009. The damage was duly verified by the Revenue Officer Field Kanungo on 1.9.2012. However, the fact of the matter is that the petitioners have not been paid any compensation. Hence this petition.

4. Respondent No. 6, in its reply, has admitted that it has undertaken the widening of the Pangi Intake road and the work has been got executed through the

contractors engaged for the purpose. The land of the petitioners was below the road in question. However, according to the averments contained in the reply only 217 kg. explosive material was used and the reports have been prepared by the revenue agency and District Agriculture Officer, belatedly.

5. It is apparent from the material placed on record that the Kanungo has visited the spot and came to the conclusion that the plants and landed property of the petitioners was damaged as per Annexure P-6. The Tehsildar has submitted the report to the SDM and the SDM has forwarded it to the Deputy Commissioner. The Deputy Commissioner, though has taken up the matter with the authorities of respondent No. 6 but to no avail. The damage to the petitioners' property was separately assessed vide Annexure P-15, by the District Agriculture Officer on 13.9.2012 and by the various functionaries of H.P. PWD, as per Annexure P-16.

6. According to the reply filed by respondent No. 5, the damage was only to the extent of Rs.4,70,976/-, as per Annexure A-II. In Annexure A-II, it has come that the number of plants of apple completely damaged are 176. The age of the trees was 8 years, the basic value has been assessed at Rs.774/- and the income for remaining bearing years at Rs.1902/-. This calculation is not as per the *Harbans Singh* case formula to determine loss and damage caused to the fruit bearing trees. The assessment at Rs.4,70,976/- only is on the very conservative side.

7. Mr. Shrawan Dogra, learned Advocate General for the State and Mr. Ajay Mohan Goel, Advocate for respondents No. 6 & 7, have vehemently argued that the present petition is not maintainable since the disputed questions of fact are involved and the petitioners should be relegated to file Civil Suit. We have gone through the petition and records. We are of the considered view that on the basis of the material placed on record, duly supported by the affidavit, the present petition is maintainable. The petitioners have placed sufficient material on record from the various functionaries of the State that a colossal loss has been caused to the plants and landed property of the petitioners violating Article 300-A of the Constitution of India.

8. The officials of the revenue agency have visited the spot. The District Agriculture officer has also assessed the damage. The Courts have discretion to grant compensation under Article 226 of the Constitution of India for any infringement of Constitutional rights of the citizens. In the instant case, the damage has been caused to the petitioners' landed property and plants. The petitioners are agriculturists. The respondents, at their own level, should have redressed their grievances instead of forcing them to file the present petition.

9. The Division Bench of this Court in ***Collector L.A.C. Mandi vs. Karam Singh and others*** and connected matters, ***Latest HLJ 2000 (2) (HP) 694,*** while relying upon standing order No.28 of Financial Commissioner, has held that when the fruit bearing trees are acquired, trees distinctly and separately can be assessed. The Division Bench has held as under:

> "12. The Director of the Horticulture of the State Government while % assessing the market value of the fruit bearing trees has been adopting the formula of Shri Harbans Singh. The Land Acquisition Collectors of the State have applied and adopted the same formula in awarding compensation of the fruit bearing trees separately. !n these factual position and circumstances, the State of Himachal Pradesh and the Land Acquisition Collector cannot be permitted to urge that they are not obliged to pay the amount of compensation on the basis of the Standing Order No. 28 and Shri Harbans

Singh formula for acquired lands and fruit bearing tees separately. The Land Acquisition Collector is the agent of the State Government who makes offer to the claimants of the amount of compensation awarded in the awards and if the offer so made is not acceptable to the claimants, the claimants are entitled to receive the amount of compensation under protest and make reference petitions under Section 18 of the Act for enhancement of the amount of compensation. Therefore, the State Govt. and the Land Acquisition Collector, who are appellants before us in these appeals cannot be permitted to raise the plea that the awards of the Collector and enhancement of the amount of compensation by the District Judges and Additional District Judges based upon the Government Standing Order, provisions contained in the Himachal Pradesh Land Records Manual and Shri Harbans Singh formula which allow compensation in respect of the land and fruit bearing trees separately. Nothing contrary has been brought to our notice and, therefore we do not think it proper to disturb the awards of the Courts below making enhancement of the amount of compensation for the land and the fruit bearing trees separately. These cases are squarely covered by the ratio of the judgment of the apex Court in State of J&K Vs. Mohammad Mateen Wani and others (Supra) and we do not find any merit in these appeals filed by the State and the Land Acquisition Collector challenging the awards on the grounds of assessment of compensation for lands and fruit trees separately.

According to para 28.9, the competent revenue officer has to assess the income from horticulture on the basis of age and kind of fruit-bearing plants according to formula evolved and approved by the Government of Himachal Pradesh, as per Appendix 'C' of Chapter 28. Appendix 'C' extract is taken from "the evaluation of fruit trees, basic principles and method by Shri Harbans Singh". This is commonly known as Harbans Singh formula. First part of Appendix deals with classification of fruit trees, value of the fuel of timber and final assessment of a tree. The value fuel of timber and final assessment of the tree, is to be made as under:

"Value of the Fuel of Timber:

Most of the fruit trees yield comparatively small quantity of fuel. Only a few fruit trees will have any timber value. However, every tree will turn out some fuel on being cut down. The extent to which a tree will provide fuel will mainly depend upon the glint of the main limbs and size of the tree. Once one knows the estimated quality of fuel wood on a tree at the time of its acquisition, it is easy to calculate its value by taking into consideration the local market rates of such a non dry wood. As regards timber value the work relates to the forest Department.

Final assessment of a Tree:

Most of the factors affecting the value of a tree have been elucidated. It would appear that the value of a tree at a particular time will be the sum total of the basic value, income from the remaining bearing years of the tree and fuel value. There is another a important factor which cannot escape attention. The owner of the tree will get payment for the future bearing capacity of the tree in one lot without incurring any expenditure on his tree, disposal of fruit etc. for the remaining bearing years. Normally he would have got income in yearly installments spread over a long period. There are obvious advantages and benefits in getting the income of all the future years in one lot. Such a compensation will be not justifiable. Keeping all these factors into

consideration it has been felt that the value of the remaining bearing age of a tree may be reduced to 25 per cent. This will do justice to the owner of the tree getting the compensation and the agency paying the price in one lot. The final formula will thus be as follows:

Basic value of the tree + No. of remaining bearing years. x income per year x ¼ + Fuel value

A. Basic value. An apple tree comes into bearing in the 6th year and as such it remains in sapling stage for 5 yeas. (Sl. No. 1 col. 5 of appendix).

(a) Non recurring expenditure: Rs.5.00 (col. 3 of appendix).

(b) Recurring expenditure for 5 years at the rate of Rs.5/- per year: Rs.59.80 (col. 4 of appendix).

Or say total basic value
5+(5x5)= Rs.30.00

B. Assessment of Remaining Bearing Age:

A ten year old apple tree has already completed five years of bearing life. Average bearing life of an apple tree is 45 years (col. 6 of appendix). Having borne fruit for five years, the tree is expected to bear for another 40 years.

A class I apple tree will give an yearly income of Rs. 100 per year (Col. 7 of appendix). Thus the tree will give a total gross income of Rs.4000.00 during the remaining years of its bearing life. Future expenditure and payment in one lot will reduce the amount by one fourth to Rs.1000.00. or in other words (40x10x1/4)=Rs.1000

Fuel Value:

If the spot inspection reveals that the tree has about 5 quintals of wood and the local rate is Rs.5.00 per quintal of wet wood, the fuel value will be Rs.25.00. Total value of a ten year old class I tree will thus be.

Rs.30.00 (Basic value) +Rs.1000
(Income from the remaining bearing years)
+Rs.25.00 (Fuel value)=Rs.1055.00."

Similarly, now, the court has to determine the compensation for fruit bearing and non-fruit bearing trees. It has come in the standing order No. 28 that the value of the house and trees standing in the land has also to be worked out. Initially, these are worked out by the Department concerned. The compensation for fruit-bearing/non-fruit-bearing trees is to be determined as per Harbans Singh Formula and Appendix-C of para 28.9 of the Himachal Pradesh Land Records Manual. The Harbans Singh Formula was prepared in the year 1966, but while allowing the compensation, the inflationary trends have not been taken into consideration. The Division Bench of this Court in 1988 (1) Shim.L.C. 479 has taken into consideration the inflationary trends on the basis of price index while calculating the damage caused to the fruit bearing trees.

10. Their Lordships of the Hon'ble Supreme Court in **Nilabati Behera (Smt) alias Lalita Behera (through the Supreme Court Legal Aid Committee)** Vs. **State of Orissa and others** (1993) 2 Supreme Court Cases 746 have held that award of compensation in proceedings for enforcement of fundamental rights under Articles 32 and 226 is a remedy available in public law. Their Lordships have held as under

"8. The doctor deposed that all the injuries were caused by hard and blunt object; the injuries on the face and left temporal region were post-

mortem while the rest were ante-mortem. The doctor excluded the possibility of the injuries resulting from dragging of the body by a running train and stated that all the ante-mortem injuries could be caused by lathi blows. It was further stated by the doctor that while all the injuries could not be caused in a train accident, it was possible to cause all the injuries by lathi blows. Thus, the medical evidence comprising the testimony of the doctor, who conducted the post-mortem, excludes the possibility of all the injuries to Suman Behera being caused in a train accident while indicating that all of them could result from the merciless beating given to him. The learned Additional Solicitor General placed strong reliance on the written opinion of Dr. K. K. Mishra, Professor & Head of the Department of Forensic Medicine, Medical College, Cuttack, given on 15-2-1988 on a reference made to him wherein he stated on the basis of the documents that the injuries found on the dead body of Suman Behera could have been caused by rolling on the railway track in between the rail and by coming into forceful contact with projecting part of the moving train/engine. While adding that it did not appear to be a case of suicide, he indicated that there was more likelihood of accidental fall on the railway track followed by the running engine/ train. In our view, the opinion of Dr. K. K. Mishra, not examined as a witness, is not of much assistance and does not reduce the weight of the testimony of the doctor who conducted the post-mortem and deposed as a witness during the inquiry. The opinion of Dr. K. K. Mishra is cryptic, based on conjectures for which there is no basis, and says nothing about the injuries being both ante-mortem and post-mortem. We have no hesitation in reaching this conclusion and preferring the testimony of the doctor who conducted the post-mortem.

9. We may also refer to the Report dated 19-12-1988 containing the findings in a joint inquiry conducted by the Executive Magistrate and the Circle Inspector of Police. This Report is stated to have been made under S. 176, Cr. P.C. and was strongly relied on by the learned Additional Solicitor General as a statutory report relating to the cause of death. In the first place, an inquiry under S. 176, Cr. P.C. is contemplated independently by a Magistrate and not jointly with a police officer when the role of the police officer itself is a matter of inquiry. The joint finding recorded is that Suman Behera escaped from police custody at about 3 a.m. on 2-12-1987 and died in a train accident as a result of injuries sustained therein. There was handcuff on the hands of the deceased when his body was found on the railway track with rope around it. It is significant that the Report dated 11-3-1988 of the Regional Forensic Science Laboratory (Annexure 'R-8', at p. 108 of the paperbook) mentions that the two cut ends of the two pieces of rope which were sent for examination do not match with each other in respect of physical appearance. This finding about the rope negatives the respondents' suggestion that Suman Behera managed to escape from police custody by chewing off the rope with which he was tied. It is not necessary for us to refer to the other evidence including the oral evidence adduced during the inquiry, from which the learned District Judge reached the conclusion that it is a case of custodial death and Suman Behera died as a result of the injuries inflicted to him voluntarily while he was in police custody at the Police Outpost Jeraikela. We have reached the same conclusion on a reappraisal of the evidence adduced at the inquiry taking into account the circumstances, which also support that conclusion. This was done in view of the vehemence with which the learned Additional Solicitor General urged that it is not a case of custodial death but of

death of Suman Behera caused by injuries sustained by him in a train accident, after he had managed to escape from police custody by chewing off the rope with which he had been tied for being detained at the Police Outpost. On this conclusion, the question now is of the liability of the respondents for compensation to Suman Behera's mother, the petitioner, for Suman Behera's custodial death.

10. In view of the decisions of this Court in Rudul Sah v. State of Bihar (1983) 3 SCR 508 : (AIR 1983 SC 1086), Sebastian M. Homgray v Union of India (1984) 1 SCR 904 : (AIR 1984 SC 571) and (1984) 3 SCR 544 : (AIR 1984 SC 1026), Bhim Singh v. State of J. & K., 1984 (Supp) SCC 504 and (1985) 4 SCC 677 : (AIR 1986 SC 494), Saheli, A Women's Resources Centre v. Commr. of Police, Delhi Police Headquarters (1990) 1 SCC 422 : (AIR 1990 SC 513) and State of Maharashtra v. Ravikant S. Patil (1991) 2 SCC 373 : (1991 AIR SCW 871) the liability of the State of Orissa in the present case to pay the compensation cannot be doubted and was rightly not disputed by the learned Additional Solicitor General. it would, however, be appropriate to spell out clearly the principle on which the liability of the State arises in such cases for payment of compensation and the distinction between this liability and the liability in private law for payment of compensation in an action on tort. It may be mentioned straightway that award of compensation in a proceeding under Art. 32 by this Court or by the High Court under Art. 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort. This is a distinction between the two remedies to be borne in mind which also indicates the basis on which compensation is awarded in such proceedings. We shall now refer to the earlier decisions of this Court as well as some other decisions before further discussion of this principle.

16. Lord Hailsham while dissenting from the majority regarding the liability for compensation in that case, concurred with the majority opinion on this principle and stated at page 687, thus :-

> *"............. I am simply saying that, on the view I take, the expression 'redress' in sub-s. (1) of S. 6 and the expression 'enforcement' in sub-s. (2), 'although capable of embracing damages where damages are available as part of the legal consequences of contravention, do not confer and are not in the context capable of being construed so as to confer a right of damages where they have not hitherto been available, in this case against the state for the judicial errors of a judge ...."*
>
> *Thus, on this principle, the view was unanimous, that enforcement of the constitutional right and grant of redress embraces award of compensation as part of the legal consequences of its contravention.*

17. It follows that a claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to the remedy private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable,

and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Arts. 32 and 226 of the Constitution. This is what was indicated in Rudul Sah (AIR 1983 SC 1086) and is the basis of the subsequent decisions in which compensation was awarded under Arts. 32 and 226 of the Constitution, for contravention of fundamental rights.

22. The above discussion indicates the principle on which the Court's power under Arts. 32 and 226 of the Constitution is exercised to award monetary compensation for contravention of a fundamental right. This was indicated in Rudul Sah (AIR 1983 SC 1086) and certain further observations therein adverted to earlier, which may tend to minimise the effect of the principle indicated therein. do not really detract from that principle. This is how the decisions of this Court in Rudul Sah and others in that line have to be understood and Kasturilal (AIR 1965 SC 1039) distinguished therefrom. We have considered this question at some length in view of the doubt raised, at times, about the propriety of awarding compensation in such proceedings, instead of directing the claimant to resort to the ordinary process of recovery of damages by recourse to an action in tort. In the present case, on the finding reached, it is a clear case for award of compensation to the petitioner for the custodial death of her son."

11. Their Lordships of the Hon'ble Supreme Court in **Chairman, Railway Board and others** Vs. **Chandrima Das (Mrs) and others** (2000) 2 Supreme Court Cases 465 have held that the State has vicarious liability to pay compensation for tortuous acts of its employees. Their Lordships have further held that the doctrine of sovereign power not applicable in welfare State where functions of the State now extend to various fields which cannot be strictly related to sovereign power. Their Lordships have held as under:

"9. Various aspects of the Public Law field were considered. It was found that though initially a petition under Article 226 of the Constitution relating to contractual matters was held not to lie, the law underwent a change by subsequent decisions and it was noticed that even though the petition may relate essentially to a contractual matter, it would still be amenable to the writ jurisdiction of the High Court under Article 226. The Public Law remedies have also been extended to the realm of tort. This Court, in its various decisions, has entertained petitions under Article 32 of the Constitution on a number of occasions and has awarded compensation to the petitioners who had suffered personal injuries at the hands of the officers of the Govt. The causing of injuries, which amounted to tortious act, was compensated by this Court in many of its decisions beginning from Rudul Sah v. State of Bihar, (1983) 3 SCR 508 : (1983) 4 SCC 141 : AIR 1983 SC 1086. [See also Bhim Singh v. State of Jammu and Kashmir, (1985) 4 SCC 577 : AIR 1986 SC 494; People's Union for Democratic Rights v. State of Bihar, (1987) 1 SCR 631 : (1987) 1 SCC 265 : AIR 1987 SC 355; People's Union for Democratic Rights Thru. Its Secy. v. Police Commissioner, Delhi Police Headquarters, (1989) 4 SCC 730 : 1989 (1) SCALE 598; Saheli, A Women's Resources Centre v. Commissioner of Police, Delhi,

(1990) 1 SCC 422 : 1989 Supp (2) SCR 488 : AIR 1990 SC 513; Arvinder Singh Bagga v. State of U. P., (1994) 6 SCC 565 : AIR 1995 SC 117 : (1994 AIR SCW 4148); P. Rathinam v. Union of India, 1989 Supp (2) SCC 716; In Re: Death of Sawinder Singh Grower, (1995) Supp (4) SCC 450 : (1992) 6 JT (SC) 271 : 1992 (3) SCALE 34 (2); Inder Singh v. State of Punjab, (1995) 3 SCC 702 : AIR 1995 SC 1949 : (1995 AIR SCW 3037); D. K. Basu v. State of West Bengal, (1997) 1 SCC 416 : AIR 1997 SC 610 : (1997 AIR SCW 233)].

11. Having regard to what has been stated above, the contention that Smt. Hanuffa Khatoon should have approached the Civil Court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution, cannot be accepted. Where public functionaries are involved and the matter relates to the violation of Fundamental Rights or the enforcement of public duties, the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law.

12. In the instant case, it is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved. Smt. Hanuffa Khatoon was a victim of rape. This Court in Bodhisattwa v. Ms. Subhra Chakraborty, (1996) 1 SCC 490 : (1996 AIR SCW 325 : AIR 1996 SC 922) has held "rape" as an offence which is violative of the Fundamental Right of a person guaranteed under Article 21 of the Constitution. The Court observed as under (Para 10 of AIR):

"Rape is a crime not only against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. Rape is therefore the most hated crime. It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21."

14. The main contention of the learned counsel for the appellants is that Mrs. Chandrima Das was only a practising advocate of the Calcutta High Court and was, in no way, connected or related to the victim, Smt. Hanuffa Khatoon and, therefore, she could not have filed a petition under Article 226 for damages or compensation being awarded to Smt. Hanuffa Khatoon on account of the rape committed on her. This contention is based on a misconception. Learned counsel for the appellants is under the impression that the petition filed before the Calcutta High Court was only a petition for damages or compensation for Smt. Hanuffa Khatoon. As a matter of fact, the reliefs which were claimed in the petition included the relief for compensation. But many other reliefs as, for example, relief for eradicating anti-social and criminal activities of various kinds at Howrah Railway Station were also claimed. The true nature of the petition, therefore, was that of a petition filed in public interest.

15. The existence of a legal right, no doubt, is the foundation for a petition under Article 226 and a bare interest, may be of a minimum nature, may give locus standi to a person to file a Writ Petition, but the concept of "Locus Standi" has undergone a sea change, as we shall presently notice. In Dr. Satyanarayana Sinha v. S. Lal and Co. Pvt. Ltd., AIR 1973 SC 2720 : (1973) 2 SCC 696, it was held that the foundation for exercising jurisdiction under Article 32 or Article 226 is ordinarily the personal or individual right of

the petitioner himself. In writs like Habeas Corpus and Quo Warranto, the rule has been relaxed and modified.

17. In the context of Public Interest Litigation, however, the Court in its various judgments has given widest amplitude and meaning to the concept of locus standi. In People's Union for Democratic Rights v. Union of India, AIR 1982 SC 1473 : (1982) 3 SCC 235, it was laid down that Public Interest Litigation could be initiated not only by filing formal petitions in the High Court but even by sending letters and telegrams so as to provide easy access to Court. (See also Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802 : 1984 (2) SCR 87 : (1984) 3 SCC 161 and State of Himachal Pradesh v. Student's Parent Medical College, Shimla, AIR 1985 SC 910 : (1985) 3 SCC 169 on the right to approach the Court in the realm of Public Interest Litigation). In Bangalore Medical Trust v. B. S. Muddappa, AIR 1991 SC 1902 : 1991 (3) SCR 102 : (1991) 4 SCC 54 : (1991 AIR SCW 2082), the Court held that the restricted meaning of aggrieved person and narrow outlook of specific injury has yielded in favour of a broad and wide construction in the wake of Public Interest Litigation. The Court further observed that public-spirited citizens having faith in the rule of law are rendering great social and legal service by espousing causes of public nature. They cannot be ignored or overlooked on technical or conservative yardstick of the rule of locus standi or absence of personal loss or injury. There has, thus, been a spectacular expansion of the concept of locus standi. The concept is much wider and it takes in its stride anyone who is not a mere "busy-body".

18. Having regard to the nature of the petition filed by respondent Mrs. Chandrima Das and the relief claimed therein it cannot be doubted that this petition was filed in public interest which could legally be filed by the respondent and the argument that she; could not file that petition as there was nothing personal to her involved in that petition must be rejected."

12. The petitioners have also served legal notice upon the respondents and the reply thereof is Annexure P-28. The averments contained in the reply to the legal notice are contrary to the material placed on record by the petitioners. The respondent No. 6-Corporation, is vicariously liable for the acts of the contractor, who has undertaken the widening of the road and resultantly causing loss to the petitioners' property.

13. The petitioners have constitutional/human right to enjoy and protect their properties. A person cannot be deprived of his property save and except in accordance with law. The property of the petitioners has been damaged by the contractor(s) employed on behalf of respondent No. 6. The value of the trees was required to be calculated on the basis of the Harbans Singh, after taking into consideration inflationary trends. Thus, the value of 176 trees of apple and 18 chilgoza trees, which are completely damaged and remaining trees which are partially damaged due to debris, would not be less than rupees twelve lacs. Since there are huge boulders lying on the land of the petitioners, the same are required to be removed and it would at least incur expenditure not less than rupees three lacs. The Court while assessing the damage to completely damaged trees and remaining trees which are partially damaged due to debris, has also relied upon Annexures P-15 and P-16.

14. Accordingly, the Writ Petition is allowed. Respondent No. 6 is directed to pay compensation to the petitioners to the tune of Rs. 15,00,000/- (Fifteen lacs), with interest @ 9% per annum, from the date of filing of the petition, within a period of six weeks from today. Pending application(s), if any, shall stand disposed of.

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

HPSIDC Employees Union ……Petitioners.
Versus
State of H.P. & anr. …..Respondents.

CWP No. 134 of 2009.
Reserved on: 13.5.2015.
Decided on: 20.5.2015.

Constitution of India, 1950- Article 226- Government of India had introduced Voluntary Retirement Scheme for the employees of the public enterprises- scheme was adopted by State Government as well as by HPSIDC- however, scheme was subsequently modified and instead of 1½ months' emoluments for each completed year, one month's emoluments were proposed to be given- the representation was made to the State Government which was rejected without a speaking order- held, that fixation of the date was arbitrary and had no nexus sought to be achieved by retirement scheme- all the employees who were in the service of State Government and Corporation were given the benefit - modified order is quashed and set aside- Corporation directed to grant ex-gratia payment equivalent to 1½ months emoluments as per original scheme. (Para-5 to 9)

Case referred:
D.S. Nakara & Others vs Union Of India, AIR 1983 SC 130

For the petitioners: Mr. Ramakant Sharma, Advocate.
For the respondents: Mr. Parmod Thakur, Addl. AG with Mr. Neeraj Sharma, Dy. AG for respondent No. 1.
Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashistha, Advocate, for respondent N o. 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner is a registered Union of the employees of the Himachal Pradesh State Industrial Development Corporation Ltd. (hereinafter referred to as the respondent-Corporation, in short). The Union of India has introduced Voluntary Retirement Scheme (VRS) for employees of the public enterprises as per memorandum dated 5.10.1988. The State Government also approved the scheme for implementation of all public sector undertakings in Himachal Pradesh. The proposal was placed before the Board of Directors of the respondent-Corporation. The same was adopted by the respondent-Corporation vide communication dated 3.2.1993 (Annexure P-2). Para (d) of the same reads as under:

> "(d) In addition, an employee whose request for Voluntary Retirement is accepted would also be entitled to an ex-gratia payment equivalent to 1.5 months' emoluments (pay + DA) for each completed year of service of the monthly emoluments at the time of retirement multiplied by the balance months of service left before normal date of retirement, whichever is less. For example an employee, who has put in 24 years of service and has got only one year of service for normal retirement will get ex-gratia payment of only 12 months emoluments and not 36 months' emoluments."

2. The Scheme was also introduced by the Corporation in the year 2000. Thereafter, vide Circular dated 6.1.2005, Scheme was again introduced. This Scheme was further re-introduced vide Annexure P-7 dated 17.3.2007. The fact of the matter is that the respondent-Corporation vide Annexure P-9 has amended the Voluntary Retirement Scheme (VRS) by substituting following clause (d):

> "(d) In addition, an employee whose request for Voluntary Retirement is accepted would also be entitled to an ex-gratia payment equivalent to one month's emoluments (Basic pay + DA) for each completed year of service or the monthly emolument at the time of retirement multiplied by the balance months of service left before normal date of retirement, whichever is less. For example an employee, who has put in 24 years of service and has got only one year of service for normal retirement will get ex-gratia payment of only 12 months emoluments and not 24 months' emoluments."

3. This has been done as per the orders of the Principal Secretary (Fin.) to the Government of H.P., dated 2.9.2008. The petitioner-Union made a representation on 11.11.2008 before the Board of Directors of the respondent-Corporation. It was referred to the State Government on 7.1.2009. The same has been rejected vide Annexure R-2/II on 22.1.2009 by retaining amended clause (d).

4. The Voluntary Retirement Scheme (VRS) was framed by the Government of India vide Office memorandum dated 5.10.1988 for the employees of the public enterprises. The same has been approved by the State Government, as noticed hereinabove, and adopted by the respondent-Corporation, w.e.f. 11.1.1993. It was re-introduced in the year 2000, 2005 and 2007.

5. It is evident from clause (d) of the Scheme, as it existed before 2008, that the ex-gratia payment was equivalent to 1 ½ months' emoluments (pay + DA) for each completed year of service or the monthly emolument at the time of retirement multiplied by the balance months of service left before normal date of retirement, whichever is less. The respondent-Corporation has accorded benefit of granting the ex-gratia payment equivalent to 1 ½ months' emoluments (pay + DA) for each completed year of service or the monthly emolument at the time of retirement multiplied by the balance months of service left before normal date of retirement to those employees who have sought voluntary retirement under Voluntarily Retirement Scheme. However, vide letter dated 2.9.2008 Annexure P-9, the ex-gratia payment has been reduced equivalent to one month's emoluments (pay + DA) for each completed year of service. This has been introduced as per the Circular dated 2.1.2009. All the employees who were in the service of respondent-Corporation have been given the benefit of ex-gratia payment equivalent to 1 ½ months' emoluments but the employees thereafter would only be paid ex-gratia payment equivalent to one month's emoluments (pay + DA), in case they seek voluntary retirement.

6. The purpose of Voluntary Retirement Scheme (VRS) is to offer golden hand shake and should have been applied uniformly to all the employees instead of creating artificial cutoff date i.e. 27.1.2009, whereby the benefits have been drastically reduced from 1 ½ months to 1 month for ex-gratia payment at the time of retirement. The cut-off date i.e. 2.9.2008 and 27.1.2009, has no nexus with the object sought to be achieved. All the employees of the respondent-Corporation constitute a homogeneous class. The employees who have sought voluntary retirement before the cut-off date, as per letter dated 2.9.2008 and 27.1.2009 were released ex-gratia payment equivalent to 1 ½ months' emoluments and employees who would seek voluntary retirement after these dates, would only get the benefit of ex-gratia payment equivalent to 1 month's emoluments (pay + DA).

7. The petitioners have made a detailed representation for not altering the ex-gratia payment from 1 ½ months to one month. The Board of Directors of the respondent-Corporation have referred the matter to the State Government on 26.12.2008. However, surprisingly, the same has been rejected on 27.1.2009 without a speaking order. The petitioners have suffered civil and evil consequences on the basis of alteration of para (d), whereby the ex-gratia payment has been reduced. The representation ought to have been decided by passing a speaking/detailed order, after taking into consideration all the pleas raised by the employees.

8. Their lordships of the Hon'ble Supreme Court in the case of ***D.S. Nakara & Others vs Union Of India,*** reported in ***AIR 1983 SC 130,*** have held that the date must have nexus with the object sought to be achieved and the State Government could not pick up the date arbitrarily. It has been held as follows:

> 51 We repeatedly posed a question: what are those relevant and valid considerations and waited for the answer in vain. We say so because in the written submissions filed on behalf of the Union of India, we find not a single valid or relevant consideration much less any consideration relevant to selection of eligibility criteria. The tenor is "we select the date and it is unquestionable; either take it or leave it as a whole". The only submission was that the date is not severable and some submissions in support of it.
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> 52. Having examined the matter on principle, let us turn to some precedents. In D. R. Nim v. Union of India, (1967) 2 SCR 325 : (AIR 1967 SC 1301) the appellant questioned his seniority which was to be determined in accordance with the provisions contained in Indian Police Service (Regulation of Seniority) Rules, 1954. These rules required first to ascertain the year of allotment of the person concerned for the determination of his seniority. In doing so the Government of India directed that. officers promoted to the Indian Police Service should be allowed the benefit of their continuous officiation with effect only from 19th May, 1951. The appellant challenged the order because the period of officiation from June, 1947 to May, 1951 was excluded for the purpose of fixation of his seniority. His grievance was that there was no rationale behind selecting this date. After taking into consideration affidavit in opposition, this Court held as under:
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> "It would be noticed that the date, May 19, 1951, to begin with had nothing to do with the finalisation of the Gradation List of the Indian Police Service because it was a date which had reference to the finalisation of the gradation list for the IAS Further this date does not seem to have much relevance to the question of avoiding the anomalous position mentioned in para 9 of the affidavit, reproduced above. This date was apparently chosen for the IAS because on this date the Gradation List for all the earlier persons required to the service had been finalised and issued in a somewhat stable stage. But why should this date be applied to the Indian Police Service has not been adequately explained. Mr, B. R. L. Iyengar. the learned counsel for the appellant, strongly urges that selection of May 19, 1951, as a crucial date for classifying people is arbitrary and irrational. We agree with him in this respect. It further appears from the affidavit of Mr. D. K. Guha, Deputy Secretary to the Government of India, Ministry of Home Affairs, dated Dec. 9, 1966, that "the Government of India have recently decided in consultation with the Ministry of Law that the Ministry of Home Affairs Letter No. 2/32/51-AIS, dated the 25th Aug., 1955, will not be applicable to those SCS/SPS Officers, who were appointed to IAS/IPS prior to the promulgation

of IAS/JPS (Regulation of Seniority) Rules, 1954, and the date of the issue of the above letter if their earlier continuous officiation was approved by the Ministry of Home Affairs and Union Public Service Commission". It further appears that 'in the case of Shri C. S. Prasad also, an IPS Officer of Bihar, a decision has been taken to give the benefit of full continuous officiation in senior posts and to revise his year of allotment accordingly'. But, it is stated that "as Shri Nim was appointed to IPS on the 22nd Oct., 1955, i.e. after the promulgation of IPS (Regulation of Seniority) Rules, 1954 and after the issue of letter dated 25-8-1955, his case does not fall even under this category". The above statement of the case of the Government further shows that the date, May 19, 1951 was an artificial and arbitrary date having nothing to do with the application of the first and the second provisos to Rule 3 (3). It appears to us that under the second proviso to Rule 3 (3) the period of officiation of a particular officer has to be considered and approved or disapproved by the Central Government in consulation with the Commission considering all the relevant facts. The Central Government pick out a date from a hat --- and that is what it seems to have done in this case -- and say that a period prior to that date would not be deemed to be approved by the Central Government within the second proviso."

57. The learned Attorney General next referred to D.C. Gouse and Co. etc. v. State of Kerala & Anr. etc. (1) This Court while repelling the contention that the choice of April 1, 1973 as the date of imposition of the building tax is discriminatory with reference to Art. 14 of the Constitution, approved the ratio in the case of M/s. Parameswaran Match Works etc. supra. Even while reaching this conclusion the Court observed that it is not shown how it could be said that the date (April 1, 1973) for the levy of the tax was wide of the reasonable mark. What appealed to the Court was that earlier an attempt was made to impose the building tax with effect from March 2, 1961 under the Kerala Building Tax Act, 1961 but the Act was finally struck down as unconstitutional by this Court as per its decision dated August 13, 1968. While delivering the budget speech, at the time of introduction of the 1970-71 budget, the intention to introduce a fresh Bill for the levy of tax was made clear. The Bill was published in June 73 in which it was made clear that the Act would be brought into force from April 1, 1970. After recalling the various stages through which the Bill passed before being enacted as Act, this Court held that the choice of date April 1, 1973 was not wide of the reasonable mark. The decision proceeds on the facts of the case. But the principle that when a certain date or eligibility criteria is selected with reference to legislative or executive measure which has the pernicious tendency of dividing an otherwise homogeneous class and the choice of beneficiaries of the legislative/executive action becomes selective, the division or classification made by choice of date or eligibility criteria must have some relation to the objects sought to be achieved. And apart from the first test that the division must be referable to some rational principle, if the choice of the date or classification is wholly unrelated to the objects sought to be achieved, it cannot be upheld on the specious plea that was the choice of the Legislature."

9. Accordingly, the Writ petition is allowed. Newly substituted clause (d) of Annexure P-9 is struck down. Annexure R-2/II dated 27.1.2009 is quashed and set aside. It is declared that the employees of the respondent-Corporation shall get ex-gratia payment

equivalent to 1 ½ months' emoluments (pay + DA) for each completed year of service, as per memorandum(s) P-2 dated 3.2.1993, P5 dated 6.1.2005 and P-7 dated 17.3.2007 at the time of their retirement under Voluntary Retirement Scheme. Pending application(s), if any, shall stand disposed of.

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

Kuldeep Thakur son of Shri Ludar Chand .....Appellant.
Vs.
State of Himachal Pradesh. ....Respondent.

Cr.Appeal No. 01 of 2013
Judgment reserved on: 23rd April, 2015
Date of Judgment: May 20, 2015

Indian Penal Code, 1860- Section 376- Prosecutrix, aged 14½ years old, was taken by accused 'K' to go to Rivalsar – she was taken to the house of co-accused 'H' where she was raped – prosecutrix supported the prosecution version – her testimony is trustworthy, reliable and confidence inspiring - same is corroborated by medical evidence- held, that testimony of prosecutrix is sufficient to convict a person if the same is free from blemish. (Para-11)

Indian Penal Code, 1860- Section 363- Prosecutrix, aged 14½ years old, did not return from the school- she was persuaded by accused 'K' to go to Rivalsar- she was taken to the house of co-accused 'H'- father of the prosecutrix specifically stated that prosecutrix had gone to school and had not returned - there was no evidence that consent of the father was taken - since prosecutrix was minor, therefore, her consent was immaterial- held, that in these circumstances, accused was rightly held liable for the commission of offence punishable under Section 363 of I.P.C. (Para-12)

Indian Evidence Act, 1872- Section 35- Birth certificate is issued under Registration of Birth and Death Act- similarly, family register is prepared by the Public Officer in discharge of his official duty- therefore, both these documents are admissible under Section 35 of Indian Evidence Act. (Para-13)

Cases referred:

Bodhisattwa Gautam vs. Miss Subhra Chakraborty, AIR 1996 SC 922
Mohd. Alam vs. State (NCT of Delhi), 2007 Cri..L.J. 803 (Delhi)
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 of H.P. vs. Lekh Raj and another, (2000)1 SCC 247
Madan Gopal Kakkad Vs. Naval Dubey and another, (1992) 3 SCC 204
State of Maharashtra vs. Chander Prakash, (1990)1 SCC 550
State of U.P. vs. Chotte Lal, (2011)2 SCC 550
Harpal Singh vs. State of H.P. (Full Bench), AIR 1981 SC 361
Vidyadhar vs. Mohan, ILR 1978 HP 174
Murugan @ Settu vs. State of Tamil Nadu, AIR 2011 SC 1691
Chitru Devi vs. Ram Dai, AIR 2002 HP 59

For the Appellant: Mr. Chaman Negi, Advocate
For the Respondent: Mr. J.S. Rana Assistant Advocate General.

The following judgment of the Court was delivered:

P.S.Rana Judge

Present appeal is filed against the judgment and sentence passed by learned Sessions Judge Mandi in Sessions Trial No 38 of 2011 titled State vs. Kuldeep Thakur and another decided on dated 28.6.2012 and quantum of sentence announced on dated 29.6.2012.

Brief facts of the case as alleged by the prosecution:-

2. It is alleged by the prosecution that on dated 2.2.2011 prosecutrix left her home in order to attend Government Senior Secondary School Chowk where she was studying. It is alleged by prosecution that age of prosecutrix was 14½ years. It is alleged by prosecution that prosecutrix did not come back and her father inquired about prosecutrix from her relatives. It is also alleged by prosecution that one Ishwar Dass noticed the prosecutrix in Baba bus which was enrouted to Kullu and on dated 4.2.2011 prosecutrix was found at Bhunter along with co-accused Kuldeep and thereafter prosecutrix and co-accused Kuldeep were brought to police station Sarkaghat and FIR Ext.PW3/A was registered. It is alleged by prosecution that on dated 2.2.2011 co-accused Kuldeep met the prosecutrix and pursuaded the minor prosecutrix to go to Rewalsar and also pursuaded the minor prosecutrix to throw away her school bag. It is alleged by prosecution that thereafter prosecutrix accompanied co-accused Kuldeep to Rewalsar in private bus namely Baba bus service and thereafter accused took the prosecutrix to Kullu. It is alleged by prosecution that co-accused Kuldeep expressed his desire to marry the prosecutrix and took the minor prosecutrix to village Kharahal in the house of co-accused Hari Singh. It is alleged by prosecution that co-accused Kuldeep committed forcible sexual intercourse with minor prosecutrix in the house of co-accused Hari Singh in the night of dated 3.2.2011. It is alleged by prosecution that Investigating Officer moved application Ext.PW9/A and requested the medical officer CHC Sarkaghat to conduct medical examination of prosecutrix. It is alleged by prosecution that no lady doctor was available in hospital CHC Sarkaghat and thereafter minor prosecutrix was forwarded to Zonal Hospital Mandi where PW9 Dr. Renu conducted the medical examination of minor prosecutrix and medical officer opined that age of prosecutrix was between 14 to 16½ years. It is alleged by prosecution that accused was also medically examined and MLC of accused Ext.PA was obtained. It is alleged by prosecution that birth certificate of prosecutrix from family register was also obtained. It is alleged by prosecution that date of birth of minor prosecutrix is dated 11.12.1996 and birth certificate of prosecutrix is Ext.PW1/C. It is alleged by prosecution that father of prosecutrix produced the photocopy of middle standard certificate of minor prosecutrix which was took into possession vide seizure memo Ext.PW2/A. It is alleged by prosecution that attendance certificate of minor prosecutrix from school was obtained and copies of school admission and withdrawal certificate were also obtained. It is alleged by prosecution that spot map Ext.PW11/C was prepared and room of co-accused Hari Singh where co-accused Kuldeep committed forcible sexual intercourse upon minor prosecutrix was located and prosecutrix identified blanket Ext.P2 which was took into possession vide seizure memo Ext.PW11/D. It is alleged by prosecution that case property was deposited in malkhana and entry was recorded in malkhana register at Sr. No. 1225/11 and abstract of malkhana register is Ext.PW5/A. It is alleged by prosecution that case property was sent to FSL Junga through PW3 Nanak Chand vide RC No. 49 of 2011 and further alleged that DNA profiling was conducted and report was obtained.

3. Learned trial Court on dated 7.9.2011 framed the charge against co-accused Kuldeep under Sections 363, 366-A and 376 IPC and learned trial Court framed the charge

against co-accused Hari Singh under Section 368 IPC. Both accused persons did not plead guilty and claimed trial.

4. Prosecution examined as many as twelve witnesses in support of its case and accused persons examined one witness as defence witness:-

Sr.No.	Name of Witness
PW1	Jia Lal
PW2	Sita Devi
PW3	Ramjit Singh
PW4	HC Nanak Chand
PW5	HC Dharam Singh
PW6	Pinki Devi
PW7	Dev Raj
PW8	Pyar Chand
PW9	Dr. Renu Behl
PW10	Prosecutrix
PW11	ASI Vikram Singh
DW12	Ayesha Patial
DW1	Ludar

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

Sr.No.	Description.
Ext.PW1/A	Application.
Ext.PW1/B	Copy of family register
Ext.PW1/C	Birth certificate of prosecutrix
Ext.PW2/A	Memo
Ext.PA	MLC of co-accused Kuldeep Singh
Ext.PW3/A	FIR
Ext.PW4/A	Receipt
Ext.PW4/B	Copy of RC.
Ext.PW5/A	Extract of malkhana register
Ext.PW6/A	Application
Ext.PW6/B	Copy of attendance register
Ext.PW7/A	Certificate
Ext.PW9/A	Application
Ext.PW9/B	Endorsement
Ext.PW9/C	MLC of prosecutrix
Ext.PW9/D	Noting
Ext.PW11/A	Application
Ext.PW11/B	Certificate
Ext.PW11/C	Spot map
Ext.PW11/D	Memo
Ext.PW11/E	Copy of forwarding note
Ext.PW11/F	Identification form of prosecutrix
Ext.PW11/G	Copy of forwarding note

Ext.PW11/H	Identification form of co-accused Kuldeep Singh
Ext.P1	Blanket
Ext.PW11/J	Seal impression
Ext.PW12/A	Report
Ext.PW12/B	FTA card of co-accused Kuldeep Singh
Ext.PW12/C	FTA card of minor prosecutrix
Ext.DA	Copy of family register.

5. Learned trial Court convicted appellant Kuldeep Singh under Sections 363 and 376 IPC and acquitted him under Section 366-A IPC. Learned trial Court acquitted co-accused Hari Singh qua criminal offence punishable under Section 368 IPC. Learned trial Court awarded rigorous imprisonment for a period of three years and fine to the tune of Rs.10,000/- (Rupees ten thousand only) for the offence punishable under Section 363 IPC and further directed that in default of payment of fine convicted shall further undergo simple imprisonment for six months. Learned trial Court also awarded rigorous imprisonment for a period of seven years and fine to the tune of Rs.10,000/- (Rupees ten thousand only) for offence punishable under Section 376 IPC and further directed that in default of payment of fine convicted shall further undergo simple imprisonment for a period of six months.

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court appellant filed present appeal. Court heard learned Advocate appearing on behalf of the appellant and learned Assistant Advocate General appearing on behalf of the respondent-State and also perused the entire record carefully.

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

8. ORAL EVIDENCE ADDUCED BY PROSECUTION:

8.1. PW1 Jia Lal has stated that he is posted as Panchayat Secretary in G.P. Dhanalag from November 2009 and on dated 19.3.2011 police of P.S. Sarkaghat moved application Ext.PW1/A before Pardhan G.P. Dhanalag. He has stated that family register of father of prosecutrix and birth register of prosecutrix obtained by police. He has stated that copy of family register is Ext.PW1/B and copy of birth certificate is Ext.PW1/C. He has stated that as per record date of birth of prosecutrix is 11.12.1996. He has stated that entry in the family register is not in his hands. He has stated that as per record information was given by one Meera Kumari. He has denied suggestion that both certificates were issued by him on the basis of wrong information.

8.2 PW2 Smt. Sita Devi has stated that she is Pardhan of G.P. Dhanalag and on dated 3.2.2011 at about 4 AM Pyar Chand resident of Majyath telephonically informed that some pony wallas had enticed away his daughter. She has stated that thereafter she advised Pyar Chand to inform the police and thereafter information was given to police officials. She has stated that she along with Pyar Chand and his relatives visited police post Bhunter and disclosed the entire matter to police. She has stated that thereafter she and relatives of prosecutrix along with one police official went to the house of accused Kuldeep. The witness identified the accused in Court. She has stated that on dated 4.2.2011 Pyar Chand handed over the middle standard examination of prosecutrix which was took into possession by

police vide seizure memo Ext.PW2/A. She has stated that memo was signed by her and was also signed by one another marginal witness Ludar Chand. She has stated that she did not visit the house of Kuldeep at Bhunter.

8.3 PW3 Inspector Ranjit Singh has stated that he remained posted as SHO in P.S. Sarkaghat from November 2010 to July 2011 and on dated 4.2.2011 complainant Pyar Chand got recorded FIR Ext.PW3/A. He has stated that contents of FIR Ext.PW3/A were read over and explained to complainant Pyar Chand who accepted the same as correct and thereafter signed on FIR. He has stated that thereafter investigation of case was entrusted to ASI Vikram Singh for further investigation and after completion of investigation file was produced before him and as he found prima-facie case under Sections 363, 366-A and 376 IPC against accused persons he prepared challan and submitted the same in Court of JMIC Sarkaghat. He has stated that when the complainant came to police station for lodging FIR Ext.PW3/A his daughter and Kuldeep were with him. He has denied suggestion that accused Kuldeep was not accompanied with complainant when he came to police station to file FIR. He has denied suggestion that FIR was recorded on concocted facts. He has denied suggestion that no case under Section 368 IPC was made out against co-accused Hari Singh.

8.4 PW4 HC Nanak Chand has stated that he is posted as HHC in P.S. Sarkaghat for the last one and half years and on dated 1.4.2011 MHC Dharam Singh handed over to him one parcel stated to be containing blanket with direction to take the same to FSL Junga vide RC No. 49/2011 and further stated that on the same day he deposited the case property with FSL Junga vide receipt Ext.PW4/A. He has further stated that RC is Ext.PW4/B and case property remained intact in his custody. He has stated that his departure as well as arrival reports were recorded in daily diary of P.S. Sarkaghat. He has denied suggestion that no case property was given to him and also denied suggestion that he did not take the case property to FSL Junga.

8.5 PW5 HC Dharam Singh has stated that he is posted as MHC in P.S. Sarkaghat since 2010 and on dated 7.2.2011 ASI Vikram Singh deposited with him a parcel sealed with seven seals of T along with sample seal and he entered the parcel in Malkhana register at Sr. No. 1225/11. He has further stated that on dated 1.4.2011 he handed over the said parcel to Nanak Chand vide RC No. 49/2011. He has stated that abstract of malkhana register is Ext.PW5/A.

8.6 PW6 Pinki Devi TGT has stated that she has been posted as TGT in Government Senior Secondary school Chowk since 2006 and on dated 19.3.2011 police of P.S. Sarkaghat moved an application Ext.PW6/A and demanded copy of attendance register of 9th class for the moth of February 2011 and copy of age proof. She has stated that she was class teacher of 9th class and as such she submitted the copy of attendance register after attested from Principal. She has stated that copy of attendance register is Ext.PW6/B and name of prosecutrix is entered as Sr. No. 22 of attendance register. She has stated that as per record prosecutrix remained absent from school w.e.f. 2.2.2011 to 8.2.2011. She has stated that she has brought the original attendance register in Court. She has denied suggestion that she has wrongly marked the absence of prosecutrix in the attendance register at the instance of police. She has denied suggestion that prosecutrix did not remain absent from school w.e.f. 2.2.2011 to 8.2.2011.

8.7 PW7 Dev Raj has stated that he has brought the original admission register of Government Senior Secondary School Chowk Tehsil Sarkaghat District Mandi. He has stated that on dated 19.3.2011 police of P.S. Sarkaghat moved an application Ext.PW6/A to the Principal, Government Senior Secondary school Chowk requesting him to supply the

copy of attendance register as well as copy of age proof on the basis of admission register. He has stated that thereafter he prepared certificate Ext.PW7/A on the basis of official record. He has stated that as per record prosecutrix got admitted in Government Senior Secondary School Chowk on dated 19.4.2010 and date of birth of prosecutrix is recorded as 11.12.1996. He has denied suggestion that wrong birth certificate was issued.

8.8 PW8 Pyar Chand has stated that prosecutrix is his daughter. He has stated that on dated 2.2.2011 prosecutrix had gone to attend the school at Government Senior Secondary School Chowk. He has stated that prosecutrix was student of class 10th and her age was about 14½ years. He has stated that prosecutrix did not come back to her home and he inquired from her class mates who disclosed that prosecutrix did not attend the school. He has stated that thereafter he inquired by way of telephone from his relatives about whereabouts of prosecutrix. He has stated that on same day one Ishwar Dass who was his relative and who was working as Lecturer in Pattrighat school disclosed him that he noticed that prosecutrix was sitting in Baba bus. He has stated that thereafter he reported the matter to police officials. He has stated that his relative Ishwar Dass also disclosed that Baba bus was approaching to Kullu and thereafter he hired a private vehicle and then went to Bhunter, Kullu. He has stated that on dated 4.2.2011 prosecutrix was found at Bhunter. He has stated that prosecutrix was travelling in three-wheeler along with co-accused Kuldeep. He has stated that thereafter he brought prosecutrix as well as accused Kuldeep and handed over both of them to police at P.S. Sarkaghat. He has stated that he also lodged criminal report against accused Ext.PW3/A which bears his signatures at point 'A'. He has stated that during investigation police took into possession school certificate of prosecutrix vide seizure memo Ext.PW2/A. He has stated that he also inquired whole incident from prosecutrix and prosecutrix disclosed him that she was took by accused Kuldeep to Kharahal. He has stated that prosecutrix disclosed him that she was brought to Kharahal District Kullu at the residence of maternal uncle of accused Kuldeep. He has stated that prosecutrix also disclosed him that accused Kuldeep had committed *galat kaam* with her twice. He has stated that prosecutrix was also medically examined. He has stated that he started search of prosecutrix at 4/4.30 PM when other students came back. He has stated that he inquired about his daughter from his brother-in-law and sister-in-law. He has stated that on dated 2.2.2011 his daughter left the home along with school bag for school. He has stated that on the same day the school bag was found at a distance of 1-1½ K.m. from his house. He has stated that bag was found during search operation. He has denied suggestion that no bag was found. He has stated that he hired the private taxi and went to Bhunter Kullu along with five persons. He has stated that prosecutrix and accused were found at Bhunter bus stand. He has stated that accused and prosecutrix told him that they came to bus stand Bhunter in three-wheeler. He has denied suggestion that prosecutrix was failed in her annual examination once or twice. He has stated that accused started living in rice sheller of his brother for about 1-1½ months prior to the incident. He has denied suggestion that accused was not living in rice sheller of his brother. He has denied suggestion that prosecutrix did not meet them at Bhunter and also denied suggestion that he did not go to Bhunter. He has denied suggestion that false case filed against the accused just to extract money from him. He has denied suggestion that age of prosecutrix was 18-19 years. He has denied suggestion that accused had no concern with prosecutrix.

8.9 PW9 Dr. Renu has stated that in the month of February 2011 she was posted as Medical Officer in Zonal Hospital Mandi and on dated 5.2.2011 lady C. Anjana brought prosecutrix present in Court and she conducted medical examination of prosecutrix. She has stated that prosecutrix aged 14 years was brought with alleged history of sexual assault by one Kuldeep who took the prosecutrix to Kullu where he assaulted her sexually. She has stated that on examination she found no injury on person of prosecutrix

and on local examination a fresh mucosal injury to hymen at 9 and 6 O'clock position was found which bleeded on touch. She has further stated that an abrasion on left side of labia minora was found and vaginal swab were taken from posterior fornix of cervix and also two slides of vaginal smear were obtained and seen under microscope but no dead or alive spermatozoa was seen at the time of examination. She has also stated that on per vaginal examination one finger was introduced easily but it was difficult to introduce two fingers and uterus of prosecutrix was found ante-verted normal sized and fornices were clear. She has stated that samples were collected, sealed and handed over to police for chemical analysis. She has stated that as per her opinion prosecutrix was exposed to coitus and probable duration was less than 48 hours and she proved MLC Ext.PW9/C and has further stated that MLC bears her signatures. She has stated that as per report of Radiologist age of prosecutrix was found between 14 to 16½ years. She stated that it was bleeding on touch as such she opined it to be fresh and within 48 hours. She has denied suggestion that such injuries could be caused due to poor hygiene. She has denied suggestion that no reports of radiologist were produced before her and she also denied suggestion that she had not conducted the MLC of prosecutrix.

8.10 PW10 prosecutrix aged 15 years has stated that on dated 2.2.2011 at about 8 AM she was present in her house and at about 8 AM she moved for her school and when she reached at bus stop Nahalan then accused Kuldeep met her and he offered her to go to Rewalsar. She has stated that accused also requested her to throw away her school bag and thereafter she threw away her school bag. She has stated that thereafter accused Kuldeep took her to Rewalsar in a private bus namely Baba Bus Service and at Rewalsar she requested the accused to return back to her house but accused Kuldeep insisted her to go to somewhere. She has further stated that thereafter accused Kuldeep took her to Kullu in same bus and at Kullu accused disclosed her that he wanted to marry her. She has also stated that thereafter accused Kuldeep took her to village Kharahal in house of his maternal uncle. She has stated that co-accused Hari Singh present in Court kept the prosecutrix in his house and further stated that accused Kuldeep forcibly committed the sexual intercourse with her in the house of his maternal uncle. She has stated that accused Kuldeep kept her in his maternal uncle's house for two days. She has stated that on the second night also accused committed forcible sexual intercourse/rape with her. She has stated that after spending two days at Kharahal accused Kuldeep brought her back. She has stated that when she and co-accused Kuldeep reached at Bhunter her father along with Ghop Chand, Pardhan and other persons met them. She has stated that thereafter they were brought to P.S. Sarkaghat and thereafter her custody was handed over to her father. She has stated that her medical examination was conducted and thereafter police officials took her and co-accused Kuldeep to village Kharahal where co-accused Kuldeep identified the house of his uncle. She has stated that police also took into possession the blanket. She has stated that blanket was taken from bed from the house of maternal uncle of accused and further stated that accused committed forcible sexual intercourse with her. She has stated that accused Kuldeep took her to Kullu on the pretext of marrying her. She has stated that she was not interested to marry with co-accused Kuldeep and thereafter co-accused Kuldeep committed forcible sexual intercourse twice at Kharahal. She has stated that her date of birth is dated 11.12.1996. She has stated that accused was working in rice sheller of her uncle. She has stated that rice sheller is situated nearby to her residential house. She has stated that seven persons were found in the house where co-accused Kuldeep kept her for two days. She has stated that four of them were women and three of them were male. She has stated that on dated 3.2.2011 she remained inside the house at Kharahal and due to language problem she could not understand the language of other members of house. She has denied suggestion that co-accused Kuldeep did not work in the rice sheller of her uncle. She has denied suggestion that co-accused did not go to her village.

She has denied suggestion that co-accused Kuldeep did not take her to Kullu and also denied suggestion that co-accused did not keep her in his maternal uncle's house. She has denied suggestion that accused did not commit any forcible sexual intercourse with her. She has denied suggestion that accused did not allure her to marry. She has denied suggestion that her date of birth is 1992. She has denied suggestion that accused was falsely implicated in present case.

8.11 PW11 ASI Vikram Singh has stated that in the month of February 2011 he remained posted in P.S. Sarkaghat and after registration of FIR No. 23 of 2011 Ext.PW3/A investigation of case was entrusted to him. He has stated that he requested the medical officer to conduct the medical examination of prosecutrix. He has stated that no lady doctor was present in CHC Sarkaghat hence medical officer advised to take the prosecutrix to Zonal Hospital Mandi for medico legal examination of prosecutrix. He has stated that consequently PW9 Dr. Renu conducted the medical examination of prosecutrix and her MLC is Ext.PW9/C. He has stated that he also requested the medical officer CHC Sarkaghat to conduct the medical examination of accused. He has stated that during investigation father of prosecutrix produced the school certificate of prosecutrix which is Ext.PW2/A. He has stated that he also recorded statements of witnesses as per their version. He has stated that he prepared spot map Ext.PW11/C and prosecutrix also located the room of co-accused Hari Singh and blanket which was on the cot. He has stated that blanket was took into possession and recovery memo Ext.PW11/D was prepared. He has stated that he also obtained the copy of family register Ext.PW1/B, birth certificate of prosecutrix Ext.PW1/C by moving application Ext.PW1/A. He has stated that case property was handed over to MHC of P.S. Sarkaghat and he also obtained attendance register from GSSS Chowk and date of birth certificate of prosecutrix was also obtained. He has stated that he also filled in FT card/identification forms of prosecutrix and accused which are Ext.PW11/G and Ext.PW11/H. He has denied suggestion that blanket Ext.P2 did not belong to co-accused Hari Singh. He has denied suggestion that when he visited the spot at that time prosecutrix was not with him. He has denied suggestion that prosecutrix did not locate the room in which she was raped. He has denied suggestion that accused has been falsely implicated in present case. He has denied suggestion that accused Kuldeep did not take prosecutrix to Kullu. He has denied suggestion that co-accused Kuldeep has been falsely implicated in present case at the instance of father of prosecutrix. He has denied suggestion that he recorded the statements of prosecution witnesses at his own. He has denied suggestion that co-accused Kuldeep did not visit the house of co-accused Hari Singh.

8.12 PW12 Ayesha Patial Scientific Officer (DNA) has stated that she is posted as Scientific Officer in State Forensic Science Laboratory Junga from 2.11.2010 and on dated 1.4.2011 two sealed parcels were received in DNA division for examination and on dated 5.5.2011 four sealed parcels after biological and serological examination were received from Biology and Serology Division SFSL Junga for examination. She has stated that seals on parcels were intact and tallied with specimen seals sent with docket. She has stated that DNA profile obtained from vaginal swab female DNA fraction of prosecutrix matched with DNA profile obtained from blood sample of prosecutrix on FTA card. She has stated that DNA profile obtained from underwear of co-accused Kuldeep matched with DNA profile obtained from blood sample of co-accused Kuldeep on FTA card. She has also stated that Y-STR DNA profile obtained from salwar of prosecutrix matches completely with Y-STR DNA profile obtained from blood sample of Kuldeep Singh on FTA card. She has stated that co-accused Kuldeep could not excluded as the possible source of male DNA on salwar of minor prosecutrix. She has proved report Ext.PW12/A and proved FTA card of accused Kuldeep as Ext.PW12/B. She has stated that she had qualified M.Sc. Micro Biology from Central Institute Kasauli affiliated to HPU and posted as Scientific Officer (DNA) from dated

2.11.2010. She has stated that she also obtained training from CFSL Hyderabad from 17.1.2011 to 28.1.2011 on DNA profiling and also at FSL Sagar on DNA profiling with reference to criminal investigation. She has stated that report Ext.PW12/A was signed by her as well as by Dr. Vivek Sahajpal Assistant Director DNA Division Junga and they both of them examined the exhibits for DNA profiling. She has denied suggestion that underwear of co-accused Kuldeep and blood sample of co-accused Kuldeep on FTA card were in tampering condition. She has denied suggestion that she has not done the DNA profiling in the laboratory.

9. Statement of accused recorded under Section 313 Cr.P.C. He has stated that he is innocent and prosecution witnesses have deposed falsely against him. Accused also produced oral evidence in defence.

10. Defence evidence adduced by the accused

10.1. DW1 Ludar Singh has stated that he is mule driver by profession and co-accused Kuldeep present in Court did not work with him.

11. Submission of learned Advocate appearing on behalf of appellant that no criminal offence under Section 376 IPC is proved against the appellant is rejected being devoid of any force for the reasons hereinafter mentioned. Prosecutrix while appearing in witness box has specifically stated that appellant Kuldeep took the prosecutrix to Kullu on the pretext of marrying her and thereafter took the prosecutrix to village Kharahal in his maternal uncle Hari Singh's house where accused Kuldeep committed forcible sexual intercourse with prosecutrix twice during the night period. Court has carefully perused the testimony of minor prosecutrix. Testimony of minor prosecutrix is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of minor prosecutrix. There is no evidence on record in order to prove that minor prosecutrix has hostile animus against the appellant at any point of time. Testimony of minor prosecutrix is corroborated with testimony of medical officer PW9 Dr. Renu Behl who opined that prosecutrix was exposed to coitus and medical officer has given the probable duration of sexual assault as less than 48 hours. Minor prosecutrix was medico legally examined on dated 5.2.2011. Even medical Officer PW9 Dr. Renu has clearly stated in positive manner that injury to hymen was 9 and 6 O'clock position and there was bleeding on touch of hymen. Testimony of minor prosecutrix is also corroborated by documentary evidence i.e. MLC of prosecutrix placed on record. Rape is not only a crime against a person of a victim but it is a crime against the entire society. It destroys the entire psychology of woman and pushed the woman into deep emotional crisis. Rape is a crime against the basic human rights and is violative of the victim's most cherished Fundamental Rights as mentioned in Article 21 of Constitution of India. ***(See AIR 1996 SC 922 titled Bodhisattwa Gautam vs. Miss Subhra Chakraborty)*** It is well settled law that sole testimony of prosecutrix is enough to convict the person if the testimony is free from blemish and implicit reliable. ***(See 2007 Cri..L.J. 803 (Delhi) titled Mohd. Alam vs. State (NCT of Delhi).*** It is well settled law that testimony of prosecutrix must be appreciated in the background of entire case and Courts should be alive to its responsibility and should be sensitive while dealing with cases involving sexual molestation. ***(See (1996)2 SCC 384 titled State of Punjab vs. Gurmit Singh and others, See (2000)5 SCC 30 titled State of Rajasthan vs. N.K. the accused, See (2000)1 SCC 247 titled State of H.P. vs. Lekh Raj and another, (1992) 3 SCC 204 Madan Gopal Kakkad Vs. Naval Dubey and another. Also see (1990)1 SCC 550 titled State of Maharashtra vs. Chander Prakash. Also see (2011)2 SCC 550 titled State of U.P. vs. Chotte Lal)***

12. Another submission of learned Advocate appearing on behalf of the appellant that no criminal offence of kidnapping under Section 363 IPC is proved against appellant is rejected being devoid of any force for the reasons hereinafter mentioned. The definition of kidnapping has been defined under Section 361 of Indian Penal Code and as per definition under Section 361 IPC the age of a female should be below 18 years at the time of kidnapping. It is well settled law that kidnapping is of two types. (1) Kidnapping from India as defined under Section 360 of Indian Penal Code and (2) Kidnapping from lawful guardianship as defined under Section 361 of Indian Penal Code 1860. It is proved on record that at the time of incident PW8 Pyare Lal was the lawful guardian of minor prosecutrix and PW8 Pyare Lal has specifically stated in positive manner that on dated 2.2.2011 prosecutrix went to school but did not return back and thereafter she was found at Bhunter along with accused Kuldeep. Testimony of PW8 Pyare Lal is also trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW8 Pyare Lal. It is proved beyond reasonable doubt that appellant had kidnapped the minor prosecutrix without consent of lawful guardian on dated 2.2.2011 when minor prosecutrix was student of 10th class.

13. Another submission of learned Advocate appearing on behalf of appellant that birth certificate wherein birth of prosecutrix is proved as 11.12.1996 and middle standard examination certificate placed on record wherein date of birth of prosecutrix mentioned as 11.12.1996 and certified copy of family register placed on record have been illegally relied by learned trial Court relating to age of prosecutrix is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that birth certificate was issued under Section 12 and 17 of the Registration of Births and Deaths Act 1969 and Rule 8 of the H.P. Registration of Births and Deaths Rules 2003 and it is also proved on record that certified copy of family register was prepared prior to incident and was issued by pubic servant in discharge of his official duty and is relevant fact under Section 35 of Indian Evidence Act. It is also proved on record that family register was also issued by public servant in discharge of his official duty and is relevant fact under Section 35 of Indian Evidence Act. It is held that middle standard examination certificate placed on record is also issued by public servant in discharge of his official duty and is relevant fact under Section 35 of Indian Evidence Act. Appellant did not adduce any positive cogent and reliable evidence in rebuttal to rebut above stated public documents issued by public servants while discharging their official duty. It was also held in case reported in ***AIR 1981 SC 361 titled Harpal Singh vs. State of H.P. (Full Bench)*** that entry made by public officials in discharge of official duty in public record is relevant fact under Section 35 of Indian Evidence Act. ***(Also see ILR 1978 HP 174 titled Vidyadhar vs. Mohan)*** Even entry in birth register is much prior to incident of rape. It was held in case reported in ***AIR 2011 SC 1691 titled Murugan @ Settu vs. State of Tamil Nadu*** that document made *ante litem motam* can be relied upon safely when such document is admissible under Section 35 of Indian Evidence Act 1872. It was held in case reported in ***AIR 2002 HP 59 titled Chitru Devi vs. Ram Dai*** that entries in birth register kept by competent authority under Birth and Death Registration Act 1969 is admissible in evidence.

14. Another submission of learned Advocate appearing on behalf of appellant that present case is a case of consent and on this ground appeal filed by appellant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Definition of rape has been defined under Section 376 of Indian Penal Code 1860 and in description 6th it has been specifically mentioned that factum of consent would be immaterial when age of prosecutrix would be under 16 years of age. In present case it is proved by way of oral as well as documentary evidence that at the time of incident age of prosecutrix was 14 years and two months and it is proved on record that prosecutrix was

minor at the time of incident. Hence it is held that consent of minor is immaterial in view of description 6th mentioned in Section 375 IPC.

15. Another submission of learned Advocate appearing on behalf of the appellant that there was no resistance on the part of prosecutrix and there was no teeth bite or scratches on face of assailant from nails of prosecutrix and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that in view of the fact that age of prosecutrix was 14 years and 2 months at the time of incident the pleas of resistance and teeth biting and scratches on face of assailant is immaterial.

16. Another submission of learned Advocate appearing on behalf of appellant that present case was filed due to vengeance and grudge on the part of prosecutrix and on this ground appeal be allowed is also rejected being devoid of any force for the reasons hereinafter mentioned. Accused did not adduce any positive cogent and reliable evidence on record in order to prove that there was prior enmity between prosecutrix and appellant. Plea of appellant that there was prior enmity is defeated on the concept of ipse-dixit (An assertion made without proof).

17. Another submission of learned Advocate appearing on behalf of the appellant that in present case corroboration qua testimony of prosecutrix was required is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused testimony of prosecutrix. It is held that testimony of prosecutrix is trustworthy reliable and inspires confidence of Court. There are no positive reasons to disbelieve testimonies of prosecution witnesses in present case.

18. Another submission of learned Advocate appearing on behalf of appellant that there is visible tampering in FIR and FIR is result of deliberation and concoctions and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Appellant did not adduce any positive cogent and reliable evidence on record in order to prove tampering in FIR. The plea of appellant that there was tampering in FIR is also defeated on the concept of *ipse dixit* (An assertion made without proof).

19. Another submission of learned Advocate appearing on behalf of the appellant that there is material contradiction and improvement in present case and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the entire oral and documentary evidence placed on record. There are no material contradictions in testimonies of prosecution witnesses which goes to the root of the case. It is well settled law that minor contradictions are bound to come in criminal case when statements of prosecution witnesses are recorded after a gape of sufficient time. In present case incident took place on dated 2.2.2011 and testimonies of prosecution witnesses were recorded on 25.11.2011, 26.11.2011, 20.12.2011, 24.1.2012, 3.5.2012 and 17.5.2012 after gape of sufficient time.

20. Another submission of learned Advocate appearing on behalf of the appellant that all recoveries and specimen signatures obtained in present case are in violation of Article 20(3) of the Constitution of India and are legally inadmissible is rejected being devoid of any force for the reasons hereinafter mentioned. In present case PW2 Sita Devi Pardhan of G.P. has proved the seizure memo of school certificate Ext.PW2/A in accordance with law. PW2 Sita Devi when appeared in witness box has stated that school certificate took into possession in her presence by Investigating Agency. Even seizure memo of blanket Ext.PW11/D also proved on record as per testimony of marginal witness namely Pyar Chand

PW8 and as per testimonies of other prosecution witnesses. Birth certificate has been proved by PW1 Jia Lal. The birth certificate Ext.PW1/C and copy of family register Ext.PW1/B proved by prosecution as per testimony of PW1 Jia Lal. Testimony of PW1 Jia Lal is also trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW1 Jia Lal.

21. Another submission of learned Advocate appearing on behalf of the appellant that FSL report tendered in evidence is also inadmissible in law is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the FSL report placed on record. As per FSL report DNA profile obtained from vaginal swab matches with DNA profile obtained from blood sample of prosecutrix on FTA card. Even as per FSL report DNA profile obtained from underwear of accused Kuldeep Singh matches with DNA profile obtained from blood sample of accused Kuldeep Singh on FTA card. As per report of FSL placed on record, Y-STR DNA profile obtained from salwar of prosecutrix matches completely with Y-STR DNA profile obtained from blood sample of accused on FTA card. There is positive recital in FSL report placed on record that appellant could not be excluded possible source of male DNA on salwar of minor prosecutrix.

22. Another submission of learned Advocate appearing on behalf of the appellant that conviction has been based on facts which were not explained to accused under Section 313 Cr.P.C. and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that learned trial Court has put all material questions to accused under Section 313 Cr.P.C. relating to present case and it is further held that no miscarriage of justice has been caused to appellant by way of not putting any material questions under Section 313 Cr.P.C.

23. In view of above stated facts and case law cited supra appeal filed by appellant is dismissed. Judgment and sentence passed by learned trial Court are affirmed. It is held that learned trial Court had properly appreciated oral as well as documentary evidence placed on record and it is further held that no miscarriage of justice has been caused to appellant in present case. 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.

Municipal Corporation, Shimla …Appellant.

VERSUS

Mohinder Singh Malhi and others …Respondents.

LPA No.96 of 2009.
Decided on: May 20, 2015.

Constitution of India, 1950- Article 226- Petitioner applied for 42 days earned leave, which was sanctioned- he applied for extension of leave and when he came to join his duty he was told that his services had been terminated- he made various representations which were rejected- Municipal Corporation Act provides for giving a reasonable opportunity to the employee to the show cause- petitioner was never served with any show cause notice- petitioner was never told that his leave was not sanctioned - no inquiry was conducted – absence is not misconduct unless it is pleaded or proved that absence was willful- employer

had failed to prove that absence was willful, therefore, services of the petitioner were wrongly terminated and the Writ was rightly allowed. (Para-6 to 22)

Cases referred:

Krushnakant B. Parmar vs. Union of India and another, 2012 AIR SCW 1633
State of Rajasthan & Anr. vs. Mohammed Ayub Naz., 2006 AIR SCW 197
Anant R. Kulkarni vs. Y.P. Education Society and others, (2013) 6 Supreme Court Cases 515
N.T.C. (WBAB and O) Ltd. and another vs. Anjan K. Saha, AIR 2004 SC 4255
Dr.C.N. Malla vs. State of J&K, 1999 SLJ 366

For the Appellant: Mr. Hamender Chandel, Advocate.
For the Respondents: Mr. K.D. Shreedhar, Senior Advocate with Mr. Yudhvir Singh Thakur, Advocate, for respondent No.1.
Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma & Mr. Anup Rattan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G., for respondents No.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

By the medium of the present appeal, the appellant-employer (writ respondent) has questioned the judgment and order, dated 7th May, 2009, passed by the learned Single Judge of this Court in CWP(T) No.1978 of 2008, titled Mohinder Singh Malhi vs. Commissioner, Municipal Corporation and others, whereby the writ petition filed by the respondent-employee (writ petitioner) was allowed and the termination order was quashed, (for short, the impugned judgment).

2. The writ petitioner, being a regular employee of the appellant-Corporation, was serving the Corporation as Junior Engineer, applied for 42 days earned leave, which was sanctioned on 24th August, 1981, made applications for extension of leave on various dates right from 7th October, 1981 to 22nd July, 1983 and in the month of February, 1985, when he came back to join his duties, he was informed, rather told, that his services stood already terminated w.e.f. 1st November, 1983, vide office order dated 18th November, 1983, by the appellant/writ respondent. The writ petitioner made representations for re-employment and also questioned the termination order by the medium of representations, which were rejected, constraining him to file the writ petition and question the impugned termination order, on the grounds taken in the memo of writ petition.

3. Appellant-Corporation resisted the writ petition. The learned Single Judge, after appreciating the rival contentions of the parties, allowed the writ petition and quashed the termination order in terms of the impugned judgment. The learned Single Judge has held that the services of the writ petitioner were terminated without conducting a regular inquiry, and thus, the said action of the appellant-employer was held to be against the principles of natural justice and in breach of the mandate of law applicable.

4. The learned Single Judge has also discussed Section 73 of the Himachal Pradesh Municipal Corporation Act, 1979, (hereinafter referred to as the Act), which is reproduced in the impugned judgment.

5. We have gone through the impugned judgment and the material available on the record and are of the view that the impugned judgment is well reasoned and needs to be upheld for the following reasons.

6. Section 73 of the Act provides for giving a reasonable opportunity to the delinquent employee for showing cause. Section 73 of the Act also postulates that in case the competent authority is satisfied that it is not reasonably practicable to give to the delinquent employee an opportunity of showing cause, then the competent authority is required to record reasons.

7. Thus, it was obligatory for the appellant-Corporation to adopt the procedure enshrined in Section 73 of the Act, which procedure was never adopted by it.

8. The Writ Court has categorically recorded that the petitioner was never served with any show cause notice. It was for the employer-appellant to plead and prove that it was not practicable to provide opportunity to show cause and hear him, for which, the appellant-Corporation was required to record reasons. The learned Single Judge has recorded categorical finding that no material was ever placed on record to show that such reasons were ever recorded by the appellant-Corporation.

9. It is beaten law of the land that for passing removal, dismissal or termination order, inquiry is required to be conducted. However, in case the requirement of conducting the inquiry is to be dispensed with, in that eventuality, reasons have to be recorded separately. While going through the writ record and the impugned judgment, one comes to an inescapable conclusion that no such reasons have been recorded or mind has been applied by the competent Authority, while dispensing with the requirement of conducting the regular inquiry. Thus on this count alone, the impugned judgment needs to be upheld.

10. It appears that the petitioner was treated as absent from duty since his application for extension of leave was not approved. However, there is nothing on the file which can be made the basis for holding that the employer has ever communicated to the employee about the non-sanction of the leave. It was for the employer to plead and prove that the employee-writ petitioner (respondent herein) has remained willfully absent from the duty.

11. Thus, the only conclusion which can be drawn in the instant case is that the services of the employee/writ petitioner were terminated without conducting a regular inquiry, though the inquiry was to be conducted in terms of Section 73 of the Act, which fact came to the knowledge of the writ petitioner only when he came for joining his duties. No opportunity was granted to the petitioner to participate in the inquiry proceedings, not to speak of hearing the petitioner at the time of imposing the penalty. In fact, without conducting the inquiry, the termination order was passed and no such ground has been carved out for dispensing with the requirement of conducting a regular inquiry. It was for the Disciplinary Authority to record reasons that the inquiry was not practicable or there were sufficient reasons to dispense with the requirement of conducting the inquiry. No such reasons have been assigned and no reasons have been recorded therefor by the Disciplinary Authority.

12. The absence of the respondent-employee has been made the foundation for passing the termination order. However, absence itself is not misconduct unless it is pleaded and proved that absence of the employee was willful.

13. The Apex Court in case **Krushnakant B. Parmar vs. Union of India and another, 2012 AIR SCW 1633,** has dilated on the issue as to when absence can be said to be willful. It is apt to reproduce paragraphs 16 to 19 of the said decision hereunder:

> *"16. The question whether 'unauthorised absence from duty' amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances.*
>
> *17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be willful.*
>
> *18. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean willful. There may be difference eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalization, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.*
>
> *19. In a Departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in absence of such finding, the absence will not amount to misconduct.*

14. The Apex Court in case **State of Rajasthan & Anr. vs. Mohammed Ayub Naz., 2006 AIR SCW 197,** has referred to various decisions in paragraphs 10, 12, 14, 15, 16 and 17, and has observed that in case the charge of willful absence is proved against a delinquent employee, he can be removed from service, of course after giving an opportunity of hearing. It is apt to reproduce paragraphs 9 and 18 of the said decision hereunder:

> *"9. Absenteeism from office for prolong period of time without prior permission by the Government servants has become a principal cause of indiscipline which have greatly affected various Government Services. In order to mitigate the rampant absenteeism and wilful absence from service without intimation to the Government, the Government of Rajasthan inserted Rule 86 (3) in the Rajasthan Service Rules which contemplated that if a Government servant remains wilfully absent for a period exceeding one month and if the charge of wilful absence from duty is proved against him, he may be removed from service. In the instant case, opportunity was given to the respondent to contest the disciplinary proceedings. He also attended the enquiry. After going through the records, the learned Single Judge held that the admitted fact of absence was borne out from the record and that the respondent himself has admitted that he was absent for about 3 years. After holding so, the learned Single Judge committed a grave error that the respondent can be deemed to have retired after seeking of service of 20 years with all retiral benefits which may be available to him. In our opinion, the impugned order of removal from service is the only proper punishment to be awarded to the respondent herein who was wilfully absent for 3 years without intimation to the Government. The facts and circumstances and the admission made by the respondent would clearly go to show that Rule 86 (3) of the Rajasthan Service Rules is proved against him and, therefore, he may be removed from service.*
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> xxxxxxxxxx xxxxxxxxxxxx xxxxxxxxxxxx
>
> *18. For the foregoing reasons, we are of the opinion that a Government servant who has wilfully been absent for a period of about 3 years and which fact is not disputed even by the learned Single Judge of the High Court has no right to receive the monetary/retiral benefits during the period in question. The High Court has given all retiral benefits which shall mean a lump sum money of lakhs of rupees shall have to*

be given to the respondent. In our opinion, considering the totality of the circumstances and the admission made by the respondent himself that he was wilfully absent for 3 years, the punishment of removal imposed on him is absolutely correct and not disproportionate as alleged by the respondent. The orders passed by the learned Single Judge in S. B. Civil Writ Petition No. 2239/1991 dated 24-8-2001 and of the order passed by the Division Bench in LPA No. 1073 of 2001 dated 13-12-2001 are set aside and the punishment imposed by the disciplinary authority is restored. However, there shall be no order as to costs. Order accordingly."

15. The Apex Court in another decision in **Anant R. Kulkarni vs. Y.P. Education Society and others, (2013) 6 Supreme Court Cases 515**, has widened on purpose of inquiry against a delinquent. It is apt to reproduce paragraph 17 of the said decision hereunder:

"17. The purpose of holding an enquiry against any person is not only with a view to establish the charges levelled against him or to impose a penalty, but is also conducted with the object of such an enquiry recording the truth of the matter, and in that sense, the outcome of an enquiry may either result in establishing or vindicating his stand, and hence result in his exoneration. Therefore, fair action on the part of the authority concerned is a paramount necessity."

16. The Apex Court in **N.T.C. (WBAB and O) Ltd. and another vs. Anjan K. Saha, AIR 2004 SC 4255,** has held that the delinquent official must be given an opportunity to show cause and he should be heard on the proposed penalty. It is apt to reproduce paragraph 11 of the said decision hereunder:

"11. As a result of the discussion aforesaid this appeal preferred by the employer is partly allowed. The impugned orders of the High Court to the extent they direct reinstatement in service of the respondent with full monetary dues are set aside. It is directed that in accordance with the legal position explained in the case of B. Karunakar and Ors. (supra) [in paragraph 31 as quoted above], there would be a formal reinstatement of the employee for the limited purpose of enabling the employer to proceed with the enquiry from the stage of furnishing him with the copy of the enquiry report. The employer can place him under suspension for completing the enquiry. After conclusion of the enquiry in the manner as directed in the case of B. Karunakar and Ors. (supra), if the employee is exonerated, the authority shall decide according to law how the intervening period from the date of his dismissal to the date of his reinstatement shall be treated and what consequential benefits should be granted. If on the contrary, the employee is found to be guilty, before taking final decision he should be heard on the proposed penalty in accordance with clause 14(4)(c) of the Standing Order on the quantum of punishment."

17. The Jammu and Kashmir High Court, in **Dr.C.N. Malla vs. State of J&K, 1999 SLJ 366,** wherein also the charge of overstaying the leave was framed against the delinquent employee, has held the termination, without holding inquiry, to be bad and not sustainable in the eyes of law.

18. Applying the above tests to the instant case, the employer has failed to establish on record that the absence of the employee/writ petitioner was willful.

19. The inquiry was to be conducted in view of the mandate of Section 73 of the Act and in the inquiry proceedings, notice was to be issued to the employee/writ petitioner and he was to be heard. Though it is pleaded by the employer that notice was sent to the writ petitioner, but the same was received back unserved. It has been pleaded by the

appellant-employer that a notice was issued in the newspaper, which plea has been rightly turned down by the learned Single Judge on the ground that it is not clear whether the said newspaper had wide circulation in the area in which the writ petitioner was residing at the relevant point of time. What steps thereafter the Disciplinary Authority has taken, is not forthcoming. Even, to conduct the inquiry in absentia, the procedure was to be followed and it was imperative for the Authority concerned to record finding about the willful absence of the employee, whether that absence could be termed as misconduct or otherwise and in case he was found to be guilty, he was to be heard on the proposed penalty, which has not been done in the present case. Thus, the order of termination is against the principles of natural justice and came to be passed in breach of the provisions of the Act.

20. During the course of hearing, the learned counsel for the appellant-Corporation submitted that the Corporation has initiated the regular inquiry against the respondent-employee, which is likely to be concluded within two months. Here, we may place on record that the Writ Court, vide the impugned judgment, has already granted opportunity to the appellant-Corporation to conduct a regular inquiry against the employee-respondent as per the law applicable.

21. Having said so, the Writ Court has passed a well reasoned judgment, which warrants no interference.

22. Viewed thus, the impugned judgment needs to be upheld and the instant appeal merits to be dismissed. Ordered accordingly.

23. Pending CMPs, if any, also stand disposed of.

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

S.M. Katwal ... Petitioner/Appellant.
Versus
Virbhadra Singh and others ... Respondents.

Cr.M.P.(M) No. 11350 of 2013.
Reserved on: 22nd April, 2015.
Decided on: 20th May, 2015.

Code of Criminal Procedure, 1973- Section 2 (wa)- Victim is a person who has suffered any loss or injury on account of an act or omission with which accused persons have been charged- petitioner claimed that he had set the criminal law in motion and, therefore, he falls within the definition of victim- complainant had made a complaint on the basis of which an inquiry was conducted but FIR was not lodged– complainant has enmity with accused and, the possibility of filing complaint to wreak-vengeance cannot be ruled out- when the prosecution lodged an FIR on the basis of complaint, it is only the State which can prefer an appeal and not the complainant or informant who is not a victim. (Para-34 to 58)

Limitation Act, 1963 - Section 5- Petitioner claiming himself to be a victim filed an appeal against the judgment of acquittal- appeal is barred by limitation- an application for condonation of delay was filed pleading that petitioner came to know about the judgment from the newspaper- State had not preferred any appeal against the acquittal and, therefore, petitioner had to file the appeal- explanation furnished by the petitioner is vague, cryptic and highly unbelievable – petitioner was present in the Court when judgment was

announced- acquittal gained wide publicity on the next day and therefore, petitioner would come to know about the judgment, hence, application is liable to be dismissed.

(Para-75 to 89)

Indian Evidence Act, 1872- Sections 3 and 65 (B)- Prosecution relied upon the conversation between the accused and 'K' to prove the acceptance of bribe- held, that before acting upon the electronic record, Court has to consider whether it is genuine or not- technology of preparing CD was not in existence in the year 1989-90 when the bribe was allegedly received by the accused – no evidence was produced to show as to what was the device used for recording the CD- whether such device was technically in order- the name of the person who recorded the conversation was also not mentioned- FSL had raised certain queries which was not answered- there were contradictions in the testimonies of the witnesses- there was no evidence against the accused except CD - therefore, acquittal of the accused in these circumstances was justified. (Para-96 to 120)

Cases referred:

Joginder Singh v. State of Himachal Pradesh, 2013(2) RCR (Criminal) 60
Sheo Nandan Paswan v. State of Bihar and others, AIR 1987 SC 877.
Balasaheb Rangnath Khade v. State of Maharashtra and others, 2012 (2) CCR 381
Ram Kaur @ Jaswinder Kaur v. Jagbir Singh @ Jabi and others (2010) 3 RCR (Cri.), 391 (DB)
Bhavuben Dineshbhai Makwana v. State of Gujarat and others, 2013 Cri.L.J. 4225
National Commission for Women v. State of Delhi and another, (2010) 12 SCC 599
State of Tamilnadu v. N. Suresh Ranjan and others, 2014 (1) RCR (Cr.) 572.
State (NCT of Delhi) v. Ahmed Jaan, 2008 Cri.L.J, 4355
State of Nagaland v. Lipok A.O. and others (2005) 3, SCC, 752
State of Gujarat v. Kaliashchandra Badriprasad, 2001 (1) RCR (Criminal) 162
Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation and another (2010) 5 SCC, 459
Lanka Venkateswarlu (dead) by LRs. v. State of Andhra Pradesh and others, (2011) 4 SCC 363
Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai, (2012) 5 SCC 157
P.K. Ramachanderan v. State of Kerala, AIR 1998 SC, 2276
S. Partap Singh v. State of Punjab, AIR 1964 SC 72
Yusufalli Esmail Nagree v. The State of Maharashtra, AIR 1968 SC 147
Anvar P.V. v. P.K. Basheer and others, AIR 2015 SC 180
State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru, (2005) 11 SCC 600

For the petitioner/appellant:	Mr. A.P.S. Deol, Senior Advocate, with Mr. Virbahadur Verma and Mr. Adhiraj Singh Thakur, Advocates.
For respondents No.1 & 2:	Mr. R.S. Cheema, Senior Advocate, with M/s. Ajay Kochhar, Satyen Vaidya and Vivek Sharma, Advocates.
For respondent No.3:	Mr. R.M. Bisht and Mr. P.M. Negi, Deputy Advocates General.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Petitioner S.M. Katwal is an IAS Officer (Retd.). He claims himself to be a 'victim' within the meaning of Section 2(wa) of the Code of Criminal Procedure, in short to be

referred as 'the Code', hence aggrieved by the judgment dated 24th December, 2012, in Corruption Case No.9-S/7 of 2010, passed by learned Special Judge (Forests), Shimla, acquitting accused-private respondents Virbhadra Singh and his wife Pritibha Singh from the charges under Sections 7, 9, 11, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and under Section 120-B of the Indian Penal Code framed against each of them. Hence he has filed a petition under Section 378(4) of the Code seeking leave to appeal along with memorandum of appeal under Section 372 of the Code. The appeal, however, is time barred, therefore, the present petition for condonation of delay has been filed on the grounds, *inter alia* that while he was at PGI, Chandigarh during the months of January-March, 2013 attending to his ailing wife there, he came to know about the judgment dated 24th December, 2012 under challenge in the appeal, through newspaper. He is having no access to the record nor engaged any lawyer to prosecute the case on his behalf. On coming to know that the State of Himachal Pradesh ruled by the Congress Party Government and accused-respondent No.1 the Chief Minister, who is holding the charge of Home Department also and therefore, prosecutor and the accused became one and the same having common interest not to pursue the case for filing the appeal against the judgment of acquittal, the petitioner has come forward to prefer an appeal against the judgment in the capacity of a 'victim'. An age old rule "***nullum tempus qut locus occurrit regi***" embedded in criminal justice delivery system has been pressed into service and it is submitted that the Parliament while acknowledging the said rule has prescribed no period of limitation for filing the appeal under the proviso to Section 372 of the Code against an order of acquittal. The rule of limitation, according to the petitioner, cannot be mechanically applied in a case of this nature. He having obtained Photostat copy of the judgment under challenge in the month of August, 2013 has preferred the appeal immediately thereafter. It has been urged that the delay, as occurred in filing the appeal is not intentional, but attributed to the compelling circumstances under which he was made to search for the relevant record required for the purpose of drafting the grounds of appeal.

2. The stand of the respondent-State in reply to the petition in a nutshell is that in the opinion of the District Attorney it was not a fit case for filing an appeal. The said opinion was examined in the office of Additional Director General, State Vigilance & Anti Corruption Bureau, Himachal Pradesh and the file was forwarded to Additional Secretary (Home/Vig.). Based upon the opinion of the District Attorney and that of Joint Director (Prosecution) in the office of Additional Director General, State Vigilance & Anti Corruption Bureau, Himachal Pradesh, the case file along with relevant record was sent to the Law Department for seeking final opinion. In the office of Law Department the case being of no evidence, a conscious decision was taken for not preferring the appeal. It is pointed out that in a police challan no private individual other than victim can prefer appeal against acquittal. The petitioner allegedly is not a victim because initially it is the State Government, which took a conscious decision to hold vigilance enquiry into the allegations against accused-respondents No.1 and 2 and after submission of enquiry report a decision was taken to register a case against them. Consequently, FIR No.27 of 2009 came to be registered against them on 3rd August, 2009 at the instance of Superintendent of Police in the capacity of complainant. Therefore, the petitioner is stated to be neither complainant nor victim as defined under Section 2(wa) of the Code and as such is not entitled to prefer an appeal under Section 372 of the Code.

3. Private respondents in separate reply filed on their behalf have given the details of the criminal cases, which were registered against the petitioner and all those cases the petitioner instituted against the 1st respondent and have submitted that the petitioner is under an impression that the criminal cases against him were registered at the instance of accused-respondent No.1 and the appeal has been filed by him with ulterior motive. It is

denied that the petitioner came to know about the announcement of judgment of acquittal during the months of January-March, 2013. Rather the judgment dated 24th December, 2012 was given wide publicity in the print as well as electronic media on 25th December, 2012. Not only this, but the statement of the petitioner as one of the witnesses was recorded on the day of announcement of the judgment, i.e., 24th December, 2012 itself and while appearing as a witness he was fully aware about the conclusion of the trial. The appeal having been filed beyond the period of 90 days, is said to be time barred. It has also been urged that the petitioner is neither a complainant nor victim within the meaning of Section 2(wa) of the Code, hence not competent to file the appeal against their acquittal.

4. In the counter reply (rejoinder) while denying the contentions to the contrary being wrong and reiterating the case as set out in the petition, it is pointed out that accused-respondent No.1 is acting in mala fide manner and with ulterior motive to settle scores not only with the petitioner, but also with all Officers/Officials namely, Dr. D.S. Minhas, former Director General of Police, Himachal Pradesh, Shri I.D. Bhandari, the then Additional Director General, Shri Daya Sagar, Inspector (Retired) and Shri Hardesh Bisht, the then Superintendent of Police, Vigilance (now Retired), the Investigating Officers, who supervised the proceedings in the case registered against him and his wife accused-respondent No.2 in one way or the other/investigated the same. The instances of harassment of the above Police Officers have also been highlighted in the counter reply with the help of documents, i.e., Annexure P-3, representation of Dr. D.S. Minhas to Secretary (Home), Government of India against the request made by the State Government for seeking permission to charge-sheet him in connection with the case in hand registered against accused-respondents No.1 and 2, Annexure P-4, a charge-sheet served upon Shri Daya Sagar, the then Inspector, Vigilance, who has investigated the case partly and Annexure P-5, copy of FIR No.5 dated 29th April, 2014 registered under Section 218 of the Indian Penal Code against Shri Hardesh Bisht, the then Superintendent of Police, SIU and Shri Daya Sagar aforesaid with the allegation that they did not investigate the case against the accused in a fair manner.

5. It is in this backdrop, the questions that the petitioner has shown sufficient cause for condonation of delay and that he is victim within the meaning of Section 2(wa) of the Code and entitled to prefer the appeal under the proviso to Section 372 of the Code, have to be examined and answered, however, before that it is desirable to take note of the facts leading to the institution of the appeal along with this petition and also the arguments addressed by learned Counsel on both sides.

6. Accused-respondent No.1 Virbhadra Singh is the Chief Minister of Himachal Pradesh. Accused-respondent No.2 Pritibha Singh, a former Member of Parliament is his wife. Accused-respondent No.1 remained Chief Minister of Himachal Pradesh during the period 1985-1990 also. PW-21 Major Vijay Singh Mankotia, former Minister of Himachal Pradesh in the month of May, 2007 received a secret information at Shimla about the audio-cassette having recording of the voice of accused-respondent No.1. The informer arranged to supply the audio-cassette to PW-21, which was found in an envelop alongwith his other Dak nearby the door of MLA flat where he was residing. He played and heard the audio-cassette and found the same to be containing the conversation of accused-respondent No.1 with Shri Mohinder Lal, the then Deputy Commissioner, Shimla, that of accused-respondent No.2 and said Shri Mohinder Lal and also that of Shri Kedar Nath Sharma, the then OSD-cum-Private Secretary to accused-respondent No.1 and said Shri Mohinder Lal qua the exchange of money in lacs of rupees between the accused-respondents on one side and Mr. Piyush Jain of Mini-Steel Plant, Mr. Suresh Neotia and Mr. P.C. Jain of M/s. Gujarat Ambuja Cement,

Brigadier Kapil Mohan, owner of Mohan Meakin through one Mr. Suresh Kapoor of Mohan Meakin Brewery and one Mr. Mittal of Kangra on the other.

7. PW-21 has convened the press conference on 28th May, 2007. The audio-cassette was played in that conference in the presence of media persons and released to the media. The audio-cassette was given wide publicity in the media. Petitioner S.M. Katwal (PW-37) having gone through the news-item in the issues of Hindi dailies "Dainik Bhaskar" and "Divya Himachal" dated 29th May, 2007, has reported the matter to Station House Officer, Police Station, Vigilance and Anti Corruption, Shimla vide petition dated 30th May, 2007 (Ext.PW-37-A). The contents of the same read as follows:

> "Your attention is invited towards the news published in the Hindi Dailies, Dainik Bhaskar and Divya Himachal of 29-5-2007 containing details of telephonic conversation between a high officer and reportedly the present CM and his wife and mentioning others, about payment/acceptance of huge sums of money. The facts, prima facie disclose commission of offences, under the PC Act and Specific Corrupt Practices Act, IPC (Conspiracy) and other laws. I request that a case against the persons named/mentioned therein be registered and action as per law be taken against the persons, and a copy of the FIR so registered may be supplied to me, as per law. It is no excuse that the case is old or that I have no locus standi. There is no time limit in such like cases and any body can set the law in motion.
>
> Earlier also, I had requested that a case be registered about jobs on chits, and when no action was taken I had to pray to the Hon'ble High Court and as per directions of the Hon'ble Court, a case (FIR No.1/2006) was registered. It is another matter that under pressure and deliberately, no accused was named and efforts have been and are being made to dilute the offences and the cases, about which the Hon'ble Supreme Court in a recently reported case has taken a serious view. Non action or non response will mean that you are also committing an offence under sections 120B, 217, 218 of the IPC and I may have to approach the Hon'ble High Court again impleading your as a party."

8. On receipt of the complaint (Ext.PW37-A) supra, the Vigilance Headquarter forwarded the same to the Secretary-cum-Director Vigilance, Government of Himachal Pradesh vide letter No.Vig-Compl.199/2007 (SML)-8687/Confidential dated 7th June, 2007 for issuance of necessary directions in the matter. Since the complaint was against former Chief Minister of Himachal Pradesh and his wife having reference of CD released by PW-21, the Government decided to get the matter enquired into from the Vigilance Department. The Vigilance Headquarters was directed to take appropriate action in the matter and submit the report to the Government. One CD and copy of CWP No.1913 of 2007 (Ext.PW-37/B) filed by S.M. Katwal (PW-37) was also forwarded to Vigilance Headquarters.

9. Consequently, the Vigilance Headquarters entrusted the enquiry to Shri Anand Pratap Singh, Superintendent of Police, State Vigilance and Anti Corruption Bureau, Southern Zone, Shimla, vide letter dated 18th February, 2008. Shri Anand Pratap Singh aforesaid sought for the service record of Shri Mohinder Lal from General Administration Department of Himachal Pradesh and also sought the voice samples of accused-respondents No.1 and 2 from the Director, Public Relations Department, Himachal Pradesh. The record and voice samples so sought were received. It is on 2nd May, 2008 the Inquiry Officer

recorded the statement of Shri Mohinder Lal in the presence of Shri I.D. Bhandari, the then Additional Director General of Police and Shri Ashok Tiwari, Deputy Inspector General, which reads as follows:

> "I have heard the CD today purported to have been converted from a tape recorded sometime in the year 1989. At that time there was no CD but only Tape Recorders were available. I do not know as to how and where it has been recorded. The contents of the CD contain prima facie my conversation with the then Chief Minister, his wife and Shri K.N. Sharma etc. Prima facie the voice in the CD is mine and as far as I remember the conversation has taken place. As regards the names of the persons and the detail thereof the same must have recorded by Rani Sahiba and may be obtained from her. The persons, who made contributions as far as I remember, were sent to the Chief Minister's house on various occasions and the present CD is a version of those occasions which happened and appears to have been recorded on various dates and made into one tape/CD. I am available for any further clarification based on my memory at any time as and when needed, as the matter relates to long time back."

10. The samples of voice of the accused-respondents supplied by the office of Director, Public Relations, Himachal Pradesh were sent to Forensic Science Laboratory, Chandigarh for comparison and report. The Forensic Science Laboratory has submitted its opinion, which reads as follows:

> "Hence, the voice samples marked 'Exh-Q1 and Exh-S1' are probable voice of the same person (Smt. Praibha Singh)".
>
> "Hence, the voice samples of speakers marked 'Exh-Q2 and Exh-S2' are voice of the same person (Sh. Virbhadra Singh, Former Chief Minister of Himachal Pradesh) with high probability."

11. The record pertaining to allotment of steel plant to one Piyush Jain was requisitioned from the Managing Director, HPSIDC, Shimla. The same was received and Shri Ashok Tiwari, Deputy Inspector General (Vigilance), has examined the same on the directions of the then Additional Director General Vigilance and submitted the report on 14th May, 2008 highlighting therein that the Committee had helped Shri Piyush Jain in the matter of allotment of the steel plant. The exchange of money between R.R., who in the opinion of the Inquiry Officer could have been Shri Rangila Ram Rao, the then Industry Minister-cum-Chairman of Board of Directors and Piyush Jain also surfaced, as per the conversation recorded in the CD.

12. Shri Santosh Patial, Superintendent of Police, Sate Vigilance and Anti Corruption Bureau, Northern Range, Dharamshala, was directed to interrogate Major Vijay Singh Mankotia (PW21) in the matter. The audio-cassette was taken into possession by Shri Paras Ram, Dy.S.P. (Vigilance) on 21st May, 2008 from Major Vijay Singh Mankotia.

13. After conducting the enquiry, the Inquiry Officer Shri Anand Pratap Singh has submitted the report dated 18th August, 2008 to the Vigilance Headquarters, which reads as follows:

> "To the Addl. Director General of Police SV&ACB, Shimla dated Shimla-2, the 18th August, 2009. Subject:- Complaint against

former Chief Minister and his wife made by Shri S.M. Katwal IAS (Retd.) on the basis of CD released by Sh. Mankotia. Sir, A complaint dated 16-2-08 (No.Home (Vig) A(5) 147/2007 MLA) was received from Principal Secretary, Home and Vigilance to enquire into the C.D. released by Mr. Vijay Singh Mankotia and CWP 1913/07 filed by Sh. S.M. Katwal, IAS (Retd.) in Hon'ble High Court in this regard. 2. During enquiry, a transcript of the C.D. was made and statement of Sh. Mohindra Lal IAS (Retd.) was recorded on 02-05-08. The statement of Sh. S.M. Katwal IAS (Retd.) was recorded on 07-05-08. On 15-05-08 the statements of Sh. Chaman Kapoor, Sh. Rajinv Bhanot and Smt. Santosh Saini were also recorded at Una. 3. On 08-05-08, the C.D. submitted by Sh. S.M. Katwal IAS (Retd.) was sent for Auditory Analysis to Central Forensic Laboratory, Chandigarh, alongwith a Video C.D. which contained voice samples of both Sh. Virbhadra Singh and Smt. Praibha Singh, and a Digital Video Cassette, which contained the voice samples of Smt. Pratibha Singh. Both the Video C.D. and the Digital Video cassette were obtained from the Director Public Relation H.P. 4. On 21-05-08 Sh. Vijay Singh Mankotia also handed over an audio cassette to the Vigilance team handed by Dy.S.P SV&ACB Dharamshala purporting to contain the voices of Sh.Virbhadra Singh, Smt. Pritabha Singh and Sh. Mohinder Lal, IAS (Retd.). This cassette was sent to Central Forensic Science Laboratory, Chandigarh, on 23-05-08. 5. According to Sh. Mohinder Lal, the voices belong to him, Sh. Virbhadra Singh, Smt. Pratibha Singh and Sh. K.N. Sharma (now deceased). He has also stated that "the persons, who made contributions as far as I remember, were sent to the Chief Minister's House on various occasions and the present CD is a version of those occasions which happened and appears to have been recorded on various dates and made into one tape/CD". He was evasive and did not comment on 'how' and 'where' it was recorded. 6. Sh. S.M. Katwal IAS (Retd.) in this statement has also stated that since he was posted as SDM Rampur in the past and had worked with Sh. Virbhadra Singh in various capacities, he was familiar with his voice and was certain that the voice in the C.D. was that of Sh. Virbhadra Singh. He was also familiar with the voices of Smt. Pratibha Singh and Sh. Mohinder Lal, IAS (Retd.) and was certain that the CD in question also contained their voices. 7. Shri Chaman Kapoor, Sh. Rajiv Bhanot and Smt. Santosh Saini, whose statements were also recorded at Una have claimed to identify the voices in the CD as those of Sh. Virbhadra Singh, Smt. Pratibha Singh and Sh. Mohinder Lal IAS (Retd.). 8. The report from Central Forensic Science Laboratory, Directorate of Forensic Science (No.CFSL/301/08/Phy/62/08-484 dated 8/8/08), copy attached, opines as under: "The auditory analysis of recorded speech samples of speakers marked 'Exh-Q1 and Exh-S1' and subsequent acoustic analysis of the recorded speech samples of the speakers marked Exh-Q1 and Exh-S1 by using Computerized Speech Lab (CSL), revealed that voice exhibits of speakers marked 'Exh-Q1' are similar to the voice exhibits of speaker marked 'Exh-S1' in respect of their acoustic cues and other linguistic and phonetic features. Hence the voice

samples of speakers marked 'Exh-Q1' and 'Exh-S1' are probable voice of the same person (Smt. Pratibha Singh)". "The auditory analysis of recorded speech samples of speakers marked 'Exh-Q2' and 'Exh-S2' and 'Exh-S2' and subsequent acoustic analysis of the recorded speech samples of the speakers marked 'Exh-Q2' and 'Exh-S2' by using Computerized Speech Lab (CSL), revealed that voice exhibits of speakers marked 'Exh-Q2' are similar to the voice exhibits of speakers marked 'Exh-S2' in respect of their acoustic cues and other linguistic and phonetic features. Hence the voice samples of speakers marked 'Exh-Q2' and Exh-S2' are voice of the same person (Sh. Virbhadra Singh, Former Chief Minister of Himachal Pradesh) with high probability". 9. A study of the transcripts and contents of the C.D. reveals a total of nine conversations by Sh. Mohinder Lal, four with Smt. Pratibha Singh, four with Sh. Virbhadra Singh and one with K.N. Sharma. During the course of the conversation the following points comes to notice: 1) The conversations took place immediately prior to the Lok Sabha Elections of February, 1990, as there is discussion regarding 4 seats of Lok Sabha from Himachal Pradesh, and since Shri Mohinder Lal is of the opinion that these conversations took place in 1989, it may be reasonably inferred that the conversations took place during the last months of 1989 and may have gone into the early months of 1990 before the Vidhan Sabha elections. 2) The following persons appeared to have made contributions':1) Atma Ram 2.) Owner of Ambuja Cement 3.) Mr. Jain (In connection with a hotel in Manali 4.) Mr. Kapur of Mohan Meakins 5) Owner of Kangra Flour Mills 6.) One Mr. Mittal from Kangra 7.) Some person from Gujarat 8.) Some person from K&K 9.) One Mr. Neotia. 10.) Mr. Piyush Jain (in connection with the allotment of a steel plaint) 3. There is also a reference of helping "these people as and when the opportunity arises" 4.) There is mention of collection of more than 25 lacs as against the target of 15 lacs. 10. During enquiry the following facts also came to light: 1. A project was awarded to Gujarat Ambuja Cement Ltd. for the manufacture of all types of cements for Rs. 150 crores on 19.2.90, and that this project was under consideration during the period when conversation took place. 2. A mini steel plant project of Mr. Piyush Jain (Sl No. 10) was under consideration during the period when conversation took place. 3. A case of Hotel Honeymoon Inn (then called Hotel Hill Huts) was also pending with the government during the period when conversation took place. An FIR for illegal purchase was also registered against Sh. Satish Chand Jain (Sl No.3) along with revenue employees, in the Vigilance department in 1989 and was under investigation at the time of these conversations. The case was not charge sheeted subsequently because Mr. Satish Chand Jain passed away. A departmental inquiry against revenue officials was ordered. The land was eventually transferred to Hotel Hill Huts by the order of Financial Commissioner-cum-Secretary (Rev) vide order No.Rev 2 F(10)38/88 dated 10/9/1992. 4. Shri Mohinder Lal's case for promotion into the super time Scale was also pending for which DPC was to take place at the time of these conversations and there are references to it. 11. The contents of the C.D. Suggest that

Sh. Mohinder Lal I.A.S. (Retd.), posted as Director of Industries, was a conduit for arranging delivery of money to Sh. Virbhadra Singh through various industrialists. It is quite obvious that a record was maintained of the amount collected. There is also a reference of an amount having being paid by Sh. Piyush Jain 'Rao Sahab' on allotment of the Steel Mill. 12. Since the voice samples have been matched by CFSL the identity of the speakers is clear. Furthermore, Sh. Mohinder Lal, IAS (Retd.) in his statement identifies these voices as his own and as those of Sh. Virbhadra Singh and Smt. Pratibha Singh. It is also pertinent to mention here that no clues recording where or how or by whom the C.D was made, came to light during inquiry, as the matter in question pertains to 1989. Shri S.M. Katwal IAS (Retd.) only mentions that the C.D was found in his letter box during the time of Lok Sabha Elections. Shri Mohinder Lal, IAS (Retd.) and Sh. Vijay Singh Mankotia has also not provided any information in this regard. 13. During the course of enquiry evidence of allotment of Ambuja Cement and Steel Mill to Sh. Piyush Jain and case of Hotel Honeymoon Inn on behalf of Sh. Sathish Chand Jain also came to light. It cannot be established where any favours were indeed given to any of the contributors mentioned above in the letter. But it is quite clear that these matters were pending with the Government towards the end of 1989. 14. Sec. 13 1(d) (ii) and (d) (iii) of the PC act 1988 define Criminal Misconduct as under: 13. Criminal Misconduct by Public Servant (1) A Public servant is said to commit the offence of criminal misconduct, (d) if he,--(ii) by abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage, without any public interest. The inquiry is complete and the facts that have come to light have been disused above. The entire record collected during the course of enquiry is in the custody of the undersigned. Hence the report is submitted as desired by your letter No. Vig. Compl-199/2007(SML)-2418 dated 18/2/2008." Thanking You, Yours faithfully, Sd/- A.P. Singh, SP SV&ACB SR Shimla."

14. The Additional Director General of Police State Vigilance and Anti Corruption Bureau, Himachal Pradesh has forwarded the report to Principal Secretary (Home) and Vigilance vide letter No.16345 dated 9th September, 2008, with his opinion that prima facie a cognizable offence is found to have been committed by the accused-respondents and that it is the Government, which is the competent authority to take final decision in this regard.

15. The matter was examined in the Home Department and vide letter No.Home(Vig.)A(5)147/2007 (MLA&MP) Govt. of HP Department of Home (E-Section) dated 31st July, 2009, the Vigilance Headquarter was informed as under:

> "As per opinion of the Law Department, the Police Officer has to take an independent decision after due application of mind. You are therefore, requested to take further necessary action in the matter. Enquiry report as received from your office is returned herewith."

16. The above communication was received in the Vigilance Headquarter on 1st August, 2009 and on the receipt thereof, Director General of Police, State Vigilance and Anti Corruption Bureau, Shimla, has ordered as under:

> "Get the case registered in P.S. SV&ACB, Shimla and let it be investigated by S.P. (SIU) SV&ACB, Shimla."

17. It is how the case vide FIR No.27 of 2009 came to be registered against the accused-respondents by Shri Arvind Digvijay Singh Negi, the then Additional Superintendent of Police, Incharge, Police Station, State Vigilance and Anti Corruption Bureau, Shimla, under Sections 8, 9, 10, 13(1) (d)(i)(ii) read with Section 13(2) of the Prevention of Corruption Act, 1988 and Section 120-B of the Indian Penal Code.

18. The investigation was entrusted to Special Investigating Unit vide letter No.Reader/SR/09-5045 dated 3rd August, 2009. The Investigating Officer had obtained the notifications qua appointment of accused-respondent No.1 as Chief Minister of Himachal Pradesh. The transcript of CD in nine separate parts was got prepared and each and every part carefully analyzed. It transpired that Super Time Scale was due to Shri Mohinder Lal on 1st January, 1990; however, the same was released to him well before the due date on 23rd November, 1989. The required action in the matter including constitution of the Committee for the purpose was taken on the same day, i.e., 23rd November, 1989 itself. In the opinion of the investigating agency it was done to help Shri Mohinder Lal, who was apprehending the defeat of the Congress Party in 1989 General Election of Lok Sabha followed by the election of HP Legislative Assembly in the month of February, 1990, hence was in hurry in the matter of his induction in super time scale on promotion. Shri Mohinder Lal died on 19th January, 2009 during the investigation of the case and in his place his son Kavinder Lal (PW-22) was associated in the investigation of the case.

19. The permission to set-up cement plant by Gujarat Ambuja Cement was also found to be expedited in haste allegedly on receipt of bribe. In the matter of installation of modified Effluent Treatment Plant by Mohan Meakin, no action was taken by the concerned Department and it so happened on account of accused-respondent No.2 received `2 lacs from its owner. The case to grant permission to set-up mini steel plant by one Piyush Jain was also found to be given with a view to help him in lieu of the money received from him by the accused-respondents and also Shri Rangila Ram Rao, the then Industry Minister; however, no case could be registered against Mr. Rao for want of sufficient evidence.

20. The perusal of the transcript of the CD further reveals that lacs of rupees were taken in bribe by the accused-respondents in connivance with Shri Mohinder Lal. Though involvement of Shri Mohinder Lal was also established, however, as he died during the course of investigation, therefore, no challan could be filed against him.

21. In view of the investigation conducted in the matter, the investigating agency has arrived at a conclusion that accused-respondent No.1 has committed the offence punishable under Sections 10, 13(1)(d),(i), (ii) read with Section 13(2) of the Prevention of Corruption Act and 120-B of the Indian Penal Code, whereas accused-respondent No.2 under Sections 8 and 9 of the Prevention of Corruption Act and 120-B of the Indian Penal Code.

22. The report under Section 173 of the Code of Criminal Procedure was filed accordingly against both accused-respondents in the Court of learned Special Judge (forests), Shimla. This has led to registration of Corruption Case No.9-S/7 of 2010 against them.

23. Learned Special Judge after taking into consideration the police report and the documents annexed therewith and hearing learned Public Prosecutor as well as defence Counsel, has prima facie found a case under Sections 7, 13(1)(d) read with Section 13(2), 11 of the Prevention of Corruption Act and Section 120-B of the Indian Penal Code made out against accused-respondent No.1, whereas under Section 9 of the Prevention of Corruption Act and Section 120-B of the Indian Penal Code against accused-respondent No.2. Charges against both of them were framed accordingly to which they pleaded not guilty and claimed trial.

24. After holding full trial, learned Special Judge has arrived at a conclusion that the prosecution has failed to prove its case against accused-respondents beyond reasonable doubt and vide judgment dated 24th December, 2012 they have been acquitted from the charges framed against each of them.

25. As noticed at the very outset, the State has not preferred any appeal against the judgment of acquittal. It is the petitioner, who claims himself to be the complainant and ultimately a victim within the meaning of Section 2 (wa) of the Code, has filed the appeal under the proviso to Section 372 along with a petition under Section 378 (4) of the Code seeking leave to appeal. Since the appeal is barred by 96 days, the present petition has been filed with a prayer to condone the delay so occurred in filing the same.

26. Mr. A.P.S. Deol, learned Senior Advocate assisted by M/s. Virbahadur Verma and Adhiraj Singh Thakur, Advocates, has made many fold submissions to substantiate the question of maintainability of the appeal, the petitioner a victim within the meaning of Section 2(wa) of the Code and to persuade this Court that the appeal on condonation of delay may be entertained.

27. As the respondent-State and also accused-private respondents have raised the question of locus-standi of the petitioner to file the appeal and that he has not suffered any loss or injury including physical or mental, economic loss or impairment of his fundamental right through acts and omissions for which the accused persons were charged, hence not a 'victim' within the meaning of Section 2(wa) of the Code. The petitioner, however, claims himself to be a 'victim', hence, it is urged that the proviso to Section 372 extends a right in his favour to file the appeal. Besides, while raising the question of fairness of the trial and learned Special Judge allegedly ignored the merits, it is urged that on condonation of delay as occurred in filing the appeal, the same be decided on merits.

28. Therefore, the following points arise for consideration of this Court:

a. Whether the petitioner is a 'victim' within the meaning of Section 2(wa) of the Code and he has locus-standi to file an appeal under the proviso to Section 372 of the Code against the judgment of acquittal passed by learned Special Judge (Forests), Shimla on 24th December, 2012?

b. Whether the petitioner has been able to show sufficient cause to condone the delay, as occurred in filing the appeal?

c. Whether the merit of the case has been ignored by the trial Court?

d. Whether fair trial has not been conducted by the trial Court?

Point No.1.

Brief background:

29. There is no quarrel that proviso to Section 372 of the Code incorporated by way of amendment on and with effect from 31st December, 2009, extends a right in favour of a victim to prefer an appeal against the judgment passed by the Court acquitting the accused or convicting for a lesser sentence or imposing inadequate compensation either to the Sessions Court or to the High Court, as the case may be. In Cr.M.No.790-MA of 2010(O&M), titled ***M/s. Tata Steel Ltd***. v. ***M/s. Atma Tube Products Ltd. and others*** along with its connected matter Cr.M.A. No.547-MA of 2011(O&M), titled ***Kesar Singh*** v. ***Dheeraj Kumar,*** Punjab and Haryana High Court though has held that in an appeal filed under the proviso to Section 372 of the Code, the leave to appeal under Section 378 of the Code is not required to be obtained in a case of private complaint and the victim is a complainant. He has got two options, i.e. either to file appeal against the order of acquittal recorded by the trial Court to the High Court under Section 378 of the Code or to the Sessions Court, as the case may be under the proviso to Section 372 of the Code. The present, however, is a case where the proceedings against accused-respondents No.1 and 2 have been launched consequent upon registration of a criminal case against both of them. In a case of this nature, as per Division Bench of our own High Court in ***Joginder Singh*** v. ***State of Himachal Pradesh, 2013(2) RCR (Criminal) 60***, leave to appeal is required to be obtained by the victim for filing an appeal under the proviso to Section 372 of the Code.

30. Any how the main dispute herein is as to whether the petitioner is a victim within the meaning of Section 2(wa) of the Code and has locus-standi to file the appeal or not.

31. The urge to find out true answers to the questions so formulated vis-à-vis the law laid down by the Apex Court and various High Courts by way of judicial pronouncements led to lengthy arguments addressed on behalf of the petitioner by Mr. A.P.S. Deol, learned Senior Advocate assisted by bright young lawyers S/Shri Virbahadur Verma and Adhiraj Singh Thakur, Advocates, whereas the private respondents by Mr. R.S. Cheema, learned Senior Advocate assisted by S/Shri Ajay Kochhar, Satyen Vaidya and Vivek Sharma, Advocates and respondent No.3-State by S/Shri R.M. Bisht and P.M. Negi, learned Deputy Advocate General.

Respective contentions of learned Counsel representing the parties.

32. Though it is Mr. Cheema, who has raised the question of maintainability of the petition for condonation of delay and also leave to appeal as well as the appeal filed therewith, this Court allowed Mr. Deol to address arguments first in counter to the question so raised.

33. Mr. Deol has drawn the attention of the Court to the definition of the 'victim' as defined in Section 2(wa) of the Code, the same reads as follows:

> "Victim means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."

34. The 'victim', therefore, is a person, who has suffered any loss or injury on account of an act or omission with which the accused persons have been charged. The emphasis, therefore, is on terms "loss" or "injury". The term "loss" has not been defined in

the Code. However, it is Section 23 of the Indian Penal Code, which defines term "wrongful loss" as follows:

> "**"Wrongful loss"**.- "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled."

35. The term "injury" is also defined in Section 44 of the Indian Penal Code, which reads as follows:

> "44. **"Injury".-** The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property."

36. According to Mr. Deol, Ext.PW-37/A is the complaint, which has been made by the petitioner and thereby set into motion the machinery. He is a public spirited person and as the acquittal of the accused persons has resulted in "loss" or "injury" to him, therefore, he is a 'victim' and as such entitled to file the appeal under the proviso to Section 372 of the Code.

37. In support of his contentions, he placed reliance on the decision of Full Bench judgment of Punjab and Haryana High Court in ***M/s. Tata Steel's*** case supra. In this judgment terms "victim", "wrongful loss" and "injury" have been discussed in detail and liberally construed.

38. Mr. Deol has also placed reliance upon a decision of the Apex Court in ***Sheo Nandan Paswan*** v. ***State of Bihar and others, AIR 1987 SC 877***.

39. Another precedent relied upon is the judgment of Bombay High Court in ***Balasaheb Rangnath Khade*** v. ***State of Maharashtra and others, 2012 (2) CCR 381***. It is the observations in paras 47 and 48 of this report which have been pressed into service.

40. Mr. Deol has also placed reliance on a Division Bench judgment of this Court in ***Joginder Singh's*** case supra. In this judgment also it is held that a victim has a right to file an appeal against a judgment of acquittal of the accused and also conviction for lesser offence as well as inadequacy of compensation on obtaining leave to appeal under Section 378 (4) of the Code.

41. Mr. Deol has also placed reliance on a Division Bench judgment of Gauhati High Court (Agartala Bench) in C.M. Appl (Crl) 89 of 2011 in Crl. A. No.13 of 2011, titled ***Gouranga Debnath*** v. ***State of Tripura and others*** and on that of Punjab and Haryana High Court in ***Ram Kaur @ Jaswinder Kaur*** v. ***Jagbir Singh @ Jabi and others (2010) 3 RCR (Cri.), 391 (DB).***

42. A Full Bench of Gujarat High Court in ***Bhavuben Dineshbhai Makwana*** v. ***State of Gujarat and others, 2013 Cri.L.J. 4225*** has also held that the victim can file an appeal under the proviso to Section 372 of the Code to challenge therein the order of acquittal or conviction for lesser offence or award of inadequate compensation, irrespective of the State has also filed an appeal against the same order.

43. Mr. R.S. Cheema, learned Senior Advocate, while repelling the arguments addressed by Mr. Deol on the question of maintainability of the delay petition, the petition for leave to appeal and the appeal, has strenuously contended that the petitioner is neither a complainant nor even an informant and rather a whistle blower, as the FIR against the accused-respondents was registered on the basis of the complaint made by Superintendent of Police, State Vigilance and Anti Corruption Bureau, Shimla. The petitioner's claim that he

being a public spirited person and as such is a complainant/first informant is not sustainable. The proceedings have been initiated by the petitioner merely to wreak-vengeance against the private respondents as he is under the impression that the criminal cases have been registered against him at their instance. Therefore, according to Mr. Cheema, the petitioner is inimical towards accused-respondents No.1 and 2. He according to Mr. Cheema, at the most is a whistle-blower. A whistle-blower cannot be termed to be a 'victim'. It is also urged that even if the petitioner is to be treated as an informant or a complainant in that event also he has no right to prefer an appeal as the proviso to Section 372 of the Code extends a right only in favour of a victim and not in favour of the complainant/ first informant. From the case law referred to by Mr. Deol, it is pointed out that there is not even a single decision in which a view that complainant has a right to file an appeal in terms of Section 372 of the Code, is taken. According to Mr. Cheema, in ***M/s. Tata Steel's*** case supra, the point in issue was qua the definition of victim, whereas in ***Balasaheb Rangnath Khade's*** case the question examined and answered was with regard to the requirement of obtaining leave to appeal by the victim to file an appeal under the proviso to Section 372 of the Code. The judgment rendered by Full Bench of Gujarat High Court in ***Bhavuben Dineshbhai Makwana's*** case deals only with the right of a victim to file an appeal and stated to be not relevant to the present controversy. The ratio of the law laid down by the High Court of Gauhati (Agartala Bench) in ***Gouranga Debnath's*** case deals only with the question that the father of a person murdered, is victim or not whereas that of the Apex Court in ***Sheo Nandan Paswan's*** case deals with the question of a non-informant to challenge an order of withdrawal of prosecution by the Prosecutor.

44. Per contra, Mr. Cheema has placed reliance on the judgment of the Apex Court in ***National Commission for Women*** v. ***State of Delhi and another, (2010) 12 SCC 599.*** It is held in this judgment that the impression 'victim' has to be interpreted in appropriate legal perspective. It was a case of atrocities against woman and the Apex Court has held that National Commission for Women was neither victim nor complainant to file the appeal. This judgment reads as follows:

> "11. An appeal is a creature of a Statute and cannot lie under any inherent power. This Court does undoubtedly grant leave to the appeal under the discretionary power conferred under Article 136 of the Constitution of India at the behest of the State or an affected private individual but to permit anybody or an organization pro-bono publico to file an appeal would be a dangerous doctrine and would cause utter confusion in the criminal justice system. We are, therefore, of the opinion that the Special Leave Petition itself was not maintainable."

45. Reliance has also been placed upon a Division Bench judgment of Punjab and Haryana High Court in CRM No.26221 of 2011 and CRM No.A-402-MA of 2011, titled ***Parmod Kumar*** v. ***Har Parkash and others***, in which petitioner Parmod Kumar, who had lodged the FIR, was not held to be a victim.

Discussion and the conclusion drawn:

46. Now analyzing the rival submissions and also the law cited at the bar, proviso to Section 372 of the Code extends an indefeasible right to the victim to prefer an appeal against an order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation. There is no quarrel in this regard. The petitioner is a victim or not, is a question hotly contested on both sides.

47. It is well established from the law cited on both sides that it is not necessary that an informant or the complainant is always a victim and proviso to Section 372 of the Code confers a right upon the victim alone to prefer an appeal and not on an informant or a complainant. The appeal is a creation of statute and the right to file an appeal has to be determined with reference to the relevant statutory provisions.

48. In a case of prosecution launched on the registration of FIR and presentation of police report under Section 173 of the Code, it is only the State, which is competent to prefer the appeal and the statute does not confer power on a complainant or informant, who is not a victim, to prefer an appeal against the acquittal.

49. Adverting to the case in hand, of course, on the complaint Ext.PW-37/A made by the petitioner, he set into motion the machinery because it is consequent upon said complaint the Government ordered an enquiry into allegations in the complaint, which was conducted by Shri Anand Pratap Singh, Superintendent of Police, State Vigilance and Anti Corruption Bureau. He submitted the report and it is on the basis thereof FIR No.27 of 2009 under Sections 8, 9, 10, 13(1)(d)(i)(ii) read with Section 13(2) of the Prevention of Corruption Act, 1988 and Section 120-B of the Indian Penal Code was registered against accused-respondents No.1 and 2.

50. As per the decisions cited at the bar and the law as discussed hereinabove, laid down therein, the proviso to Section 372 of the Code empowers the victim to prefer an appeal against an order acquitting the accused or convicting for lesser sentence or imposing inadequate compensation. None of the precedents so cited except for ***M/s. Tata Steel Limited*** and ***Gouranga DebNath's*** cases supra, however, deal with term 'victim' within the meaning of Section 2(wa) of the Code. The Full Bench of Punjab and Haryana High Court in ***M/s. Tata Steel Limited***, after examining the term 'victim' within the meaning of Section 2(wa) of the Code and also words "loss" and "injury" within the meaning of Sections 23 and 44 of the Indian Penal Code with the help of the case law relied upon has held that words "loss" and "injury" used in Section 2(wa) are synonymous and that a person, who has suffered an injury in body or mind or reputation or to his/her property, is a 'victim' within the meaning of Section ibid. No doubt, as per law laid down by the Full Bench, 'victim' is a person not only suffered with an injury in body or mind or to the property, but reputation also, is a victim. This judgment reads as follows:

> "47. Section 2(wa) of the Code defines 'victim' to mean a person who has suffered any loss or injury caused by the reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her 'guardian' or 'legal heir'. We find on its plain reading that the Legislature has classified the 'victim' in two categories i.e. (i) a person who has suffered any loss or injury caused by the act or omission attributed to the accused; and (ii) the 'guardian' or 'legal heir' of such 'victim'. The correct understanding of the first part of the term "victim" is contingent and is subject to the true scope of the words "loss" or "injury" contained therein. Both these words are not denied in the Code, however, its Section 2(y) says that "words and expressions used herein and not denied but defined in the Indian Penal Code (45 of 1860) have the meanings respectively assigned to them in that Code".
>
> 48. Section 23 IPC defines "wrongful loss" and it says that "wrongful loss" is the loss by unlawful means of property

to which the person losing it is legally entitled". It is further explained that "a person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property". According to Section 44 IPC, the word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property". It is, thus, in the context of offences against property, especially under Section 418 and 'mischief' as defined in Section 425 IPC that the term 'wrongful loss' has been used in the Penal code. The Legislature while defining 'victim' in Section 2(wa) of the code has used the word 'any loss' before 'or injury' and has not restricted it to 'wrongful loss' only. We, thus, find that the words 'loss' and 'injury' used in Section 2(wa) are synonymous. This view is also fortified by the use of wide term 'any loss' in clause (b) as compared to 'the loss' in clause (c) of Section 357(1) of the Code.

49. It is so acte clair that a person who has suffered any injury in body or mind or reputation or to his/her property or if such person has been caused loss of property, to which he is legally entitled to, unlawfully at the hands of another person who has charged as an accused, is the 'victim' within the meaning of Section 2(wa). Similarly, if as a result of the aggravated form of victimization, such 'victim' of first part does not survive, the second part of the definition of 'victim' as defined in Section 2(wa) of the Code substitutes the first part and becomes operative whereupon the guardian (if such 'victim' was a minor or of unsound mind) or the legal heirs of the deceased victim, as the case may be, step-in for the 'victims' for the varied purposes under the Code".

51. In ***Gouranga Debnath's*** case, Gauhati High Court (Agartala Bench), while giving a wider interpretation to the term 'victim', has observed that the 'victim' is a person, who individually or collectively have suffered hard, including physical or mental injury, emotional suffering, economical loss or substantial impairment to his fundamental rights through the acts or omissions in conflict with criminal law. As a matter of fact, this was the meaning assigned to term 'victim'. This judgment reads as follows:

"41. In the case of **Smt. Ram Kaur**, the High Court of Punjab and Haryana while examined the Section 2(wa) of the Code took note of the Minutes of the 96th Plenary meeting on 29th November, 1985 of the General Assembly of the United Nations wherein the United Nations made a Declaration of Basic Principles of Justice for victims of Crime and Abuse of Power, recognizing that millions of people throughout the world suffer hard as a result of crime and the abuse of power and that the right of these victims have not been adequately recognized and also that frequently their families, witnesses and other who aid them are unjustly subjected to loss, damage or injury. The Assembly affirmed the necessity of adopting national and international norms in order to secure universal and effective recognition of and respect for, the

rights of victims of crimes and abuse of power. In the said declaration, the word 'victim' was defined as under:

> 6.2:- 6.2 The Declaration defines victims as "person who, individually or collectively, have suffered hard, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws prescribing criminal abuse of power".

42. The aforesaid definition of victim has been discussed in 154th Report of Law Commission, but the legislation has not adopted the said definition and have given a restricted meaning of the word "victim" means only a person, who has suffered any loss or injury caused by a reason of the act or omission of the offender and victim includes his or her guardian or legal heir, which in fact subsequently incorporated in the amendment of the Code by way of inserting the clause (wa) of Section 2 of the Code.

43. A joint reading of Smt. Ram Kaur (supra) and Section 2(wa) of the Code, we are of the opinion that person who has suffered loss due to a crime is obviously a victim and more particularly we are also in agreement with Mr. Kar Bhowmik as well as Mr. Deb that in Section 2(wa) of the Code, there are two parts. One part is relating to victim who has suffered loss and injury and by way of other parts, the Legislature expanded the word 'victim' even to the persons who are the guardian and legal heirs."

52. In CRM No. 26221 of 2011 and CRM No.A-402-MA of 2011, titled ***Parmod Kumar*** v. ***Har Parkash and Others***, Punjab and Haryana High Court has held as follows:

> "In terms of the proviso to Section 372 of the Code of Criminal Procedure ("Cr. PC" – for short) only a 'victim' can file an appeal. 'Victim' has been defined in Section 2 (wa) Cr.PC to mean a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir."

53. In rest of the judgments cited on behalf of the petitioner, the only legal question dealt with pertains to the entitlement of a victim to prefer an appeal against a judgment of acquittal under the proviso to Section 372 of the Code, qua which there is not much quarrel, hence need no further elaboration.

54. The question, however, arises that the petitioner before this Court is covered by the meaning so assigned to term 'victim' or not. The answer to this poser in all fairness and in the ends of justice would be in the negative for the reason that irrespective of the complaint Ext.PW-37/A having been made by him, he is not a complainant nor the case is registered at his instance. He at the most is a whistle blower. On going through the reply to this petition filed on behalf of accused-respondents No.1 and 2, the petitioner is an accused in criminal cases registered vide FIR No. 3 of 2003 under Sections 465, 467, 468, 471 of the Indian Penal Code and 13(2) of the Prevention of Corruption Act, FIR 15 of 2003 under

Sections 420, 467, 468, 471, 120-B of the Indian Penal Code and 13(2) of the Prevention of Corruption Act, FIR No. 27 of 2005 under Sections 420, 467, 468, 471 of the Indian Penal Code and 13(2) of the Prevention of Corruption Act, FIR No.11 of 2006 under Sections 420, 467, 468, 471 of the Indian Penal Code and 13(2) of the Prevention of Corruption Act, FIR No.1 of 2004 under Sections 420, 467, 468, 471 of the Indian Penal Code and 13(2) of the Prevention of Corruption Act, FIR No.4 of 2003 under Sections 420, 467, 468, 471, 120B of the Indian Penal Code and 13(2) of the Prevention of Corruption Act, and FIR No.2 of 2004 under Sections 420, 467, 468, 471, 120B of the Indian Penal Code and 13(2) of the Prevention of Corruption Act, in Police Station, Enforcement North Zone, Dharamshala. Therefore, all these cases were registered against him at a time when accused-respondent No.1 was the Chief Minister of this State. Not only this, but three Civil Suits bearing No.5 of 2004, 5 of 2005 and 8 of 2005 have been instituted by the petitioner against accused-respondent No.1. It can reasonably be believed that both accused-respondent No.1 and the petitioner are inimical to each other. Therefore, the possibility of he having initiated these proceedings against the accused-respondents merely to wreak-vengeance against them cannot be ruled out. Although, the kind of "loss" and "injury" as discussed by the Full Bench of Punjab and Haryana High Court in ***M/s. Tata Steel Limited*** and Gauhati High Court in ***Gouranga Debnath's*** case have not been suffered by the petitioner and at the most he can only be said to have suffered with mental injury or emotional suffering and for that matter even every citizen suffers such loss and injury if an offence of the nature already committed by the accused-respondents is found to be committed by a person occupying such a high position, yet keeping in view that the petitioner has not set the machinery in motion in the capacity of a public spirited person and rather on account of he being inimical to the accused-respondents, he cannot be termed as 'victim' within the meaning of Section 2(wa) of the Code nor competent to prefer an appeal under the proviso to Section 372 of the Code.

55. Of course, charges against accused-respondents No.1 and 2 are that of corruption, therefore, if any "loss" or "injury" including the emotional loss or mental injury is caused by their acquittal, it cannot only be to a particular individual, like the petitioner, but also to the public at large. As already said, the term 'victim' is wide enough and to be construed liberally in a case having charges of corruption that too against a person occupying high position and at the helm of affairs. What to speak of complainant or informant having suffered loss on account of acquittal of an accused from the charge of this nature, any one else may also feel aggrieved, however, this alone is not sufficient because under the proviso to Section 372 of the Code, it is a victim alone competent to prefer appeal. In this case since the petitioner is inimical to accused-respondents No.1 and 2, therefore, if he claims himself to be a 'victim', it is difficult to believe. I am, therefore, in agreement with Mr. Cheema that the petitioner is not a victim within the meaning of Section 2(wa) of the Code for the reason that an informant or complainant has no right to prefer an appeal. The amendment empowers only a 'victim' and none else to prefer an appeal, not a complainant or first informant that too when the criminal proceedings were launched consequent upon the investigation conducted on registration of FIR. It is worth to mention here that in ***National Commission for Women*** v. ***State of Delhi and another***, supra the Apex Court has not held the National Commission for Women as 'victim' in-spite of that case being that of atrocities/crime against women. To my mind in that case the National Commission was on better footing as compared to the petitioner in the case in hand.

56. In another precedent cited by Mr. Cheema, **Parmod Kumar,** at whose instance the FIR was registered, was not held to be a victim by the Punjab and Haryana High Court.

57. As regards ***Sheo Nandan Paswan's*** case supra, the same also does not deal with the questions arising in the present case at all. In this case, learned Public Prosecutor moved an application for withdrawal of prosecution, which was opposed by ***Sheo Nandan Paswan***. The said application was allowed and the accused Dr. Jagannath Misra and others were ordered to be discharged. Sheo Nandan Paswan filed a revision against the said order, which was dismissed by the High Court. Sheo Nandan Paswan challenged the orders of learned Courts below before the Hon'ble Supreme Court. Therefore, the questions involved in ***Paswan's*** case were entirely different and dealt with the locus standi of a non-informant to challenge an order of withdrawal of prosecution. It was not a case of an appeal against acquittal. The reference by the Hon'ble Supreme Court in para 14 to a decision of the Constitution Bench in ***A.R. Antulay's*** case stating that anybody could set the machinery of law in motion on commission of a crime and file the complaint, does not render any assistance to the petitioner, who has to plead his case on the basis of a statutory right to file an appeal.

58. In view of what has been said in para supra, it would not be improper to conclude that the right to file an appeal is creature of statute and the same need determination with reference to the statutory provisions. In a case, where the prosecution is launched on the basis of an FIR, it is only the State, which can prefer an appeal against the acquittal and not the complainant or informant, who is not a victim. Therefore, when the petitioner is not proved to be a victim, he is not entitled to prefer an appeal under the proviso to Section 372 of the Code against the acquittal of the accused-respondents. This takes us to the second question which pertains to the delay as occurred in filing the appeal.

Point No.2.

Brief background:

59. After having said that the petitioner is not a victim within the meaning of Section 2 (wa) of the Code and as such not competent to file the appeal, it is deemed appropriate to go into the question of limitation also.

60. Now coming to the question of delay the reasons therefor as mentioned in paras 2 to 4 of the petition read as follows:

> "2. That the applicant received knowledge of the judgment dated 24.12.2012 through Newspaper when he was attending to his sick wife who was undergoing treatment for a serious ailment at PGI, Chandigarh during the months of Jan-March, 2013.
>
> 3. That the applicant had no access to the file record since he had not engaged any private counsel for prosecuting this case. On receiving knowledge that the State of Himachal Pradesh which is ruled by Sh. Virbhadra Singh (respondent No.1) and who is also holding charge of Home Department would not let the prosecution department to file any appeal against his acquittal, the petitioner has come forward as a 'victim' to prefer an appeal against the judgment of acquittal. The competent authority to give fitness/unfitness certificate for filing appeal in the High Court was special public prosecutor, appointed in the case by present Govt. after declaration of result of State Assembly on 23.12.2012. The said prosecutor was appointed by the Govt. headed by Sh. Virbhadra Singh by Home Department which intern was headed by Respondent No. 1. Thus the

prosecutor and the accused became one and the same having common interest not to peruse the case in effectiveness.

The State Govt. department of Home is thus happy to oblige the accused in this case i.e. Respondent No. 1 and 2 by not filing any appeal against the acquittal and has let the period of limitation expire conveniently for obvious reasons. In this peculiar circumstance the delay in filing the appeal may kindly be considered in the light of above stated facts.

4. That although Section 372 Cr.P.C does not provide a period of limitation for filing an appeal by the victim. However, the period as provided under Article 114 of the Limitation Act has been made applicable by certain decisions rendered by the Hon'ble High Courts in the country. Full Bench of the Gujarat High Court in the case of **Bhavu Ben Dinesh Bhai Makwana vs. State of Gujarat Crl Appeal No. 238 of 2012 and 608 of 2012** has held that the period of 90 days should be a reasonable period for the victim to file an appeal since the said period is the longest period of limitation for filing an appeal prescribed by the legislature.

This view is based upon the well recognized principles of criminal jurisprudence (Crime never dies), the **Maxim "nullum tempus qut locus occurrit regi"** (Lapse of time is no bar to Crown in proceedings against offenders) is an age old rule embedded in criminal justice delivery system. The public policy behind this rule is that a criminal offence is considered as a wrong committed against the State and the Society. The aforesaid rule of prudence has been duly acknowledged by the Parliament as it has prescribed no period of limitation for filing an appeal under proviso to Section 372 of the Code against an order of acquittal. It would be pertinent to mention here that the applicant/appellant has got the Photostat copy of the judgment in the month of August, 2013."

61. The response on behalf of accused-respondents is that not only the petition but also the appeal is mala fide, filed with an ulterior motive to settle score with them as he is under the impression that the criminal cases registered against him during the period 2003 to 2006 detailed in earlier part of this judgment were registered at the behest of accused-respondent No.1. It is denied that the petitioner acquired knowledge of passing judgment of acquittal during the period January-March, 2013. As averred in reply to the petition, the case of the accused-respondents is that the petitioner appeared as PW-37 on 24th December, 2012 in the Court. The impugned judgment was announced on that day itself. The judgment so delivered was given wide publicity in Print and electronic media on 25th December, 2012. The petitioner, therefore, was fully aware about passing of the judgment on 24th December, 2012 and he has filed the appeal due to personal grudge and vindictive attitude against the accused-respondents. The petitioner's claim that he is a victim within the meaning of Section 2(wa) was also denied being wrong. The allegations against the accused-respondents and other functionaries of the State are stated to be baseless, malicious and defamatory. The averments that accused-respondent No.1 having taken over as Chief Minister of Himachal Pradesh and Minister in charge of Home Department, the department of Home obliged him by not filing the appeal against his acquittal, have also been denied being wrong. In this behalf, it is submitted that since the

competent authority had found the present a case of no evidence, hence rightly decided not to file appeal. It is denied that no period of limitation is prescribed for filing an appeal under the proviso to Section 372 of the Code and stated that the period of limitation as provided under Article 114 of the Limitation Act is 90 days. It is also denied that the petitioner got Photostat copy of the judgment in August, 2013. He rather intentionally and deliberately suppressed the source from where he got the copy of the judgment. The copy of the judgment annexed to the appeal is shown to have been prepared on 31st December, 2012. Therefore, according to accused respondents, the petitioner has no right to file the appeal. Otherwise also, the petition discloses no cause or reason muchless sufficient cause or reason for condonation of delay.

62. The respondent-State in preliminary submissions has come forward with the version that on receipt of the copy of judgment of acquittal, the District Attorney has examined the matter and opined that it was not a fit case for filing the appeal. The opinion of District Attorney was forwarded to Additional Director General, State Vigilance and Anti-Corruption Bureau, Himachal Pradesh and was examined in Vigilance Headquarters by Joint Director (Prosecution). The file along with the opinion of Joint Director was sent to Additional Chief Secretary (Home). The Home Department has forwarded the matter to Law Department for seeking opinion. In the opinion of the Law Department, it was a case of no evidence; therefore, a thoughtful and conscious decision not to file appeal by the State was taken.

63. The petitioner should have been vigilant and approached the Court within the reasonable time for redressal of his grievances. He however, remained negligent. Otherwise also, the present being a police case, it is only the victim, who alone is competent to file an appeal under the proviso to Section 372 of the Code. The petitioner in this case is not a victim, hence not competent to file the appeal. It is denied that the Home Department has obliged the accused-respondent No.1 by not filing the appeal against the judgment. It is also denied that no limitation is prescribed for filing an appeal under the proviso to Section 372 of the Code. It is submitted that the procedure as prescribed under Section 378 of the Code for filing the appeal against the acquittal is applicable for filing the appeal under the proviso to Section 372 of the Code also.

64. In rejoinder to the reply filed on behalf of the accused/respondents, while pointing out the alleged revengeful and vindictive attitude of accused respondent No.1 on becoming Chief Minister of the State, the instances of initiation of criminal/departmental proceedings against Dr. D.S. Minhas, the then Director General of Police, Himachal Pradesh, who allegedly has ordered the registration of FIR No.27 of 2009 against the said accused and monitored the investigation conducted therein, Shri I.D. Bhandari, on the charges of snooping upon certain politicians now in power, Inspector Daya Sagar (Retd.), the Investigating Officer., who allegedly have been charged with recording statements of Brigadier Kapil Mohan and Shri P.C. Jain, the witnesses examined by the prosecution in the trial against the accused/respondents allegedly falsely and Shri Hardesh Bisht, the then Superintendent of Police, SIU one of the Investigating Officer, who filed final report under Section 173 of the Code against accused- respondents No.1 and 2. Therefore, the complaint is that, it is not the petitioner, but the accused-respondent No.1, who is vindictive and inimical not only against the petitioner but also against all those who any how or other monitored/investigated the case FIR No. 27 of 2009, which was registered against him and his wife Pratibha Kumari, accused No.2 on taking over as Chief Minster of the State.

65. The representation Annexure P-3 to the rejoinder highlighting the alleged acts of vindictiveness on the part of accused-respondent No.1, made by Dr. D.S. Minhas to Shri Anil Goswami, Secretary (Home) to the Government of India against the communication

made by respondent-State for seeking permission to charge-sheet Dr. Minhas. Annexure P-4 (Colly.) is a communication addressed to Additional Superintendent of Police, Police Station, State Vigilance and Anti-Corruption Bureau, Shimla- 2, with a request to serve charge-sheet upon Shri Daya Sagar, aforesaid and Annexure P-5, copy of FIR No.5 of 2014 registered against Shri Hardesh Bisht, Superintendent of Police, SIU and Shri Daya Sagar, Inspector (Retd.), aforesaid have also been pressed into service.

Respective Contentions of learned Counsel for the parties.

66. Mr. Deol, learned Senior Advocate has argued that the petitioner have not engaged any counsel in the trial Court nor have any access to the record and decided to file appeal against the judgment of acquittal only on coming to know that respondent-State will not file the appeal. Therefore, the delay, which according to Mr. Deol, is not inordinate and on the other hand the offence like immorality and corruption by the persons occupying high position the term "sufficient cause", has been sought to be liberally construed. Therefore, on condonation of delay the appeal has been sought to be entertained and decided on merits.

67. In order to buttress the arguments so addressed, Mr. Deol, has placed reliance on the judgment of the Apex Court in ***State of Tamilnadu*** v. ***N. Suresh Ranjan and others***, ***2014 (1) RCR (Cr.) 572***. While answering the issue of delay, the observations made by Hon'ble Apex Court are as under:-

> "10. The contentions put forth by Mr. Sorabjee are weighty, deserving thoughtful consideration and at one point of time we were inclined to reject the petitions filed for condonation of delay and dismiss the special leave petitions. However, on a second thought we find that the validity of the order impugned in these special leave petitions has to be gone into in criminal appeals arising out of Special Leave Petitions (Criminal) Nos. 3810-3811 of 2012 and in the face of it, it shall be unwise to dismiss these special leave petitions on the ground of limitation. It is worth mentioning here that the order impugned in the criminal appeals arising out of Special Leave Petition (Criminal) Nos. 3810-3811 of 2012, State of Tamil Nadu by Ins. of Police, Vigilance and Anti Corruption v. N. Suresh Rajan & Ors., has been mainly rendered, relying on the decision in State by Deputy Superintendent of Police, Vigilance and Anti Corruption Cuddalore Detachment vs. K. Ponmudi and Ors.(2007-1MLJ-CRL.-100), which is impugned in the present special leave petitions. In fact, by order dated 3rd of January, 2013, these petitions were directed to be heard along with the aforesaid special leave petitions. In such circumstances, we condone the delay in filing and re-filing the special leave petitions."

68. The reliance has also been placed on the judgment again that of the apex Court in ***State (NCT of Delhi)*** v. ***Ahmed Jaan, 2008 Cri.L.J, 4355.*** In this judgment, the Apex Court, after taking note of the law laid down in various judicial pronouncements has elaborated the expression "sufficient cause" as follows:-

> "………The expression "sufficient cause" is adequately elastic to enable the court to apply the law in a meaningful manner which subserves the ends of justice - that being the life-purpose for the existence of the institution of courts. It is

> common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. This Court reiterated that the expression "every day's delay must be explained" does not mean that a pedantic approach should be made. The doctrine must be applied in a rational common sense pragmatic manner. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. Judiciary is not respected on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the State which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a step-motherly treatment when the State is the petitioner. The delay was accordingly condoned."

69. Similar is the ratio of the judgment again that of the Apex Court in ***State of Nagaland*** v. ***Lipok A.O. and others (2005) 3, SCC, 752***, which reads as follows:

> "15. It is axiomatic that decisions are taken by officers/agencies proverbially at a slow pace and encumbered process of pushing the files from table to table and keeping it on the table for considerable time causing delay - intentional or otherwise - is a routine. Considerable delay of procedural red tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression "sufficient cause" should, therefore, be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process. The Court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-à-vis private litigant could be

> laid to prove strict standards of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the courts or whether cases require adjustment and should authorise the officers to take a decision or give appropriate permission for settlement. In the event of decision to file appeal, needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or petition since he is a person legally injured while the State is an impersonal machinery working through its officers or servants."

70. Mr. Deol then placed reliance on a full Bench judgment of Gujarat High Court in ***State of Gujarat*** v. ***Kaliashchandra Badriprasad, 2001 (1) RCR (Criminal) 162*** and on that of Gauhati High Court in ***Gouranga Debnath's*** case supra.

71. Reliance has also been placed on a Division Bench judgment of our own High Court in ***Joginder Singh's*** case cited supra.

72. On the other hand Mr. Cheema, learned Senior Advocate has very fairly submitted that he would have not raised any objections to the plea of condonation of delay, but the petition, according to him, does not disclose sufficient cause and rather has been filed for extraneous consideration with mala fide intention to harass the accused-respondents on account of enmity. The very foundation that the petitioner came to know about the passing of impugned judgment somewhere in January-March 2013, on the face of it is false, as according to Mr. Cheema, the acquittal of the accused followed by taking over as Chief Minister, Himachal Pradesh by accused-respondent No.1 on the next day i.e. 25th December, 2012, the judgment was given wide publicity not only in print media but also in electronic media.

73. The day when the judgment was pronounced i.e. 24th December, 2012, the petitioner was present in the Court as a witness. The copy of judgment is not certified one. The same is Photostat copy having been prepared on 31st December, 2012. There being no explanation as to who applied for the same and when its copy was supplied, renders the explanation so coming forth absolutely false. The petitioner is a convict and his conviction even affirmed by the High Court also, of course the appeal he filed is pending disposal in the Hon'ble Supreme Court. His perception is that the criminal cases against him were registered at the instance of accused-respondent No.1. He, according to Mr. Cheema, is inimical to the accused-respondents and betting for personal interest and not for the cause of public at large. Mr. Cheema has fairly conceded that the Courts have wider discretion in the matter of condonation of delay; however, the discretion should also be exercised judiciously depending upon the facts and circumstances of each case. According to Mr. Cheema, in the present case neither any plausible explanation is forthcoming nor is sufficient cause found to have been shown. It has, therefore, been urged that the delay cannot be condoned. Mr. Cheema has placed reliance on the judgment of Apex Court in ***Oriental Aroma Chemical Industries Limited*** v. ***Gujarat Industrial Development Corporation and another (2010) 5 SCC, 459.*** Another judgment as relied upon is again that of Apex Court in ***Lanka Venkateswarlu (dead) by LRs***. v. ***State of Andhra Pradesh and others, (2011) 4 SCC 363.*** Reliance has also been placed on the judgment of Apex

Court in ***Maniben Devraj Shah*** v. ***Municipal Corporation of Brihan Mumbai, (2012) 5 SCC 157***.

74. On the similar lines are the arguments addressed qua this aspect of the matter on behalf of the respondent-State.

Discussion and the conclusion drawn:

75. The above stated factual and legal position takes us to the adjudication of the question of condonation of delay. The present is a case where the delay of 96 days has occurred in filing the appeal. The same has been sought to be condoned on the above grounds in the petition discussed in para supra.

76. It is well settled at this stage that a party seeking the condonation of delay has to show "sufficient cause" warranting condonation of delay.

77. As per the law laid down by the Apex Court in ***Ahmed Jaan's*** case supra, the expression 'sufficient cause' should be interpreted liberally and in a meaningful manner to sub-serve the ends of justice. Also that the expression 'every day's delay must be explained' should also be applied in a rational common sense by taking pragmatic approach to do substantial justice.

78. To the similar effect is the ratio of the judgment again that of Apex Court in ***Lipok A.O's*** case supra relied upon in support of the case of the petitioner. Be that as it may, however, one should also not lost sight of the fact that the expiry of the period of limitation prescribed for filing appeal/petition results in existence of a valuable right to the opposite party and such right should not be taken away by condoning the delay without sufficient cause. It is apt to make reference to the judgment of Apex Court in ***P.K. Ramachanderan*** v. ***State of Kerala, AIR 1998 SC, 2276***. It is held in this judgment that the law of limitation may harshly affect a particular party, but it has to be applied with all rigors when the statute so prescribes and the Courts have no powers to extend the period of limitation on equitable grounds.

79. Here the delay has been sought to be condoned on the following grounds:

i) the petitioner came to know about the judgment under challenge somewhere in January-March 2013 at such a time when he was looking after his ailing wife in PGI Chandigarh;

ii) the trial was being conducted by the public prosecutor and as he had not engaged any counsel hence not having the record of the case;

iii) photocopy of the judgment was made available to him in the month of August, 2013; and

iv) on coming to know that the Home Department with a view to oblige accused respondent No.1, who by that time took over as the Chief Minister of Himachal Pradesh, not opted for filing appeal against the judgment of acquittal.

80. Now applying the law as discussed hereinabove in the light of the explanation so forthcoming, taking a lenient view of the matter and pragmatic approach as well keeping in mind that the matter should normally not be closed merely that it is time barred and the merit should not be made to suffer, this Court finds itself unable to agree with the explanation as set forth in the petition for seeking the condonation of delay for the reason that the same does not constitute "sufficient cause" as is required to be shown for

seeking the condonation of delay. In the case in hand, the explanation as forth coming is absolutely vague, cryptic and highly unbelievable. The judgment under challenge has been passed on 24th December, 2012. The petitioner on that day was very much present in the Court because he appeared as one of the witnesses. The pronouncement of judgment on 24th December, 2012, followed by oath taking ceremony of accused-respondent No.1 on the very next day, i.e., 25th December, 2012, were such events, which were given wide publicity in print and electronic media. The petitioner, a Himachali and being an IAS Officer (Retired) can reasonably be believed to have gone through the reports in print media and the news in electronic media regarding acquittal of the accused-respondent by learned trial Court on 24th December, 2012. The plea that he came to know about the acquittal of the accused respondents somewhere during January-March, 2013 is not only palpably false but vague, evasive and absurd also. Therefore, on that basis the delay as occurred in filing the appeal could have not been condoned even if the appellant is held to be a 'victim' having right to prefer appeal against the judgment of acquittal. It may be that the petitioner was not represented by a counsel nor had any access to the records of the case; however, no explanation is forthcoming to show as to how and what efforts he made to obtain the record and from whom. It is also missing that he applied for the certified/uncertified copies of record on a particular day and the date on which the same was supplied to him.

81. Surprisingly enough, the petitioner even does not have certified copy of the judgment under challenge because it is only a photocopy of certified copy, which has been filed along with the appeal. It is not known as to who applied for the same. The stamp of copying agency, however, reveals that the certified copy was complete for delivery on 31st December, 2012 and was actually delivered on 23rd February, 2013. The petitioner is persuading this Court to exercise discretion in his favour in the matter of condonation of delay even without disclosing the name of the person, who has supplied him the Photostat copy of the judgment. There is no explanation as to why he himself did not apply for the certified copy of the judgment under challenge. It is again absurd and evasive that he filed the appeal on coming to know that the Home Department with a view to oblige the accused-respondent No.1, has not preferred appeal against the impugned judgment because he has not disclosed the source of such information and also when he came to know about it. The present is a case where there is nothing on record to show that since when the limitation start running because here the petitioner has neither applied for certified copy of the judgment nor is it his case that he came to know on a particular date about passing of the impugned judgment or the date when he received information qua the State Government having decided not to prefer an appeal against the impugned judgment. The explanation for condonation of delay as forth coming is therefore, neither plausible nor cogent and reliable nor constitute sufficient cause. The grounds raised rather are absolutely vague, absurd, cryptic and evasive also. The present, therefore, is a case where the petitioner has miserably failed to show sufficient cause warranting the condonation of delay as occurred in filing the appeal. Therefore, this is not a case warranting liberal construction of expression "sufficient cause" nor any ground for taking pragmatic and justice oriented approach as held by the Apex Court in ***Lipok AO's*** and ***Ahmed Jaan's*** cases supra, is made out. The present rather is a case where sufficient cause has not been shown nor from the petition any ground is made out warranting condonation of 96 days' delay as occurred in filing the appeal. The present rather is a case where an order condoning the delay would amount to take away a valuable right having accrued in favour of the accused-respondents on the expiry of the period prescribed for filing the appeal. In the given facts and circumstances, the right so accrued in favour of the accused respondents cannot be taken away.

82. Mr. Deol has also placed reliance on a Full Bench judgment of Gujarat High Court in ***Kaliashchandra Badraiprasad's*** case supra. However, the law laid down therein

is not attracted in this case for the reason that the question referred to the full bench in that case was as to whether delay can be condoned without hearing an accused or not, which has been answered in affirmative while holding that the delay cannot be condoned without hearing the accused and also that in a case of acquittal rather the delay should not be condoned without sufficient cause. The law laid down in this judgment is hardly of any help to the case of the petitioner and rather substantiate the cause of the accused-respondents for the reason that the petitioner has failed to show sufficient cause and as such the delay cannot be condoned.

83. The question for determination before a Division Bench of Gauhati High Court in ***Gouranga Debnath's*** case was with regard to exclusion of time by extending the benefit of Section 470 of the Code in certain cases because in that case initially instead of filing an appeal, revision petition was filed, which later on was sought to be withdrawn and dismissed as such. It is in this backdrop, it was held that on coming to know the revisional proceedings and the appeal cannot be pursued together, the petitioner having withdrawn the revision petition in good faith, was held entitled to the benefit of Section 470 of the Code. This, however, is not the point in issue in the case in hand.

84. Coming to the Division Bench judgment of our own High Court in ***Joginder Singh's*** case supra, it has been held that the procedure as prescribed for filing the appeal under Section 378 of the Code is applicable even to an appeal under the proviso to Section 372 of the Code. Therefore, the limitation for filing an appeal under the proviso to Section 372 has been held to be 90 days. Anyhow, there is no quarrel on this score as the petitioner himself submits in the petition that the period of limitation prescribed for filing appeal under Section 372 of the Code is 90 days.

85. Now coming to the judgment of Apex Court in ***N. Suresh Ranjan's*** case, supra, true it is that the delay of 2171 days as occurred in filing the appeal has been ordered to be condoned, however, on consideration of the facts that the accused, a former Minister, charge-sheeted with the allegations of corruption and in possession of disproportionate assets in his own name and also in the name of his wife, friends and sons as compared to their known sources of income, was discharged by the trial Court and the order affirmed by the High Court. It is in the nature of the allegations and gravity of the offence committed, the Apex Court, while holding that the validity of the order impugned should be gone into in appeal, has condoned the delay.

86. The present is not a case of discharge of the accused-respondents and rather they both have faced the charge and it is on appreciation of the evidence available on record learned trial Court has acquitted them from the charge.

87. On behalf of the accused-respondents reliance has been placed on a judgment rendered in ***Oriental Aroma Chemical Industries Limited*** v. ***Gujarat Industrial Development Corporation, Lanka Venkateswarlu (dead) by LRs.*** v. ***State of Andhra Pradesh and others*** and ***Maniben Devraj Shah*** v. ***Municipal Corporation of Brihan Mumbai's*** cases supra. The ratio of these judgments is also that while considering the petition for condonation of delay the Court should apply the law in a pragmatic manner to sub-serves the ends of justice and nothing beyond that.

88. The crux of what has been said hereinabove, therefore, would be that the Courts have wide discretion in the matter of condonation of delay, however, the same should be exercised judiciously and only in a case where sufficient cause is found to be shown. In the case in hand there is nothing to infer that the delay is bonafide and occurred owing to the circumstances beyond the control of the petitioner. The petitioner, for the reasons

already recorded, seems to be inimical to accused-respondent No.1. The so called vindictive attitude of the said respondent towards the petitioner and other officers named in rejoinder to the reply filed by accused-respondents is not an issue to be discussed and decided in the present petition being not the part of the record of this case. The officers named in the rejoinder in case feel that in order to wreak-vengeance against them, they have been victimized by accused-respondent No.1 on account of they having monitored/ investigated the case registered against him vide FIR No. 27 of 2009, they are at liberty to have recourse to appropriate remedy available to them against the said respondent, in accordance with law. However, so far as this petition is concerned, the so called vindictive and revengeful attitude of the accused-respondents towards them cannot be treated a ground for condonation of delay. Therefore, even if the petitioner had been held to be a 'victim' and competent to file the appeal under the proviso to Section 372 of the Code in that event also the same should have not been entertained being time barred.

89. In view of what has been said hereinabove no case for condonation of delay, as occurred in filing the appeal, is made out. Therefore, the petition for seeking leave to appeal and the appeal itself being time barred cannot be entertained. Consequently, the petition being without any merit deserves to be dismissed.

Point No. 3.

Brief background:

90. Irrespective of the findings that the petitioner is not a victim within the meaning of Section 2 (wa) of the Code, hence not competent to file an appeal under the proviso to Section 372 of the Code and that sufficient cause has also not been shown for condonation of delay of 96 days as occurred in filing the appeal, it is deemed appropriate to examine the merits of the case also because the Apex Court in **Lipok A.O.'s** case supra has held that the Court should decide the matters on merits unless the case is hopelessly time barred and without merit.

Respective contentions of learned Counsel.

91. Mr. Deol, learned Senior Advocate has mainly emphasized on the transcripts of the CD and also the statement Ex.PW-22/A of late Mohinder Lal, the then Director (Industries), Himachal Pradesh, who as per the transcripts of CDs allegedly spoken with respondents/ accused and late Shri K.N. Sharma, the then OSD to accused respondent No.1 to prove the acceptance of bribe by both accused from Suresh Neotia, Vice President of M/s. Gujarat Ambuja Cement, P.C. Jain, its Chairman, late Shri Suresh Kapoor of Mohan Meakin and Piyush Jain, one of the applicants for allotment of mini Steel Plant etc. The report Ext.PW-32/E and PW-33/H qua analysis of voice samples of both the accused have also been pressed into service. According to Mr. Deol, out of 4 points formulated by learned Special Judge for adjudication no point pertains to the CD and it has vitiated the judgment under challenge, which according to him is perverse, hence not legally sustainable. It is further urged that tape is a document within the meaning of Section 3 of the Evidence Act, hence such evidence having come on record should have been relied upon. While arguing that tape-recorder is admissible in evidence, reliance has been placed on a judgment rendered by a Constitutional Bench of the Apex Court in **S. Partap Singh** v. ***State of Punjab, AIR 1964 SC 72*** and on the strength of the ratio thereof, contended that like any other document a tape-recorder is also document. The tape-recorder version should have not been ignored merely because of capable of being tempered with as according to Mr. Deol for that matter any other document is also capable of being tempered with. Reliance has also been placed on another judgment of the Apex Court in ***Yusufalli Esmail Nagree*** v. ***The***

***State of Maharashtra, AIR 1968 SC 147**,* in which it has been held that if a statement is relevant and accurate tape-recorder of such statement, is also relevant and admissible.

92. Mr. Cheema, while repelling the arguments addressed on behalf of the appellant-petitioner has urged that Suresh Neotia of Ambuja Cement was neither associated during the course of investigation nor examined as a witness though was available. Shri S.S. Sodhi, General Manager (Personnel), Ambuja Cement (PW-18) though was examined, however, turned hostile and not supported the prosecution case. Though charge is that Shri Neotia paid a sum of Rs.3 lacs to accused-respondent No.1 in Himachal Bhawan Delhi, however, no evidence to substantiate the same is produced. It is further urged that again there is no evidence that Brigadier Kapil Mohan (PW-26) of Mohan Meakin through one Suresh Kapoor and in consultation with PW-30 H.N. Handa has paid a sum of Rs.2,00,000/- to accused Pratibha so that on account of non-installation of modified Effluent Treatment Plant (ET Plant) electricity and water supply to Brewery premises are not disconnected. Shri P.C. Jain, PW-25 of M/s. Gujarat Ambuja Cement has also not supported the prosecution case and turned hostile. It is further argued that P.C. Jain and Brigadier Kapil Mohan rather filed CWP Nos.145 of 2011 and 1856 of 2011 in this Court on the ground that they never made the statement under Section 161 of the Code with a prayer to direct the investigating agency to record their statements correctly. Major Vijay Singh Mankotia (PW-21) allegedly produced the audio-cassette before the Police and not CD. The audio-cassette was also ordered to be excluded from the evidence by the trial Court in its order framing charge, passed on 25th June, 2012 against the accused person.

93. In order to persuade this Court to discard the audio-cassette/CD as legal and acceptable evidence, reliance has been placed on a recent judgment rendered by the Apex Court in ***Anvar P.V***. v. ***P.K. Basheer and others, AIR 2015 SC 180***. It is urged that no doubt an electronic record is a documentary evidence under Section 3 of the Indian Evidence Act, however, whether it is genuine or not is a question to be taken into consideration in accordance with the legal provisions and also in the given facts and circumstances of the case.

94. Mr. Cheema, while disputing the authenticity of the audio cassette/CD has urged that the report Ex.PW-32/E cannot be relied upon particularly when as per the final report Ex.PW-33/H received from Forensic Science Laboratory, it was not possible to verify the authenticity of the audio recording in exhibits C/1 and A/1. While inviting the attention of this Court to the reply Ex.PW-32/G, in response to the quarries of the laboratory made vide letter Ex.PW-32/F, it is urged that the Forensic Science Laboratory was not apprised with correct position as at that time Mohinder Lal was also alive.

95. Mr. R.M. Bisht, learned Deputy Advocate General has also urged that Audio cassette has already been discarded by learned Special Judge being not a material piece of evidence. Original tape was neither sealed nor seized. According to Mr. Bisht, the bribe allegedly was obtained by accused respondents No.1 and 2 somewhere in 1989-90. At that time CDs were not in existence. Therefore, according to Mr. Bisht, it is for this reason the present was found to be a case of no evidence and as such no appeal was preferred by the respondent State.

Discussion and the conclusion drawn:

96. Now analyzing the rival contentions in the light of the given facts and circumstances and also evidence available on record, admittedly CD (Compact Disk) was not in existence in the year 1989-90 when the alleged recorded talk between Mohinder Lal and accused-respondent No.1, Mohinder Lal and accused-respondent No.2 and Mohinder Lal and Kedar Nath Sharma qua exchange of money had taken place. Of course, tape-recorder

used to be there at that time and as such the audio-cassette of recorded talk was being prepared. PW-21 Major Vijay Singh Mankotia is not sure that packet he received through secret source was audio-cassette or CD. According to him, when the document, which he understood audio-cassette played in the press-conference, the same was found to be a CD made by someone else. Even if it was an audio-cassette learned Special Judge has excluded the same from record being not admissible in evidence at the stage of consideration of charge, as is apparent from order dated 25th June, 2012. If it was a CD, the same again is not admissible in evidence for the reason that as per evidence available on record the same has been prepared on the basis of recording done on 1st January, 1995. Above all, CDs were not in existence during the years 1989-90, when the occurrence took place.

97. As noticed supra, the technology of CD was not in existence in the year 1989-90 when accused-respondents No.1 and 2 allegedly received bribe and committed offence. The CD being of 1st January, 1995 rather is belated and creation of undisclosed and unauthenticated version. No evidence is forth-coming that what was the device used for making the recording in the CD. Whether such device(s) was technically in order, again there is no evidence in this behalf. Who has made the recording, is also missing. According to PW-21 also, the CD might have been prepared by someone else.

98. The law on the question of admissibility of an electronic document in evidence is no more res-integra as the Apex Court in ***Anvar P.V.*** v. ***P.K. Basheer*** supra while taking note of the provisions contained under Sections 22A, 45A, 59, 65A and 65B of the Indian Evidence Act has held as follows:

> "**13.** Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a *non obstante* clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:
>
> (ii) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;
>
> (iii) The information of the kind contained in electronic record or of the kind from which the information is

derived was regularly fed into the computer in the ordinary course of the said activity;

(iv) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(v) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

14. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

15. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

16. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A–opinion of examiner of electronic evidence.

17. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements

> under Section 65B of the Evidence Act are not complied with, as the law now stands in India."

99. The larger Bench of the Apex Court has overruled two-Judge Bench judgment of the same Court in ***State (NCT of Delhi)*** v. ***Navjot Sandhu alias Afsan Guru, (2005) 11 SCC 600*** and has further held as follows:

> "…Thus, in the case of CD, VCD, chip etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which the secondary evidence pertaining to that electronic record is inadmissible."

100. In the case before the Apex Court also certificate in terms of Section 65B of the Evidence Act was not produced in respect of the CDs relied upon, hence the Apex Court has held that the same cannot be admitted in evidence.

101. In this case the conditions specified under Section 65B (2) of the Evidence Act are not at all satisfied because nothing is there to show that the information in the CD was being regularly stored or processed in the computer or being regularly fed into the computer in the ordinary course of activity and that the computer at the relevant time was being operated properly or when not operated properly the break, if any, not effected either the record or the accuracy of its contents as well as that the information in the electronic record (CD in the present case) is reproduction of the information fed into the computer in the ordinary course of the activity. The certificate duly signed by a responsible official dealing with the operation of the relevant device within the meaning of Section 65B(4) of the Evidence Act identifying the statement contained in the CD, the manner in which CD was produced, device used for preparation *of the CD and its* production *by PW-21, who* does not know anything as to how the same is prepared and by whom and with what device, rendered the document inadmissible in evidence. It is not known as to who played the CD and maker of the statement has neither initialed the CD nor signed the transcript of the contents thereof. The CD during the course of enquiry and investigation remained unsealed throughout. The prosecution story reveals that it was unsealed when received by enquiry officer, remained unsealed during the course of enquiry and received unsealed by the Investigating Officer along with other records of the case. The CD Ext.PW-21/B, therefore, is not a document to be relied upon in evidence.

102. The Forensic Science Laboratory had sought for the following information before the CD/audio cassette is analyzed vide letter dated 9th September, 2008 (Ext.PW-32/F):

> "i) Recording device with which questioned sample was recorded is not provided which is essential to authenticate the recordings;
>
> ii) How and when it was recorded may be informed?
>
> iii) The control samples may be provided as per the transcription of the question sample."

103. The reply (Ex.PW-32/G) to the letter Ex.PW-32/F supra given by the Superintendent of Police, State Vigilance & Anti Corruption Bureau, reveals that the Bureau was not in a position to satisfy the three conditions find mentioned in the letter Ext.PW-32/F supra. Meaning thereby that neither the device used for making recording of CD nor origin of CD nor control samples as per transcription of the CD were available with the Vigilance Bureau. True it is that in the opinion of the Forensic Science Laboratory Ext.PW-

32/E qua the voice-samples Ext.Q2 and Ext.S2 were found to be that of the voice of accused respondent No.1, however, as regards the voice samples Ext.Q1 and Ext.S1 in the opinion of the examiner, most probably the same were that of the voice of accused-respondent No.2. However, the report Ext.PW-33/H is fatal to the prosecution case for the reason that as per the same it was not possible for the experts to verify the authenticity of the tape-recording version in the absence of phone call details and original recording device. The evidence as produced, therefore, is tainted. The prosecution rather has withheld the material required by the Central Forensic Science Laboratory as is apparent from the perusal of letter Ext.PW-32/F and PW-32/G. In the report Ext.PW-33/H, CD is marked as C/1, whereas the audio-cassette as A/1. In the opinion of the Scientific Officer against Item No.9 "Results of examination sub-paras vii., viii and ix", it could not be ascertained that the conversation in C/1 and A/1 was recorded at the instance of Mohinder Lal or at that of the accused-respondents. Also that the authenticity of the audio recording in Ext.C/1 and A/1 could not be verified in absence of phone call details and original recording device. Ext.C/2 and V/1 the specimen of voice recording were returned un-examined. Thus, there hardly remains any legal and acceptable evidence to arrive at a conclusion that the deal of accused-respondents with the representatives of Ambuja Cement, Mohan Meakin Brewery, and Mini-Steel Plant etc. had taken place through Mohinder Lal and that they obtained the bribe and extended undue favour to these industrial units.

104. The law laid down in ***S. Partap Singh's*** and ***Yusufalli* Esmail Nagree's** cases supra cited on behalf of the petitioner, is not at all attracted in the present case because the point in issue in ***S. Partap Singh's*** case was qua the tape-recording version capable of being tempered with and it is in that background held that like other documentary evidence tape-recording can also be tempered with, but it should not be taken to conclude that the tape-recordings are not legally admissible in evidence. In **Yusufalli Esmail Nagree's** case it is held that a tape-recorder statement if recorded accurately is also relevant and admissible. As a matter of fact, there cannot be any quarrel so far as the law so laid down in the judgments supra is concerned, however, for the detailed reasons hereinabove, in the case hand, CD/audio-cassette cannot at all be considered as legal and acceptable evidence.

105. Much has been said about the statement Ext.PW-22/A of late Mohinder Lal. The same reads as follows:

> "I have heard the CD today purported to have been converted from a tape recorded sometime in the year 1989. At that time there was no CD but only Tape Recorders were available. I do not know as to how and where it has been recorded. The contents of the CD contain prima facie my conversation with the then Chief Minister, his wife and Shri K.N. Sharma etc. Prima facie the voice in the CD is mine and as far as I remember the conversation has taken place. As regards the names of the persons and the detail thereof the same must have recorded by Rani Sahiba and may be obtained from her. The persons, who made contributions as far as I remember, were sent to the Chief Minister's house on various occasions and the present CD is a version of those occasions which happened and appears to have been recorded on various dates and made into one tape/CD. I am available for any further clarification based on my memory at any time as and when needed, as the matter relates to long time back."

106. It is seen that the CDs as per this statement were not available at that time. Mohinder Lal was not aware of as to where it was recorded. Although, he has said that so far

his memory, it was his conversation and the person who made contributions as far as he remembered were sent to the Chief Minister's house on various occasions and the recording also made on various dates, but made into one tape/CD. When the CD/audio-cassette has already been discarded, therefore, the statement of late Shri Mohinder Lal is hardly of any help to the prosecution case. He was not available to make statement in the Court. Though PW-22 Dr. Kavindra Lal, his son, has been examined to prove this document, however, the evidence as has come on record by way of his statement is also hear-say hence not admissible in evidence. Above all, the statement Ext.PW-22/A is vague. The maker of the statement late Shri Mohinder Lal could not recognize his voice with all certainty and rather said that prima facie the voice in the CD was his voice. It is, therefore, not safe to place reliance on such a statement. Nothing can be made out therefrom qua the demand, offer or acceptance of bribe by the accused persons. He repeatedly used the words "as far as I remember", "appears to have been recorded". The statement, therefore, is absurd also and no findings can be recorded on such statement.

107. There are contradictions in the statements of PW-31 I.D. Bhandari, the then Additional Director General of Police and PW-32 A.P. Singh, Superintendent of Police because as per the version of former, Mohinder Lal was interrogated by PW-32 A.P. Singh. He has not said that Mohinder Lal was interrogated in his presence, however, as per version of PW-31 he was called by the Additional Director General of Police to his office and before recording the statement of Mohinder Lal by him CD was already heard by Mohinder Lal. The statement of Mohinder Lal has not been endorsed by any police officer. Therefore, in the considered opinion of this Court the statement Ext.PW-22/A cannot be held to be admissible in evidence by any stretch of imagination.

108. If the CD/audio cassette is excluded from the record, there hardly remains any evidence connecting the accused-respondents with the commission of alleged offence. The charge under Section 7 of the Prevention of Corruption Act against accused-respondent No.1 is that while the Chief Minister of the State of Himachal Pradesh, he has obtained Rs.2 lacs towards illegal gratification from Shri Suresh Neotia of M/s. Gujarat Ambuja Cement for clearance of its cement plant at Darlaghat. The allegations are that Shri Suresh Neotia, Chairman of M/s. Gujarat Ambuja Cement, accompanied by PW-25 P.C. Jain met accused-respondent No.1, the then Chief Minister of Himachal Pradesh in Himachal Bhawan at New Delhi and Shri Neotia paid a sum of Rs.2 lacs to the said accused-respondent for early installation of the plant. Surprisingly enough, said Shri Suresh Neotia has neither been associated during the course of investigation nor examined as a witness.

109. Shri P.C. Jain, of course, has stepped into witness box as PW-25, however, has not at all supported the prosecution case, as according to him he never met the then Director (Industries) in the year 1989 nor any political executive, head of the State, in connection with seeking permission of IPARA (Industrial Projects Approval and Review Authority) nor entered into the financial deal with any functionary of the State in connection with seeking such permission. He had not talked with the Chief Minister also. He, therefore, turned hostile to the prosecution. In his cross-examination conducted by learned Public Prosecutor though it is admitted that Shri Suresh Neotia was the Chairman of M/s. Gujarat Ambuja Cement, however, it is denied that he accompanied by Shri Suresh Neotia met accused-respondent No.1 in Himachal Bhawan at New Delhi and that said Shri Neotia paid a sum of Rs.2 lacs to the said accused for early installation of the cement plant. When confronted with his statement Ext.PW-39/E recorded under Section 161 of the Code, he has denied making of such statement. It is also denied that he went to Holly-Lodge, the residence of the Chief Minister and met with accused Pritibha Singh to whom he paid Rs.3 lacs for seeking early clearance of IPARA permission. In a nutshell, Shri P.C. Jain has

denied all the suggestions put to him in his cross-examination, being wrong. In his further cross-examination conducted by learned defence Counsel he rather stated that writ petition Ext.RX was filed by him when he came to know from his son about the contents of the statement recorded by the police. The writ petition was filed on the ground that his statement was wrongly recorded by the police. Therefore, the charges under Sections 7 and 11 of the Prevention of Corruption Act against accused-respondent No.1 are not at all proved.

110. PW-18 S.S. Sodhi, General Manager (Personnel) of M/s. Gujarat Ambuja Cement tells us that P.N. Neotia was the Chairman of M/s. Gujarat Ambuja Cement and its head office was at Bombay. Shri P.C. Jain was also Chairman of the Company. He, however, expressed his inability to state that it is Shri P.C. Jain, who had been liaisoning with the State Government at the time of installation of the cement plant of the Company at Darlaghat. He was also declared hostile and his version in cross-examination also remained the same. In his cross-examination conducted by learned defence Counsel, he expressed his ignorance as to whether Shri P.C. Jain was President or Senior Vice President because according to him, Mr. Jain retired well before he joined duties at Darlaghat.

111. Now coming to the charge against accused-respondent Pritibha Singh that she received Rs.2 lacs from one Suresh Kapoor, an employee of M/s. Mohan Meakin Limited and Rs.3 lacs from PW-25 P.C. Jain of M/s. Gujarat Ambuja Cement Plant for exercising influence on her husband accused-respondent Virbhadra Singh to ensure early clearance of IPARA in favour of M/s. Gujarat Ambuja and to ensure that electricity and water supply is not stopped to the premises of M/s. Mohan Meakin Limited on account of non-installation of modified ET Plant, there is again no evidence to substantiate the same for the reason that Shri Suresh Kapoor of M/s. Mohan Meakin Limited, on account of his death, was not available to make statement in the Court and as regards Shri P.C. Jain, as noticed supra, he has not supported the prosecution case at all.

112. PW-30 H.N. Handa also turned hostile to the prosecution because as per his version, he never received any notice from the State Pollution Control Board for installation of modified ET Plant at Solan, as according to him, such plant was already installed. When cross-examined by learned Pubic Prosecutor, he expressed his ignorance that in the year 1983 State Pollution Control Board made correspondence with the Company qua installation of new modified ET Plant and ordered disconnection of water and electricity supply if the plant is not installed. It is also denied that on receipt of the said notice, he contacted Brigadier Kapil Mohan, the Managing Director of the Company and that he asked him to contact Mohinder Lal (since dead) and act accordingly. It is also denied that he was asked by Mohinder Lal to pay Rs.2 lacs to accused-respondent No.2 in Holly-Lodge and that he handed over Rs.2 lacs to Suresh Kapoor for payment thereof to accused-respondent No.2. It is also denied that said Shri Suresh Kapoor had paid the money to accused-respondent No.2 and informed him when came back to Solan. It is also denied that he informed Mohinder Lal qua the payment so made and it is thereafter no notice qua installation of modified ET Plant was made. He has denied his statement Ext.PW-39/C having been recorded by Inspector Daya Sagar, as per his version.

113. Now coming to the statement of Brigadier Kapil Mohan, Managing Director of Mohan Meakin Private Limited, he has stepped into the witness box as PW-26. He was also turned hostile to the prosecution, as according to him, though notice for installation of modified ET Plant was received in the year 1983 from State Pollution Control Board, yet he never asked H.N. Handa (PW-30) to contact Mohinder Lal, the then Director of Industries. Therefore, he was also cross-examined by learned Public Prosecutor, but in sundry because nothing material lending support to the prosecution case could be elicited. He has denied

his statement Ext.PW-39/D having been recorded by Inspector Daya Sagar (PW-39) at Gaziabad. He has also denied his relations with accused-respondent Virbhadra Singh. It is denied that he asked PW-30 to make payment to accused-respondents, if required to be made in order to avoid the installation of modified ET Plant. It is also denied that the Company made the payment of money to State Government functionaries and not counted for the same in the accounts. According to this witness, he had filed petition Ext.RS for seeking a direction to record his statement in a proper manner.

114. PW-38 Amar Singh has also not supported the prosecution case that late Suresh Kapoor disclosed him about he having brought Rs.2 lacs for being paid to accused-respondent No.2 Pratibha Singh. He has denied that he made statement Ext.PW-39/B.

115. Now coming to the evidence as has come on record by way of the testimony of PW-21 Major Vijay Singh Mankotia, the star prosecution witness, his statement also not lends any support to the prosecution case. He rather is turned hostile to the prosecution. According to him, original audio-cassette, he played in the press conference is Ext.PW-21/B and that in his opinion the same is the original one. Except for Ext.PW-21/B, he allegedly had another audio-cassette Ext.PW-21/C and that in his opinion voice in the audio-cassette was that of accused Virbhadra Singh, accused Pritabha Singh, Mohinder Lal and Kehar Nath Sharma. When further cross-examined by learned defence Counsel while stating that audio-cassette Ext.PW-21/B was not prepared in his presence and that he is not aware as to who and where it was prepared and that the CDs/audio-cassette were played extensively in the election at Hamirpur by Bhartiya Janta Party, has demolished the entire prosecution case. His admission that no identification mark was put by him on the audio-cassette recovered by the police from him and that CD/audio-cassette like Ext.PW-21/B are being largely manufactured and distributed, render the authenticity and genuineness of this document highly doubtful. The statement of PW-21 only reveals that there was an audio-cassette he received from secret source, however, his statement is not suggestive of that Ext.PW-21/B is the same audio-cassette he produced before the police. He has simply produced the same before the police. He has not said anything as to how and at what time as well as about the identity of the person, who has prepared the same. Therefore, the audio-cassette/CD does not stand for the test of legal scrutiny, as discussed in detail in this judgment in paras supra.

116. Another star witness is none-else but petitioner S.M. Katwal, who has stepped into the witness box as PW-37. He also tells us about one CD he found to have been kept in an envelop in his letter-box and on hearing the same he found the voices of Mohinder Lal, Virbhadra Singh and Pratibha Singh therein. He has also said that since he remained posted in various capacities in the Government, therefore, was well conversant with their voices. He made the petition Ext.PW-37/A to Station House Officer, State Vigilance and Anti Corruption Bureau, Shimla. He also filed writ petition Ext.PW-37/B in the High Court. The CD was handed over by him to his lawyer. His testimony in cross-examination is very interesting as he expressed his inability to tell that the CD received by him was original or copied one, when the same was received. In the complaint Ext.PW-37/A there is no mention of CD, which he admits to be correct and tells us that the report he made to the police was based on the news published in a section of newspapers. He further tells us that he did not put any identification mark on the CD and that the CD given by him to the lawyer is still in existence or not, he cannot tell. He also expressed his ignorance about the enquiry, if any, made by the police from him qua the CD. Nothing incriminating has come in the statement of the petitioner connecting the accused-respondents with the commission of offence.

117. The testimony of PW-31 and PW-32, as already noticed, is contradictory on certain aspects because according to Shri I.D. Bhandari (PW-31), Shri Mohinder Lal might have been called by Shri A.P. Singh (PW-32) for the purpose of interrogation and that he did not associate himself with any enquiry, whereas as per the version of PW-32, Mohinder Lal was called by the then ADGP (PW-31) and it is PW-31 who called Mohinder Lal to his office. When he reached in the office of ADGP, the CD was already heard by the ADGP (PW-31) and Mohinder Lal. PW-32, no doubt, tells us that CD was seized by him; however, it was not original. He had asked Santosh Patial, Superintendent of Police, State Vigilance and Anti Corruption Bureau, Dharamshala to seize the CD, but he had sent audio-cassette in a sealed condition. He admits that original audio-cassette was never seized and sent to Forensic Science Laboratory. On the CD, no identification mark was there and the same remained unsealed during the course of enquiry he conducted. The statement of PW-32, who, as a matter of fact, conducted the enquiry in this matter also not substantiate the prosecution case, in any manner whatsoever. The testimony of this witness and that of PW-31 I.D. Bhandari and PW-21 Major Vijay Singh Mankotia rather are contradictory with each other.

118. PW-39 is Daya Sagar, who has partly investigated the case. Though, as per his version, statements Exts.PW-39/A to PW-39/E of S/Shri Vijay Singh Mankotia, Amar Singh, H.N. Handa, Kapil Mohan and P.C. Jain, were rightly recorded by him, however, as noticed supra the above witnesses have stated in one voice that their statements were not recorded by the police as per their version and they rather resiled from the statements so recorded. Therefore, PW-39 is also of no help to the prosecution case.

119. As discussed hereinabove, the testimony of the material prosecution witnesses also not lends any support to the prosecution case. PW-25 P.C. Jain and PW-26 Brigadier Kapil Mohan rather have filed two separate writ petitions in this Court on the ground that their statements in this case have been recorded wrongly by the police. The writ petitions were disposed of by a Division Bench of this Court with the observations that the appropriate course available to them was to have moved to senior officers for recording of their statements. Consequently, petition Ext.RZ was moved by PW-25 with a request to record his statement correctly.

120. The remaining prosecution witnesses are formal in nature. The evidence as has come on record by way of their testimony could have at the most been used as link evidence had the prosecution been otherwise able to bring guilt home to the accused persons beyond all reasonable doubt. Therefore, on merits also, no case is made out to interfere with the impugned judgment.

Point No.4:

Brief Background and respective contentions:

121. On the question of fairness of trial, the complaint is that after declaration of the result of the Himachal Pradesh Legislative Assembly Election on 20th December, 2012 the proceedings in the trial witnessed tremendous speed and that about 20 witnesses were given up by the prosecution thereafter, i.e., during the period 20th December, 2012 to 24th December, 2012 . It is further contended that special Prosecutor conducting the trial on behalf of the prosecution was abruptly replaced by a new Prosecutor. Judgment was delivered on a day before accused-respondent No.1 took over as Chief Minister of Himachal Pradesh. The evidence available on record has not been discussed. Mr. Deol has, therefore, urged that the judgment under challenge has been passed in haste to the reasons best known to learned Special Judge. The same allegedly being perverse has been sought to be quashed.

122. On the other hand, Mr. Cheema has urged that who is the material witness, given up by the Prosecutor remained unexplained. Nothing to this effect is forth-coming on record. Also that the present being a case under the Prevention of Corruption Act otherwise was also required to be decided at the earliest. It is pointed out from the record that the charges against the accused were framed in the month of June, 2012, whereas the impugned judgment passed on 24th December, 2012. The present, therefore, is said to be not a case, where it can be said that learned Special Judge has delivered the judgment in a haste. It is rather the prosecution not proceeded in the matter in a fair manner and irrespective of technology of CD was not available in the year 1989 by hook and crook believing the audio-cassette to be a genuine document, booked both the accused falsely in the case. The investigation according to Mr. Cheema has not been conducted in a fair and impartial manner.

Discussion and conclusion drawn:

123. On analyzing the arguments addressed on both sides, true it is that on and after declaration of the result of Himachal Pradesh Legislative Assembly on 20th December, 2012, 24 witnesses were summoned for examination. Out of the eight witnesses summoned for 20th December, 2012 only one witness H.N. Handa could be recorded whereas statement of Rajinder Tarlokta was deferred for the next day, i.e., 21st December, 2012 and one witness was given up by the prosecution. Remaining five not present on that day were ordered to be summoned for 22nd December, 2012, i.e., after one day. On 21st December, 2012, out of eight witnesses plus PW Rajinder Tarlokta aforesaid, statements of three including Rajinder Tarlokta were recorded and four were give up, whereas PW S.K. Jain was not present on that day. There is nothing in the order passed on 21st December, 2012 that PW A.P. Singh summoned for that day was present or not. Similarly on 22nd December, 2012, out of eight witnesses, five including aforesaid A.P. Singh were recorded and six given up. PW Daya Sagar being Investigating Officer was ordered to be examined on 24th December, 2012 along with remaining PWs S.M. Katwal and Amar Singh Thakur. On that day, i.e., 22nd December, 2012, though learned Public Prosecutor prayed for a long date, yet learned Special Judge while recording that only PWs S.M. Katwal and Amar Singh Thakur are left to be examined, adjourned the trial to 3rd day, i.e., 24th December, 2012. On that day, statements of the remaining three witnesses were recorded. The statements of both accused under Section 313 of the Code were also recorded and on hearing arguments, the judgment was also delivered on the same day.

124. Be it stated that out of total 59 witnesses, 24 were ordered to be summoned on the above three dates and those witnesses not present on a particular date were ordered to be summoned either on the next day or a day next to it as discussed hereinabove. The trend, however, was not so before 20th December, 2012. For example on 16th November, 2012 PW Amar Singh was not present, whereas PW Rajinder Tarlokta though present but not produced the record. The case though was adjourned to 17th December, 2012, i.e., after one month for recording remaining prosecution evidence including that of S/Shri Amar Singh and Rajinder Tarlokta, however, they both were not summoned or bound down for 17th November, 2012 and rather Amar Singh was recorded on 24th December, 2012 whereas Rajinder Tarlokta on 20th/21st December, 2012. Again on 9th November, 2012 when PW Nagin Nanda could not appear despite service, no order is passed on that day qua his appearance on the next date, i.e., 16th November, 2012. The order passed on 7th November, 2012 reveals that some of the witnesses were not present on that day. Though, the case was already listed for 8th and 9th November, 2012 also for recording prosecution witnesses, however, such witnesses were not ordered to be summoned/produced for the next day or day thereafter.

125. True it is that the cases in respect of offence under Prevention of Corruption Act, 1988 need expeditious hearing and disposal. The cases under the Act are, otherwise also, being fast-tracked and taken up for hearing on priority basis, both at the High Court and District Courts levels, under the Mission Mode Programme and instructions/guidelines issued by the Supreme Court and also the High Court from time to time. Even under sub-section (4) of Section 4 of the Prevention of Corruption Act also a case registered under the Act is required to be heard on day-to-day basis. But sudden change in the trend of proceedings in the case in hand during the period from 20th December, 2012 to 24th December, 2012 casts a doubt that learned trial Judge being guided by instructions issued by the High Court or the provisions ibid under the Act proceeded in the case to dispose it of expeditiously because had it been so the speed in the proceedings observed during the period of four days, i.e., 20th December, 2012 to 24th December, 2012, the speed should have been the same right from very beginning. Anyhow, there being nothing on record that learned trial Judge did so for some extraneous consideration or with oblique motive to help the accused-respondents and particularly accused-respondent No.1 to take over as Chief Minister of Himachal Pradesh after declaration of the result of general election of Himachal Pradesh Legislative Assembly on 20th December, 2012, no further discussion on this aspect of the matter is required.

126. Although, nothing is there on record that Shri J.L. Sharma, Special Public Prosecutor was removed and rather he was very much in position upto 20th December, 2012, as is apparent from his presence marked in the zimni order passed on that day. He, however, was replaced on the next day, i.e., 21st December, 2012 by Shri Ashwani Dhiman, Public Prosecutor, whereas on 24th December, 2012, the day when the proceedings in the trial concluded and the judgment announced, the State was represented by Shri L.S. Negi, learned Public Prosecutor. The Public Prosecutor though was replaced on and after 20th December, 2012, however, what prejudice thereby is caused to the petitioner, Mr. Deol has failed to spell out during the course of arguments. The complaint that on and after 20th December, 2012, 20 witnesses were ordered to be given up, is not correct because out of 24 witnesses summoned for three days, i.e., 20th to 22nd December, 2012 and also for 24th December, 2012, 13 were recorded whereas 11 were given up.

127. I find no substance in the submissions that the witnesses were given up for extraneous consideration or with malafide intention to help the accused persons. Otherwise also, it is for the Public Prosecutor to decide as to out of the witnesses cited in the final report, who is to be examined in the Court and who is to be given up. Otherwise also, Mr. Deol again could not point out during the course of arguments as to what prejudice has been caused to the petitioner or for that matter the prosecution from the decision of the Public Prosecutor to give up 11 witnesses or why the said witnesses were required to be recorded and how such evidence would have been material for the prosecution case.

128. True it is that learned trial Judge has avoided the elaboration of the evidence available on record at the pretext that it was not required to do so. Support in this regard has been drawn by learned trial Judge from various judicial pronouncements made by the High Courts including the Apex Court. The impugned judgment reveals that the evidence has not out-rightly been ignored, but learned trial Judge has referred to and discussed the relevant evidence as and where required to do so. Mr. Deol, therefore, failed to persuade this Court to take a different view of the matter on this score. Otherwise also, for want of legal and acceptable evidence connecting both the accused with the commission of the alleged offence even if it is held that fair trial has not been conducted, will hardly be of any help to the petitioner, who being not victim, is not competent to file the appeal and even failed to show sufficient cause for condonation of delay.

129. The investigation of the case seems to be not conducted in a fair manner for the reason that irrespective of technology on CD was not in existence in the year 1989-90, the same has been made basis for registration of a case against the accused persons vide FIR No.27 of 2009 on 3rd August, 2009, i.e., after the expiry of about 20 years from the commission of the alleged offence by them. Both the accused are in their public life because respondent No.1 is the Chief Minister of the State, whereas his wife accused-respondent No.2 is a former Member of Parliament. In the nature of the evidence available on record, discussed supra, they have rightly been acquitted from the charges. Therefore, on this score and on merits also, no case is found to be made out against them.

Crux of the above discussion and conclusion drawn:

130. In view of what has been said hereinabove, the petitioner has no locus-standi to file the appeal as he is not a victim within the meaning of Section 2(wa) of the Code, hence not competent to file the appeal against the judgment of acquittal dated 24th December, 2012 passed by learned Special Judge (Forests), Shimla.

131. Admittedly, the petitioner has been convicted in few of the cases which were registered against him during the period when accused-respondent No.1 previously was also the Chief Minister of Himachal Pradesh. Of course, appeals against his conviction he preferred are pending disposal in the Supreme Court. Admittedly, the petitioner has also instituted civil and criminal cases against accused-respondent No.1, out of which few stands disposed of whereas few are still pending disposal. The facts, therefore, remain that the petitioner is inimical to accused-respondent No.1.

132. The petition even does not disclose sufficient cause as required for condonation of 96 days' delay, as occurred in filing the appeal. The expiry of the limitation prescribed for filing the appeal has resulted in a valuable right in favour of the accused-respondents and the same cannot be taken away on such grounds, which are not only vague, absurd, but false also. On merits also, no case is found to be made out against the accused-respondents. Therefore, there is no merit in this petition and the same is accordingly dismissed. Consequently, the petition for seeking leave to appeal and the appeal itself shall also stand dismissed. Pending application(s), if any, shall also stand disposed of.

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

M/s Cosmo Ferrites Limited and others. ...Petitioners.
Versus
Rajinder Singh. ...Respondent.

CMPMO No. 117/2015
Decided on: 21.4.2015

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a suit seeking injunction for restraining the defendants from transferring the plaintiff from Cosmo Ferrites Limited and causing any obstruction in entering the factory premises for attending his job- the application was allowed- an appeal preferred against the order was dismissed- according to Clause 20 of the Standing Order, the workman can be transferred according to exigency of the work from one department to another provided that his wages, grade, continuity of service and other conditions of service are not adversely affected by such transfer - such transfer can be made only when the workman consents after getting a reasonable notice -

plaintiff had brought to the notice of the management that he was not capable of performing heavy work and that he may be given work according to his capability- he had never requested for his transfer- transfer was made simply because the workman had participated in a strike and an FIR was also registered against him- held that trial Court below had rightly granted injunction. (Para-6 to 8)

Code of Civil Procedure, 1908- Section 9- A dispute between an employer and a single workman cannot be termed as an industrial dispute but may become one, if it is taken up by Union or number of workmen- the case of the plaintiff was not taken up by the Union, therefore, civil Court had jurisdiction to hear and entertain and suit. (Para-10 and 11)

Cases referred:

The Bombay Union of Journalists and others vs. The Hindu, Bombay and another, AIR 1963 SC 318

Rajashtan State Road Transport Corporation and another versus Bal Mukund Bairwa (2), (2009) 4 SCC 299

For the Petitioners: Mr. O.C. Sharma, Advocate.
For the Respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge (oral).

This petition is instituted against the order dated 3.3.2015 rendered by the Additional District Judge-II, Solan in Civil Miscellaneous Appeal No. 7-FTC/14 of 2010.

2. "Key facts" necessary for the adjudication of this petition are that respondent-plaintiff (hereinafter referred to as the "plaintiff" for convenience sake) has filed a suit against the petitioners-defendants (hereinafter referred to as the "defendants" for convenience sake) under section 38 of Specific Relief Act for decree of permanent injunction restraining the defendants from transferring the plaintiff from Cosmo Ferrites Limited Jabli, Tehsil Kasauli, District Solan and also restraining the defendants from causing any obstruction in entering into the factory premises for attending his job, duty and putting any kind of illegal restriction by themselves through their agents, employees, workers etc.

3. The plaintiff has also moved an application under order 39 rule 1 and 2 read with section 151 of the Code of Civil Procedure. The application was contested by the defendants. Learned Civil Judge (Senior Division) allowed the application vide order dated 23.9.2010 whereby the transfer order dated 26.7.2010 was stayed and the defendants were directed not to restrain the plaintiff to come to his place of work. The defendants feeling aggrieved by the order dated 23.9.2010 filed an appeal before the learned Additional District Judge-II, Solan. He dismissed the same on 3.3.2015. Hence, the present petition.

4. Mr. O.C. Sharma, learned counsel for the defendants; has vehemently argued that the civil court had no jurisdiction to entertain the suit. He has relied upon standing order framed under the Industrial Employment (Standing Orders) Act, 1946. He also contended that the courts below have not taken into consideration the well known principles governing the ad-interim injunction.

5. I have heard Mr. O.C. Sahrma and gone through order dated 23.9.2010 and judgment dated 3.3.2015.

6. The plaintiff was appointed on 12.5.1989. He met with an accident in the year 1992. He has taken treatment from P.G.I. and thereafter from Ludhiana. Employees of the defendant-company had gone on strike with effect from 19.7.2009 to 30.8.2009. FIR No.70/2009 was also registered against the plaintiff. Defendant-company has framed standing order under the Industrial Employment (Standing Orders) Act, 1946. Clause 20 of the Standing Order deals with the transfer of the workman. The Additional District Judge has made elaborate reference to clause 20 of the Standing Order. According to clause 20 of the Standing Order, the workman can be transferred according to the exigency of work from one job or department to another or from one station to another or from one establishment to another under the same employer provided that his wages, grade, continuity of service and other conditions of service are not adversely affected by such transfer and where the transfer involves moving from one station to another, such transfer is to take place either with the consent of the workmen where there is a specified provision to this effect in the letter of appointment and provided that reasonable notice is given to such workmen and reasonable joining time is allowed. The plaintiff has been transferred from Jabali, Tehsil Kasauli, District Solan to M/s Sterling Oxide Limited, Works Industrial Area, Sikendrabad, District Buldandshehar, U.P. as Assistant (Clerical). It is not in dispute that Sterling oxide Limited was wound up on 11.7.2013.

7. In the instant case, a notice was issued to the plaintiff on 20.7.2010 informing him that if he did not want to work with them, then his services would be terminated. The plaintiff replied to the notice on 27.7.2010. He brought to the notice of the management that as per medical certificate, he was not capable of performing heavy work and he may be given work as per his capability. The plaintiff has never prayed to be transferred from the present place of posting to Sikendrabad.

8. Mr. O.C. Sharma has vehemently argued that the consent of the plaintiff was obtained. The transfer of the plaintiff was *mala fide* since he has participated in the strike with effect from 19.7.2009 to 30.8.2009. FIR No.70/2009 was also registered against the plaintiff. The transfer of the plaintiff is also actuated with *malice* since the workman has been transferred to a distant place without any administrative exigency. The defendants could not be oblivious that plaintiff has suffered injury on four fingers and remained under treatment for a considerable time. The suit has been instituted under section 38 of the Specific Relief Act on the basis of Standing Order framed under the Industrial Employment (Standing Orders) Act, 1946.

9. Their Lordships of the Hon'ble Supreme Court in ***The Bombay Union of Journalists and others*** vs. ***The Hindu, Bombay and another***, AIR 1963 SC 318 have held that a dispute between employer and single workman cannot *per se* be an industrial dispute, but it may become one if it is taken up by the Union or a number of workmen. Their Lordships have held as under:

> "7. The terms of reference by the Government of Bombay under S. 12(2) indicate that the dispute was primarily between "The Hindu" Bombay and the appellant -- a single employee, relating to his individual claim in which the other employees of "The Hindu" Bombay were not directly interested. In Central Provinces Transport Services Ltd. v. Raghunath Gopal Patwardhan, 1956 SCR 956: ((S) AIR SC l04) this Court after setting out the three possible views on the question whether a dispute by an individual workman may be regarded as an industrial dispute within the meaning of S. 2(k) of the Industrial Disputes Act, 1947, observed,
>
> > "The preponderance of judicial opinion is clearly in favour of the last of the three views stated above (i.e., a dispute between an employer

and a single employee cannot per se be an industrial dispute, but it may become one if it is taken up by the Union or a number of workmen and there is considerable reason behind it.) Notwithstanding that the language of S. 2(k) is wide enough to cover a dispute between an employer and a single employee, the scheme of the Industrial Disputes Act does appear to contemplate that the machinery provided therein should be set in motion, to settle only disputes which involve the rights of workmen as a class and that a dispute touching the individual rights of a workman was not intended to be the subject of an adjudication under the Act, when the same had not been taken up by the Union or a number of workmen.

This view was reiterated in Newspapers Ltd. v. Slate Industrial Tribunal, U. P. 1957 SCR 754: ((S) AIR 1957 SC 532). Therefore, the applicability of the Industrial Disputes Act to an individual dispute as distinguished from a dispute involving a group of workmen is excluded, unless the workmen as a body or a considerable section of them make common cause with the individual workman.

9. By its constitution the Bombay Union of Journalists is a Union not of employees of one employer, but of all employees in the industry of journalism in Bombay. Support of the cause, by the Union, will not in our judgment convert the individual dispute of one of its members unto an industrial dispute. The dispute between "The Hindu" Bombay and Salivateeswaran was in respect of alleged wrongful termination of employment; it could acquire the character of an industrial dispute only if it was proved that it was, before it was referred, supported by the Union of the employee of "The Hindu" Bombay or by an appreciable number of its employees. In Workmen of Dimakuchi Tea Estate v. Management of Dimakuchi Tea Estate 1958 SCR 1156: (AIR 1958 SC 353) this Court held by a majority that the two tests of an industrial dispute as defined by sub-sec. (k) of S. 2 of the Industrial Disputes Act, 1947, must, therefore, be -- (1) the dispute must be a real dispute capable. of being settled by relief given by one party to the other and (2) the person in respect of whom the dispute is raised must be one in whose employment, non-employment, terms of employment, or conditions of labour (as the case may be), the parties to the dispute have a direct or substantial interest, and this must depend on the facts and circumstances of each case. In that case certain employees sought to raise a dispute about a person who was not a workman. In the present case members of the Union who were not workmen of the employer against whom the dispute was sought to be raised, seek by supporting the dispute to convert what is prima facie an individual dispute into an industrial dispute. The principle that the persons who seek to support the cause of a workman must themselves be directly and substantially interested in the dispute in our view applies to this class of case also: persons who are not employees of the same employer cannot be regarded as so interested, that by their support they may convert an individual dispute into an industrial dispute. The mere support to his cause by the Bombay Union of Journalists cannot therefore assist the claim of Salivateswaran so as to convert it into an industrial dispute.

16. The effect of the support to the cause of Salivateeswaran by the Indian Federation of Working Journalists and the claim founded thereon

does not call for any detailed consideration. After the reference was submitted and it was pending hearing before the Tribunal a letter was written by the President of the Indian Federation of Working Journalists to the General Secretary of the Bombay Union of Journalists on April 16, 1959, stating that the Federation had lent support to Salivateeswaran in the writ petition filed by "The Hindu" in the Supreme Court and that the Federation did so as it was a test case. Another letter dated April,17, 1959, was addressed by the General Secretary of the Indian Federation of Working Journalists to the General Secretary, Bombay Union of Journalists, Bombay stating that they had advised Salivateeswaran to file a petition before the Presiding officer of the Industrial Court in Bombay and had also intervened in the Supreme Court, and further that the Federation fully supported all actions taken by the Bombay Union of Journalists to get justice for Salivateeswaran. The Secretary of the Union by letter dated July 9, 1959, wrote to the President and Secretary-General of the Indian Federation of Working Journalists that Salivateeswaran's case was being heard for a week and that Salivateeswaran was to undergo cross-examination on the next day and that Mahatame, the previous Secretary was to give evidence. He further stated "I am of opinion that we must produce some document whereby it will be possible to prove that the Federation had supported Salivateeswaran's case' and requested the Federation to send a document in the form of a minute of a meeting or a letter or a resolution and if there was none such on the record, to pass a fresh resolution supporting the Bombay Union's action regarding Salivateeswaran's case and to send the same by return of post. Taking a clue from this letter, on July 24, 1959, the President of the Federation sent a copy of the resolution alleged to have been adopted by the members of the Working Committee of the Indian Federation of Working Journalists regarding Salivateeswaran's case. The draft resolution sought to support the case of the Bombay Union of Journalists before the Industrial Tribunal, Bombay, and to "direct the Union to fight the case with all its strength." This resolution is alleged to have been passed by circulation after the commencement of the adjudication proceedings. If the dispute was in its inception an individual dispute and continued to be such till the date of the reference by the Government of Bombay, it could not be converted into an industrial dispute by support subsequent to the reference even of workmen interested in the dispute. We have already held that subsequent withdrawal of support will not take away the jurisdiction of an industrial tribunal. On the same reasoning subsequent support will not convert what was an individual dispute at the time of reference into an industrial dispute. The resolution of the Indian Federation of Working Journalists, assuming that it has any value, would not be sufficient to convert what was an individual dispute into an industrial dispute."

10. In the instant case, plaintiff's case has not been taken up by the union.

11. So far as the question whether the civil court had no jurisdiction to go into the matter as argued by Mr. O.C. Sharma is concerned, the same no more ***res integra*** in view of the judgment rendered by their Lordships of the Hon'ble Supreme Court in ***Rajashtan State Road Transport Corporation and another*** versus ***Bal Mukund Bairwa*** (2), (2009) 4 SCC 299. Their Lordships have held as under:

"12. Section 9 of the Code is in enforcement of the fundamental principles of law laid down in the maxim Ubi jus Ibi remedium. A litigant, thus, having a

grievance of a civil nature has a right to institute a civil suit in a competent civil court unless its cognizance is either expressly or impliedly barred by any statute. Ex facie, in terms of Section 9 of the Code, civil courts can try all suits, unless bared by statute, either expressly or by necessary implication.

13. The civil court, furthermore, being a court of plenary jurisdiction has the jurisdiction to determine its jurisdiction upon considering the averments made in the plaint but that would not mean that the plaintiff can circumvent the provisions of law in order to invest jurisdiction on the civil court although it otherwise may not possess. For the said purpose, the court in given cases would be entitled to decide the question of its own jurisdiction upon arriving at a finding in regard to the existence of the jurisdictional fact.

14. It is also well settled that there is a presumption that a civil court will have jurisdiction and the ouster of civil court's jurisdiction is not to be readily inferred. A person taking a plea contra must establish the same. Even in a case where jurisdiction of a civil court is sought to be barred under a statute, the civil court can exercise its jurisdiction in respect of some matters particularly when the statutory authority or Tribunal acts without jurisdiction.

26. Applying the said principles to the fact of the cases wherein the plaintiffs alleged that the enquiries were conducted in violation of the Standing Orders whereas the stand taken by the Corporation was that the requirements contained in the Standing Orders were complied with, the Bench, however, noticed that no Regulation had been framed by the Corporation in terms of Section 45 of the Act insofar as the employees answering the description of `workman' as defined in Section 2(s) of the 1947 Act are concerned.

It appears that therein no dispute was raised that the provisions of the Standing Orders were applicable. The question, therefore, which inter alia arose for consideration was as to whether in holding the departmental proceeding the provisions of the Certified Standing Orders were violated or not. While holding that Civil Court's jurisdiction to entertain the suit was bared, it was held:

> "37. It is directed that the principles enunciated in this judgment shall apply to all pending matters except where decrees have been passed by the trial court and the matters are pending in appeal or second appeal, as the case may be. All suits pending in the trial court shall be governed by the principles enunciated herein -- as also the suits and proceedings to be instituted hereinafter."

With greatest of respect to the learned judges, if a statute while creating rights and obligations did not constitute a forum for enforcing the same, plenary jurisdiction of the civil court in view of Premier Automobiles Ltd.(supra) could not be held to have been taken away. There was also no occasion to extend the scope of the dicta laid down therein. Certified Standing Orders lay down the terms and conditions of service. It did not create any new right such as Section 25F, 25G or 25H of the Industrial Disputes Act, 1947. Any new right created under a statute would ordinarily be a right in favour of an employee over and above the general law.

Let us, however, proceed on the basis that the dicta laid down therein is correct.

33. A dispute arising in between an employer and employee may or may not be an industrial dispute. The dispute may be in relation to or arising out of a fundamental right of the employee, or his right under a Parliamentary Act and the Regulations framed thereunder, and/or a right arising under the provisions of the Industrial Disputes Act or the sister laws and may relate to same or similar rights or different rights, or even may be based on common law right or contractual right. The question in regard to the jurisdiction of the civil court must, therefore, be addressed having regard to the fact as to which rights or obligations are sought to be enforced for the purpose of invoking or excluding the jurisdiction of a civil court."

12. There is a prima facie case in favour of the plaintiff and balance of convenience also lies in his favour. He would have suffered irreparable loss and injury if the transfer order was not stayed.

13. Accordingly, there is no merit in the petition and the same is dismissed. Pending application, if any, also stands disposed of. No costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Sh. Budhi Singh & another ....Appellants.
Versus
Sh. Ashok Kumar & others. ....Respondents.

RSA No.6 of 2004
Judgment reserved on: 01.05.2015
Date of Decision: May 21 of 2015

Indian Evidence Act, 1872- Section 90- Plaintiff claimed the ownership on the basis of sale deed dated 11.1.1962 and 19.3.1965- defendant denied the execution of the sale deed dated 19.3.1965 and pleaded that document was manipulated by predecessor-in-interest of the plaintiffs who obtained thumb impression on the pretext of getting the land demarcated- it was contended that Court was bound to draw the presumption under Section 90 of the Evidence Act- held, that the power conferred upon the Court is discretionary and the Court is not obliged to draw such presumption- further, mere proof of formal execution of a document does not lead to a presumption that recitals contained therein are also correct- plaintiff has neither pleaded nor proved as to how the consideration was paid, who was the Deed Writer, before whom the document was executed- hand-writing was not proved nor anyone was called from Sub Registrar office, therefore, in these circumstances, trial Court had rightly refused to rely upon the sale deed. (Para-9 to 35)

Cases referred:

Gangamma and others Versus Shivalingaiah, (2005) 9 SCC 359
Tilak Chand Kureel Versus Bhim Raj, 1969(3) SCC 367
Lallan Singh and others Versus State of Bihar, 1969 (3) SC 765
Shiv Lal and others Versus Chet Ram and others, 1970 (2) SCC 773
Lakhi Baruah and others Versus Padma Kanta Kalita and others, 1996(8) 357
State of Andhra Pradesh and others Versus Star Bone Mill and Fertiliser Company, (2013) 9 SCC 319
Mahasay Ganesh Prasad Ray & another Vs Narendra Nath Sen and others, AIR 1953 SC 431

Harihar Prasad Singh and another Versus Deonarain Prasad and others, AIR 1956 SC 305
Madamanchi Ramappa and another Versus Muthaluru Bojjappa, AIR 1963 SC 1633
Vishwanath Bapurao Sabale Vs Shalinibai Nagappa Sabale and others, (2009) 12 SCC 101
Pavitri Devi and another Versus Darbari Singh and others, (1993) 4 SCC 392
Union of India Versus Ibrahim Uddin and another, (2012) 8 SCC 148
Sital Das Versus Sant Ram and others ,AIR 1954 SC 606
Kalidindi Venkata Subbaraju and others Versus Chintalapati Subbaraju and others, AIR 1968 SC 947
Bharpur Singh and others Versus Shamsher Singh, (2009) 3 SCC 687
M.B. Ramesh (Dead) By LRs. Versus K.M. Veeraje Urs (Dead) By LRs., (2013) 7 SCC 490
Saradamani Kandappan Versus S. Rajalakshmi and others, (2011) 12 SCC 18
Gayatri Devi and others Versus Shashi Pal Singh, (2005) 5 SCC 527
Saheb Khan Versus Mohd. Yosufuddin and others, (2006) 4 SCC 476
Sait Tarajee Khimchand and others Versus Yelamarti Satyam and others, AIR 1971 SC 1865
Bhop Ram Versus Dharam Das, Latest HLJ 2009(HP) 560.
Dalip Kumar Versus Rajesh Sahani and others, Latest HLJ 2004 (HP) 1030
Rajni Tandon Versus Dulal Ranjan Ghosh Dastidar and another, (2009) 14 SCC 782
Shyamal Kumar Roy Versus Sushil Kumar Agarwal, AIR 2007 SC 637
Union of India and others Versus A. Nagamalleshwar Rao, AIR 1998 SC 111
Madamanchi Ramappa and another Versus Muthaluru Bojjappa, AIR 1963 SC 1633
Lachhman Singh (Deceased) Through legal representatives and others Versus Hazara Singh (Deceased) Through legal representatives and others, (2008) 5 SCC 444
Shalimar Chemical Works Limited Versus Surendra Oil and Dal Mills (Refineries) and others, (2010) 8 SCC 423

For the appellants: Mr. G.D. Verma, Sr. Advocate with Mr.B.C. Verma, Advocate.
For the Respondents: Mr. Bhupinder Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate, for the LRs of respondents No.1 (a) to 1(d).

The following judgment of the Court was delivered:

Sanjay Karol, J.

This regular second appeal, filed under Section 100 of the Code of Civil Procedure, stands admitted on the following substantial question of law:-

> "Whether the two courts below have erred in not raising a presumption under Section 90 of the Indian Evidence Act in respect of two sale deeds dated 11.1.1962 and 19.3.1965"?

It be only clarified that controversy is only with regard to sale deed dated 19.03.1965. Concurrent findings of fact are challenged by the plaintiffs.

2. Budhi Singh and Jamna alias Jamna Dei as plaintiffs, set up their claim, in the suit land, on the basis of sale deeds dated 11.01.1962 (Ex.PW.1/A) and 19.03.1965 (Ex.PW.1/B), executed by Sh. Longu (defendant No.1). Challenge was laid to the entries, erroneously recording the defendants to be co-owners. Plaintiffs claimed 1/4th share in the suit land, pleading defendant No.1 to be owner only to the extent of 3/16th share and defendant No.2 to be owner of a very negligible share.

3. Suit for declaration and injunction so filed by the plaintiffs was primarily resisted by Longu, who while admitting execution of sale deed dated 11.01.1962, denied execution of any sale deed dated 19.03.1965, categorically pleading the document to have been manipulated by Brehabatu (predecessor-in-interest of the plaintiffs), who on the pretext of getting the land demarcated, so sold vide earlier sale deed obtained thumb impression on a stamp paper which was supposed to be an application for demarcation, to be presented before the Tehsildar. Bhrehabatu had called Longu to the Tehsil Headquarter for the said purpose. Thus, without disputing the share of the plaintiffs in the land sold vide sale deed dated 11.01.1962, with respect to sale deed dated 19.03.1965 defendants pleaded fraud, misrepresentation and undue influence.

4. Based on the pleadings of the parties, trial Court framed the following issues:-

1. Whether the plaintiffs are owners in possession of 7/16th share by way of purchase from defendant No.1, of the suit land by way of sale deeds dated 11.1.1962 & 19.3.1965? OPP.
2. Whether share in the revenue record qua the ownership of plaintiffs are wrongly recorded as alleged? OPP.
3. Whether plaintiffs are entitled for consequential relief of injunction as prayed for? OPP.
4. Whether suit of the plaintiffs is within time? OPP
5. Whether plaintiffs have no locus standi to file the present suit? OPD
6. Whether the plaintiffs are estopped from filing the present suit by their act and conduct? OPD
7. Whether sale deed dated 19.3.1965 is a result of fraud, misrepresentation & undue influence as alleged? OPD
8. Relief.

5. Appreciating the testimonies of the witnesses, trial Court, by answering the material issues, in favour of the defendants, dismissed the suit, vide judgment and decree dated 30.04.2002, passed in CS No. 111 of 2000, titled as *Budhi Singh & another Versus Sh. Longu and another.*

6. Lower Appellate Court, in the plaintiffs' appeal affirmed all findings of fact vide judgment and decree dated 06.10.2003 rendered in Civil appeal No.74-D/XIII-02, titled as *Budhi Singh & another Versus Longu & another.*

7. Hence the present appeal.

8. There is no dispute with regard to execution of sale deed dated 11.01.1962 (Ex.PW.1/A). Plaintiffs' share in the suit land, to the extent of the land sold in terms of this sale deed is also not in dispute.

9. Section 90 of the Indian Evidence Act, 1872, reads as under:-

> "90. Presumption as to documents thirty years old.—Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of

> any particular person, is in that person's handwriting, and, in the case of a document excluded or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.
>
> > Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable".

10. Principle behind the aforesaid provision is of necessity and convenience. The underline principle being, that if a document, private or otherwise is produced from proper custody and is on its face free from suspicion, the Court may presume that it has been signed or written by the person whose signature it bears or in whose handwriting it purports to be and that it has been duly attested and executed, if it purports to be so. To raise such presumption, *prima facie* proof is necessary to show that the document is 30 years old. But however, such presumption is rebuttable. Where the party opposing the document disproves it to be so by convincing evidence, the Court is duty bound to call the party, relying on it to prove it. Where the factum of execution is not in dispute, no evidence is necessary to prove its genuineness. Proper custody under the Section would mean the custody of any person, so connected with the deed, that possession thereof, does not raise any suspicion or fraud.

11. The power conferred upon the Court is absolutely discretionary. It may or may not draw the presumption and would depend upon the factual matrix of each case. Even if the document is 30 years old, comes from the proper custody, the Court may still call upon the party to prove the same as also its contents. Court is not, under all circumstances, obliged to draw such presumption, and the Court is duty bound to consider evidence, external and internal of the document, in order to enable it to decide, whether in any particular case, it should or should not presume proper signature and execution. Age alone is not the sole criteria. However, while refusing to draw presumption, Court cannot be capricious in its attitude. But then even in the absence of any objection, taken at the time of admission of the document, Court can refuse to draw the statutory presumption. Mere tendering of a document in evidence cannot be regarded as proof of proper custody.

12. Normally Appellate Court should be loathe in interfering with the discretion exercised by the trial Court in refusing to draw the statutory presumption unless and until the discretion so exercised is arbitrary, capricious, illegal or shocks the conscious of the Court.

13. The apex Court in *Gangamma and others Versus Shivalingaiah,* (2005) 9 SCC 359, has held that even if formal execution of a document is proved, the same by itself would not lead to a presumption that recitals contained therein are also correct. Mere execution of a document does not lead to the conclusion that the recitals made therein are correct, and subject to the statutory provisions contained in Sections 91 and 92 of the Evidence Act. It is open to the parties to raise a plea contra thereto. Also the presumption enacted under the Section can be raised in relation to the original document and not copies thereof. [Also: *Tilak Chand Kureel Versus Bhim Raj,* 1969(3) SCC 367; *Lallan Singh and others Versus State of Bihar,* 1969 (3) SC 765; *Shiv Lal and others Versus Chet Ram and others,* 1970 (2) SCC 773 and *Lakhi Baruah and others Versus Padma Kanta Kalita and others,* 1996(8) 357]

14. Section 90 of the Evidence Act is based on the legal maxims: *nemo dat qui non habet* (no one gives what he has not got); and *nemo plus juris tribuit quam ipse habet* (no one can bestow or grant a greater right, or a better title than he has himself). This section does away with the strict rules, as regards the requirement of proof, which are enforced in the case of private documents, by giving rise to a presumption of genuineness, in respect of certain documents that have reached a certain age. The period is to be reckoned backward from the date of the offering of the document, and not any subsequent date i.e. the date of decision of suit or appeal. [See: *State of Andhra Pradesh and others Versus Star Bone Mill and Fertiliser Company,* (2013) 9 SCC 319.]

15. The apex Court in *Mahasay Ganesh Prasad Ray and another Versus Narendra Nath Sen and others,* AIR 1953 SC 431, had the occasion to deal with Book of Accounts which undoubtedly were 30 years old and came from the possession of its keeper. Yet Court held that:-

> "3. … … … Exhibit 32 series as noticed by the High Court, consists of loose sheets of papers. They have not the probative force of a book of account regularly kept. Being old documents, naturally, the writer is not called and barring the fact that they were produced from the Receiver's possession there is nothing to show their genuineness. Section 90, Evidence Act, does not help the appellants because this is not a case where the signature of a Particular person is in question or sought to be established. … …".

16. The apex Court in *Harihar Prasad Singh and another Versus Deonarain Prasad and others,* AIR 1956 SC 305, the Court has observed as under:-

> "8. Strong reliance was placed by the respondents on Exhibits F-1 and F-1(1) which are khatians relating to the suit lands published on 7-12-1909 recording them as in the possession of the defendants of the second party as 'kaimi' and on the presumption under S. 103-B that entry is correct.
>
> This presumption, it is contended, is particularly strong in the present case, because the predecessors-in-title of the plaintiffs were parties to the proceedings and contested the same, and that the record of rights was made after considering their objections.
>
> The plaintiffs, however, denied that they were parties to the proceedings, and contended that they were taken behind their back by the mortgagees and the second party defendants acting in collusion with a view to defeat their rights. Exhibits A-1 and A-1(1) are certified copies of the objection petitions stated to have been filed by the mortgagors under S. 103-A of the Act, and they purport to have been signed by one Chulai Mahto as karpardaz of some of the mortgagors.
>
> The plaintiffs deny the genuineness of the signatures in Exhibits A-1 and A-1(1) and also the authority of Chulai Mahto to represent the mortgagors. There is no evidence that the signatures on Exhibits A-1 and A-1(1) are true, but the defendants rely on the presumption enacted in S. 90, Evidence Act, in favour of their genuineness.
>
> But Exhibits A-1 and A-1(1) are merely certified copies of the objection petitions filed before the Survey Officer and not the originals, and it was held in - 'Basant Singh v. Brij Raj Saran Singh', AIR 1935 PC 132 (C) that the presumption enacted in the section can be raised only with reference to original documents and not to copies thereof.

There is the further difficulty in the way of the respondents that the documents are signed by Chulai Mahto as agent, and there is no proof that he was an agent, and S. 90 does not authorise the raising of a presumption as to the existence of authority on the part of Chulai Mahto to represent the mortgagors. It is again to be noted that the objection on the merits raised in Exhibits A-1 and A-1(1) that the lands are bakasht lands in the possession of mortgagees is not one which it was to the interests of the mortgagors to put forward, as, if accepted, it would preclude them from admitting tenants in respect of them, without conferring on them the status of settled raiyats and occupancy rights under S. 21 of the Act.

It was only if the lands were private lands that the proprietor would be entitled to cultivate them personally, and that was the claim which they had been making consistently from 1893 onwards. The claim put forward in Exhibits A-1 and A-1(1) is destructive of the rights claimed all along by the mortgagors, and amounts to an admission that the lands are not private and raises the doubt that the petitions were not really inspired by them.

It should also be mentioned that at the hearing of the petition, no evidence was adduced by the mortgagors, and the decision of the Survey Officer was given practically 'exparte'. The mortgagees were parties to the proceedings, and they did not appear and produce the mortgage deeds, Exhibits 2 and 3, under which they got into possession, and which described the lands as sir.'

It was to the interests of the mortgagees that the lands should be held to be 'sir', and it was further their duty to defend the title of the mortgagors as against the claim made by the tenants that they were raiyati lands. Why then did they not produce Exhibits 2 and 3 at the hearing?

The recitals in the lease deed, Exhibit 2(a) which was executed by the defendants of the second party, were inconsistent with their claim that the lands were raiyati. Why did they not produce it at the hearing? There is, therefore, must to be said for the contention of the appellants that the proceedings evidenced by Exhibits A-1 and A-1 (1) were collusive in character.

9. But even assuming that they were real, that would not materially affect the result, as the true effect of a record of rights under S. 103- A is not to create rights where none existed but simply to raise a presumption under S. 103-B that such rights exist, and that presumption is one liable to be rebutted.

There is a long line of authorities that a person who attacks a record made under S. 103-A as incorrect discharges the burden which the law casts on him under S. 103-B by showing that it was not justified on the materials on which it is based. Vide - 'Bagha Mowar v. Ram Lakham', AIR 1918 Cal 807 (D) and - 'Eakub Ali v. Muhammad Ali', AIR 1929 Cal 450 (E). And where, as here, no evidence was placed before the authorities who made the record, he has only to produce evidence which satisfies the Court that the entry is erroneous.

Whether the question is considered with reference to the presumption under S. 120(2) or S. 103-B, the position is the same. The plaintiffs who claim that the lands are kamat have to establish it by clear and satisfactory evidence. If the evidence adduced by them is sufficient, as we have held it is, to establish it, the presumption under S. 103-B equally with that under S. 120(2)

> becomes displaced. In the result, we are of opinion that the suit lands are the private lands of the proprietor".

17. In *Madamanchi Ramappa and another Versus Muthaluru Bojjappa,* AIR 1963 SC 1633, Court was dealing with a case where admissibility of certified copy of public document was an issue. Sale deed even if registered under the Registration Act, was not held to be a public document.

18. The apex Court in *Vishwanath Bapurao Sabale Versus Shalinibai Nagappa Sabale and others,* (2009) 12 SCC 101, has only held that there is a presumption with regard to valid execution of a registered document.

19. A private document produced from the custody from a private party, though 30 years old, cannot have the same weight as a public document. [See: *Pavitri Devi and another Versus Darbari Singh and others,* (1993) 4 SCC 392.]

20. The apex Court in *Union of India Versus Ibrahim Uddin and another,* (2012) 8 SCC 148, has held that:-

> "85.3. ....Presumption under Section 90 of the Evidence Act in respect of 30 years' old document coming from proper custody relates to the signature, execution and attestation of a document i.e. to its genuineness but it does not give rise to presumption of correctness of every statement contained in it. That the contents of the documents are true or it had been acted upon, have to be proved like any other fact.........".

21. It is also a settled principle of law that a Will is required to be proved in terms of the provisions of Section 63 of the Succession Act and Section 65/68 of the Indian Evidence Act and no presumption can be drawn with regard to the said document. [See: *Sital Das Versus Sant Ram and others* ,AIR 1954 SC 606; *Kalidindi Venkata Subbaraju and others Versus Chintalapati Subbaraju and others*, AIR 1968 SC 947; *Bharpur Singh and others Versus Shamsher Singh,* (2009) 3 SCC 687 and *M.B. Ramesh (Dead) By LRs. Versus K.M. Veeraje Urs (Dead) By LRs.,* (2013) 7 SCC 490.]

22. In view of the aforesaid legal position, plaintiffs' case is considered.

23. In the instant case, there is no dispute with regard to the signature of predecessor-in-interest of the plaintiffs and thumb impression of the defendant on document in issue. What is argued is its execution by exercising fraud and misrepresentation.

24. It is a settled principle of law that whenever a party wants to put forth contention of fraud, it is to be specifically pleaded and proved**,** which in the instant case stands established by leading credible evidence, in line with the ratio of law laid down in *Saradamani Kandappan Versus S. Rajalakshmi and others,* (2011) 12 SCC 18; *Gayatri Devi and others Versus Shashi Pal Singh,* (2005) 5 SCC 527 and *Saheb Khan Versus Mohd. Yosufuddin and others,* (2006) 4 SCC 476.

25. Sale deed dated 19.03.1965 cannot be said to have been proved, in accordance with law. At the time of the document being exhibited, defendants have rightly objected to the same. This view is supported by the ratio of law laid down in *Sait Tarajee Khimchand and others Versus Yelamarti Satyam and others,* AIR 1971 SC 1865.

26. With regard to sale deed in issue, plaintiff has neither pleaded nor proved as to how the consideration was paid; who was the Deed Writer; before whom the document was executed. No evidence, worthy of credence, proving the sale deed, stands led by the

plaintiffs. Document was executed between the plaintiffs' father and defendant No.1. Even the handwriting was not proved nor was anyone called from the office of the Registrar.

27. On the other hand, defendant No.1 (DW.1), in Court, has categorically deposed that in the year 1965, he was called by Brehabatu for moving an application before the Tehsildar. The land sold in the year 1962 was sought to be demarcated. With this understanding, on the asking of Brehabatu, he put his thumb impression on the documents. Neither did he receive any sale consideration nor had he any intention of selling the land, subject matter of sale deed dated 19.03.1965. His testimony is worthy of credence and inspiring in confidence. Hence, findings returned by the Courts below, with respect to issue No.7, cannot be said to be illegal or erroneous, more so, in the light of principles reiterated by this Court in *Bhop Ram Versus Dharam Das,* Latest HLJ 2009(HP) 560.

28. In view of the aforesaid discussions, entries recording the plaintiffs to be owners, in the revenue record, would also not reflect any title of ownership to the extent of land sold in terms of sale deed dated 19.03.1965.

29. On the issue I deem it appropriate to deal with certain decisions referred to by Sh. G.D. Verma, learned Senior counsel, for the plaintiffs.

30. In *Dalip Kumar Versus Rajesh Sahani and others,* Latest HLJ 2004 (HP) 1030, Court was dealing with a case pending before the Tribunal, unlike Civil Courts, which distinction the court itself drew, with regard to the statutory restrictions and limitation, so imposed upon Civil Courts by virtue of the Code of Civil Procedure or the Indian Evidence Act.

31. Ratio in *Rajni Tandon Versus Dulal Ranjan Ghosh Dastidar and another,* (2009) 14 SCC 782, is misconceived as it deals with the object of the registration of the document. In the said case no plea of fraud unlike the instant case was taken.

32. *Shyamal Kumar Roy Versus Sushil Kumar Agarwal,* AIR 2007 SC 637, deals with the impounding of the document and also where document not proved, in accordance with law, can be looked into or not. This was so done in the given facts and circumstances unlike the present case, where objection with regard to the admissibility of the document was taken at the initial stage.

33. Reliance on the decision rendered by the apex Court in *Union of India and others Versus A. Nagamalleshwar Rao,* AIR 1998 SC 111, is misconceived as it pertains to departmental proceedings. Also reliance on *Madamanchi Ramappa and another Versus Muthaluru Bojjappa,* AIR 1963 SC 1633 is misconceived.

34. Appellants have filed an application, seeking permission to lead additional evidence to prove sale deed dated 19.03.1965. In the given facts and circumstances, no case for interference is made out by the appellants. The alleged sale deed, is an act of fraud and misrepresentation as has been concurrently held by the Courts below. As such, reliance on the decision rendered by the apex Court in *Lachhman Singh (Deceased) Through legal representatives and others Versus Hazara Singh (Deceased) Through legal representatives and others,* (2008) 5 SCC 444 and *Shalimar Chemical Works Limited Versus Surendra Oil and Dal Mills (Refineries) and others,* (2010) 8 SCC 423 is misconceived in law.

35. Consequently, I do not find any reason or ground sufficient enough to interfere with the concurrent findings of fact recorded by the Courts below. It cannot be said that learned Courts below erred in correctly and completely appreciating the testimonies of the witnesses or that findings returned are illegal, erroneous or perverse in any manner

which has resulted into miscarriage of justice. Substantial question of law is answered accordingly. The present appeal is accordingly dismissed. Pending applications, if any, also stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Kehar Singh and another ....Appellants.
versus
Ramesh Chand (dead), through LRs ...Respondent.

RSA No.115 of 2004
Reserved on : 7.5.2004
Date of Decision : May 21, 2015.

Code of Civil Procedure, 1908 - Section 11- Plaintiff filed a suit for injunction which was dismissed on the ground that defendants were in possession of the suit land without any right, title or interest- plaintiff subsequently filed a suit for possession of the suit land and also for claiming damages for unauthorized use and occupation, which was decreed- held, that in earlier suit, findings were recorded regarding the defendants being in unauthorized occupation over the suit land- the plea of the defendants having become owner by way of adverse possession stood repelled – these findings were never challenged by the defendants- defendants pleaded that they had become owners on the basis of sale deed- they had also pleaded adverse possession, which is not permissible- Court had rightly decreed the suit partly for possession. (Para-10 to 14)

Cases referred:
Deity Pattabhiramaswamy v. S. Hanymayya and others, AIR 1959 SC 57
Madamanchi Ramappa and another v. Muthaluru Bojjappa, AIR 1963 SC 1633

For the Appellants : Mr. Ashwani K. Sharma, Advocate.
For the Respondent : Mr. Dushyant Dadwal, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Defendants-appellants Kehar Singh and Simro Devi have filed the present appeal under the provisions of Section 100 of the Code of Civil Procedure, assailing the judgment and decree dated 5.12.2003, passed by the learned Additional District Judge (2), Kangra at Dharamshala, in Civil Appeal No.57-P/2000, titled as *Kehar Singh and another v. Ramesh Chand,* whereby judgment and decree dated 24.2.2000, passed by the Sub Judge 1st Class, Court No.2, Palampur, Himachal Pradesh, in Civil Suit No.257/97, titled as *Ramesh Chand v. Kehar Singh and another,* stands affirmed.

2. Plaintiff Ramesh Chand (now deceased and represented through LRs) sold part of his land to defendant Kehar Singh and his wife. Alleging interference from the defendants, with respect to the remaining land, so owned and possessed by him, plaintiff filed a suit for permanent prohibitory injunction. The suit was resisted by the defendants, pleading the land to be the one so mentioned and sold in terms of the sale deed.

3. Vide judgment and decree dated 7.8.1997 (Ex.PY), passed in an earlier suit, trial Court, finding the defendants to be in possession of the suit land, dismissed the suit, reserving right to the plaintiff to recover possession in accordance with law. Significantly, the defendants were held to be in possession, without any right, title or interest.

4. Pursuant to passing of the aforesaid judgment and decree, on 16.10.1997, plaintiff filed suit for possession of the land, subject matter of earlier suit, also claiming damages for unauthorized use and occupation. Defendants pleaded ownership, justifying their possession on the basis of sale deed.

5. Based on the pleadings of the parties, trial Court framed the following issues:

1. Whether the plaintiff is entitled for the decree of possession of suit land, as prayed for? OPP
2. Whether the plaintiff is entitled for the damages to the sum of Rs.1000/- as prayed for? OPP
3. Whether the plaintiff is estopped by his act and conduct from filing the suit? OPD
4. Whether the suit is not within time? OPD
5. Whether the defendant No.1 has become owner of the suit land by way of adverse possession? OPD
6. Whether the plaintiff has no cause of action? OPD
7. Relief.

6. Trial Court decreed the suit in the following terms:

> ”In view of the findings on aforesaid issues, the suit of the plaintiff is decreed partly to the effect that plain tiff is entitled for the relief of possession of land of khata No.4, khatoni NO.4, khasra No.269, measuring 0-37-01 Hects. And khata No.3 min, khatoni No.3 Min, khasra No.258 land measuring 0-04-16 Hects. Situated at Mohal Panapar Kholi, Mauza Panapar, Sub Teh. Bheera, Tehsil Palampur, Distt. Kangar (H.P.) and suit for damages/ compensation is dismissed. The parties are left to bear their own costs. Decree Sheet be drawn accordingly. The file after its due completion be consigned to record room.”

7. Findings of fact, judgment and decree, so passed by the trial Court, stand affirmed by the lower appellate Court.

8. Present appeal stands admitted on the following substantial questions of law:

1. Whether learned Additional District Judge, being the final court of fact, erred in ignoring the report of local commissioner appointed with the consent of the parties during the pendency of the first appeal especially when no objection to the report was filed on record by either party?
2. Whether defendant No.1 being a bonafide purchaser of the land for consideration is not entitled to possession of suit land in spite of the fact that on the identification of the plaintiff, he continues to be in possession of the land since the date of its purchase in the year, 1984 and has also carried out substantial improvements over the same since thereafter?

9. Having heard learned counsel for the parties, I am of the considered view that no case for interference is made out.

10. It cannot be disputed that the subject matter of both the suits is same and similar. In the judgment and decree passed in the earlier suit, which undisputedly has attained finality, there are findings of the defendants being in unauthorized occupation over the suit land. Plea of having perfected title by way of adverse possession stood repelled by the trial Court. Findings with regard to Issue No.7, so framed therein, were never assailed by the defendants. In this view of the matter, report of the Local Commissioner, who was also not examined before the lower appellate Court, pales into insignificance.

11. Trial Court, even in the present proceedings, has decided Issue No.5, pertaining to the title so perfected by way of adverse possession, against the defendants.

12. Plea taken by the defendants is in fact contradictory. They cannot be allowed to blow hot and cold, in the same breath. They can either plead and claim ownership on the strength of sale deed or adverse possession. Any which way, findings returned by the Courts below, which are based on complete, careful and correct appreciation of the evidence, cannot be said to be erroneous or perverse.

13. It is not the defendants' case that pursuant to sale deed, so executed in their favour, they were never put in possession of any land. In the first suit, plaintiff pleaded interference on the part of the defendants and sought injunction. Only when the Court found the defendants to be in an unauthorized possession, liberty was reserved to the plaintiff to take recourse to appropriate remedy, in accordance with law. Defendants did not file any counterclaim or initiate any proceedings against the plaintiff.

14. Significantly, defendants have not placed on record or proved the sale deed, exhibiting the land sold to them. On the contrary, in Court, in his cross-examination, defendant No.1 admits that land comprising Khasra Numbers (269 and 258), subject matter of the suits, was never sold to him. All that he states is that the plaintiff had handed over these very khasra numbers to him. In view of a specific finding to the contrary, in the earlier suit, stand taken by the defendants is not factually correct, just, proper or legally sustainable.

15. The Apex Court in *Deity Pattabhiramaswamy v. S. Hanymayya and others,* AIR 1959 SC 57, has deprecated the practice, so adopted by the High Courts in disposing of second appeals as if they were to be decided as first appeals.

16. Contention, so raised by Mr. Ashwani Sharma, learned counsel for the appellant, that the appeal be decided, by balancing the equities, only needs to be repelled, in view of clear mandate of the Hon'ble Supreme Court of India, in *Madamanchi Ramappa and another v. Muthaluru Bojjappa,* AIR 1963 SC 1633, wherein it is held as under:

> "Where the Supreme Court is satisfied that in dealing with a second appeal the High Court has either unwillingly and in a casual manner or deliberately contravened the limits prescribed by S. 100 Civil P.C., by interfering with concurrent findings on simple questions of fact on ground of insufficiency of evidence, it becomes the duty of the Supreme Court to intervene and give effect to the said provisions. It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by Courts of fact; but on such occasions it is necessary to remember that what is administered in courts is justice according to law and considerations of fair play and equity however

important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the expression provisions of S. 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid."

17. As such, it cannot be held that findings returned by the Courts below are illegal, perverse and erroneous, warranting interference by this Court. Substantial questions of law are answered accordingly. For all the aforesaid reasons, the appeal is dismissed and disposed of, so also the pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Mohinder Kumar Sharma …Appellant.
Versus
State of H.P. …Respondent.

Cr. Appeal No. 337 of 2011
Judgment reserved on: 25.03.2015
Date of Decision: May 21 , 2015

Prevention of Corruption Act, 1947- Section 13(2)- **Indian Penal Code, 1860-** Section 409- Accused had withdrawn the money for the construction of Panchayat Ghar but had not utilized the same and in this manner he had misappropriated Rs.65,000/-- held, that in order to prove criminal breach of trust, prosecution is required to prove dishonest intent, converting the property to his own use, dishonestly using or disposing of the property in violation of law or agreement – statements of witnesses showed that some money was paid for construction of Panchayat Ghar- valuation certificate showed that more amount than withdrawn was spent for construction of Panchayat Ghar- the mere fact that Panchayat Ghar is not habitable will not establish the guilt of the accused. (Para-10 to 22)

Cases referred:

Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Aher Raja Khima Versus State of Surashtra, AIR 1956 SC 217
Abdulla Mohammed Pagarkar Versus State (Union Territory of Goa, Daman and Diu), (1980) 3 SCC 110
Radha Pisharassiar Amma Versus State of Kerala, (2007) 13 SCC 410

For the Appellant: Mr. Anoop Chitkara, Advocate.
For the Respondent: Mr. R.S. Verma, Additional Advocate General for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In this appeal filed under Section 374 Cr.P.C., convict Mohinder Kumar Sharma has assailed the judgment dated 17.08.2011/18.08.2011, passed by Special Judge,

(Additional Sessions Judge), Mandi, H.P., in C.C. No.2 of 2007, titled as *State Versus Mohinder Kumar Sharma*, whereby he stands convicted for having committed an offence punishable under the provisions of Section 13(2) of Prevention of Corruption Act, 1947 (hereinafter referred to as the P.C. Act) and sentenced to undergo simple imprisonment for a period of two years and to pay fine of Rs.50,000/- and in default thereof, further undergo simple imprisonment for a period of six months. Also he is convicted of having committed an offence punishable under the provisions of Section 409 of the Indian Penal Code and sentenced to undergo simple imprisonment for a period of two years and pay fine of Rs.10,000/- and in default thereof, further undergo simple imprisonment for a period of two months.

2. In brief, it is the case of prosecution that during the tenure of his posting as Naib Teshildar in Sub-Tehsil, Kotli, appellant was entrusted with public funds meant for the construction of Panchayat Ghars. Though entire money drawn by him but not fully utilized. In all he misappropriated Rs.65,000/-, thus causing loss to the State. On receipt of a complaint, inquiry was conducted by the Sub Divisional Magistrate, who submitted his report (Ex.PW.6/B), which was forwarded by the Deputy Commissioner, Mandi, to the Superintendent of Police (Vigilance), on the basis of which FIR No.2/05, dated 02.02.2005 (Ex.PW.19/A) was registered, under the provisions of Sections 13(1)(c), 13(2) of the Act and Sections 409, 467, 468 and 471 IPC at Police Station, AC Zone, Mandi, against the accused. Investigation was conducted by Gian Singh (PW.22) who seized the incriminating documents. With the completion of investigation, which revealed complicity of the accused to the alleged crime, challan was presented in the Court for trial.

3. The accused was charged for having committed offences punishable under the provisions of Sections 409, 467, 468 and 471 of the Indian Penal Code and Section 13(2) read with Section 3(d)(i)(i) of the P.C. Act, to which he did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as twenty eight witnesses. Statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took the following defence:-

> "The work was carried out in time and the money more than sanctioned was used. Office kanungo maintained the record. He used to issue the bills".

In defence, accused examined one witness.

5. Trial Court framed the following points for consideration:-

> "1. Whether the accused being entrusted with Rs.40,000/- for the repair of Patwar Khana Khalanu, Khadkoh and Khad Kalyana and had committed criminal breach of trust in respect of this amount, had forged utilization certificate regarding repair of Patwar Khana Khalanu, Karkoh and Khad Kalyana intending that these shall be used for cheating and had used the utilization certificates for cheating knowing them to be forged and had misappropriated Rs.40,000/- by abusing his position as a public servant?
>
> 2. Final order".

6. Appreciating the evidence on record, trial Court found the prosecution to have established its case, beyond reasonable doubt, against the accused only in relation to offences punishable under the provisions of Section 409 IPC and Section 13(2) of the P.C. Act. In relation to other offences, accused stands acquitted, to which there is no challenge.

7. Assailing the findings of conviction and the sentence, accused has filed the present appeal. No appeal stands filed by the State.

8. Having heard Mr. Anoop Chitkara, learned counsel duly assisted by Ms.Divya Sood, Advocate, on behalf of the appellant as also Mr. R.S. Verma, learned Additional Advocate General, on behalf of the State, as also minutely examined the testimonies of the witnesses and other documentary evidence, so placed on record by the prosecution, Court is of the considered view that trial Court erred in correctly appreciating the material on record. Contradictions and improbabilities which are glaring, rendering the prosecution case to be extremely doubtful, if not true, stand ignored.

9. I*n Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held as under:

> "7. This Court had ever since Its inception considered the correct principle to be applied by the Court in an appeal against an order of acquittal and held that the High Court has full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed. The Privy Council in Sheo Swarup v. King Emperor, AIR 1934 P. C. 227, negatived the legal basis for the limitation which the several decisions of the High Courts had placed on the right of the State to appeal under Section 417 of the Code. Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". He further pointed out at p. 404 that, "the High Court should and will always give proper weight and consideration to such matters as; (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses". In *Sanwat Singh and others v. State of Rajasthan*, AIR 1961 SC 715, after an exhaustive review of cases decided by the Privy Council as well as by this Court, this Court considered the principles laid down in Sheo Swarup's case (supra) and held that they afforded a correct guide for the appellate court's approach to a case against an order of acquittal It was again pointed out by Das Gupta, J., delivering the judgment of five Judges in *Harbans Singh v. State of Punjab*, AIR 1962 SC 439;
>
> > "In many cases, especially the earlier ones the Court has in laying down such principles emphasised the necessity of interference with an order of acquittal being based only on 'compelling and substantial reasons' and has expressed the view that unless such reasons are present an Appeal Court should not interfere with an order of acquittal (vide *Suraj Pal Singh v. The State,* (1952) SCR 194; *Ajmer Singh v. State of Punjab*, (1953) SCR 418; *Puran v. State of Punjab,* AIR 1953 SC 459). The use of the words 'compelling

> reasons' embarrassed some of the High Courts in exercising their jurisdiction in appeals against acquittals and difficulties occasionally arose as to what this Court had meant by the words 'compelling reasons'. In later years the Court has often avoided emphasis on 'compelling reasons' but nonetheless adhered to the view expressed earlier that before interfering in appeal with an order of acquittal a Court must examine not only questions of law and fact in all their aspects but must also closely and carefully examine the reasons which impelled the lower courts to acquit the accused and should interfere only if satisfied after such examination that the conclusion reached by the lower court that the guilt of the person has not been proved is unreasonable. (Vide *Chinta v. The State of Madhya Pradesh*, Criminal Appeal No. 178 of 1959 decided on 18-11-1960; *Ashrafkha Haibatkha Pathan v. The State of Bombay,* Criminal Appeal No. 38 of 1960 decided on 14-12-1960)
>
> "..............On close analysis, it is clear that the principles laid down by the Court in this matter have remained the same. What may be called the golden thread running through all these decisions is the rule that in deciding appeals against acquittal the Court of Appeal must examine the evidence with particular care, must examine also the reasons on which the order of acquittal was based and should interfere with the order only when satisfied that the view taken by the acquitting Judge is clearly unreasonable. Once the appellate court comes to the conclusion that the view taken by the lower court is clearly an unreasonable one that itself is a 'compelling reason' for interference. For, it is a court's duty to convict a guilty person when the guilt is established beyond reasonable doubt, no less than it is its duty to acquit the accused when such guilt is not so established."

[See: *Aher Raja Khima Versus State of Surashtra,* AIR 1956 SC 217].

10. Fact that appellant was entrusted with Government money and that he withdrew the same from the bank is not disputed before this Court. It be only observed that trial Court, failed to take into account entire material, so produced on record by the prosecution itself, more particularly the report of valuation (Ex.PW.22/M).

11. It is undisputed that the accused withdrew a sum of Rs.10,000/- for construction of Panchayat Ghar, Khad Kalyana; Rs.45,000/-, in two installments, for construction of Panchayat Ghar, Khalanu; and Rs.10,000/- for construction of Panchayat Ghar, Karkoh.

12. It needs to be examined as to whether these amounts were actually spent by the appellant for the construction of Panchayat Ghar or not.

13. The appellant stands convicted for having committed an offence punishable under the provisions of Sections 409 of IPC and 13(2) of the P.C. Act. What needs to be considered is as to whether, in the light of the settled principles of law, prosecution has been able to establish the essential ingredients, so required for constituting an offence of criminal breach of trust and misconduct, as defined under the P.C. Act. Has the prosecution proved the essential ingredients, so required to constitute an offence of criminal breach of trust,

which are: dishonest intent, converting property to his own use, dishonestly using or disposing of the property in violation of law or agreement.

14. From the conjoint reading of testimonies of Chand Ram (PW.1), Durga Dass (PW.5), Balbir Singh (PW.10) and Gulab Singh (PW.23-A), it is evident that some money was spent for construction of Panchayat Ghar Khalanu. Balbir Singh and Chand Ram have not supported the prosecution and despite extensive cross-examination, nothing fruitful could be elicited from their testimonies. Gulab Singh is the Investigating Officer and has no personal knowledge with regard to the money which was spent for the construction of Panchayat Ghar(s). According to Durga Dass, Panchayat Ghar was not habitable. Now the issue, which arises for consideration, is as to whether in view of utilization certificate (Ex.PW.16/D) and valuation report (Ex.PW.22/M) (wrongly marked/referred to by the trial Court as Ex.PW.20/M), so prepared by Sham Lal Sharma (DW.1), an employee of the Himachal Pradesh Public Works Department, can it be said that the appellant has misappropriated the amount in question. Significantly valuation certificate itself reveals that more than Rs.45,000/- was spent for the construction of Panchayat Ghar Khalanu. True it is that Durga Dass has deposed that the Panchayat Ghar is not in a habitable condition, but then this fact itself would not establish the guilty intent or the factum of appellant having misappropriated the amount in question. The amount, so sanctioned for the construction of Panchayat Ghar, disbursed in two installments, was actually spent and utilized for such purpose.

15. With regard to construction of Panchayat Ghar Khad Kalyanu, through the testimony of witnesses Prem Singh (PW.3) and Het Ram (PW.8), it is evident that an amount of Rs.10,000/- was withdrawn by the appellant. These witnesses also state that the Panchayat Ghar could not be utilized for the reason that construction was not complete. But then Prem Singh also contradicts himself by stating that he has not visited the spot and as such, could not state with certainty the extent of construction carried out on the spot. Be that as it may, fact of the matter is that from utilization certificate (Ex.PW.16/C) and the valuation report (Ex.PW.22/M) (wrongly marked/referred to by the trial Court as Ex.PW.20/M), it is evident that the amount, so withdrawn was fully utilized even for construction of the said Panchayat Ghar.

16. In relation to Panchayat Ghar Karkoh, prosecution seeks reliance on the testimonies of Roshan Lal (PW .9), Naresh Kumar (PW.12), Jai Singh (PW.13), Krishan Chand (PW.14), Gulab singh (PW.16), Jagdish Chand (PW.21), Gian Singh (PW.22) and Arun Kumar Sharma (PW.25). Naresh Kumar and Jai Singh have not supported the prosecution case and despite their extensive cross-examination, nothing fruitful could be elicited from their testimonies. Be that as it may, factum of withdrawal of a sum of Rs.10,000/- even for construction of the said Panchayat Ghar, is not disputed by the present appellant. Roshan Lal does state that Panchayat Ghar could not be utilized as there were no doors, windows or roof, as only the room was plastered. But then, he states that repair was carried out prior to his inspecting the Panchayat Ghar. Record, so proved by him, is not prepared by him. It is not that the author of the report (Ex.PW.1/B), upon which reliance is sought by the prosecution, was not available. It is also not that report was prepared in the normal course of business and that Roshan Lal was successor in office. Reliance on the said report is thus not permissible in law.

17. Arun Kumar Sharma, SDM, only makes out a grievance that construction of Panchayat Ghar was not complete. He does not state that money withdrawn was not fully utilized for the construction of Panchayat Ghar. Testimony of remaining witnesses is also to similar effect. Noticeably even with regard to said Panchayat Ghar, there is utilization certificate (Ex.PW.16/B) and valuation report (Ex.PW.22/M), prepared by the officials of the

Department, proved, in accordance with law, evidencing the fact that the amount so withdrawn by the appellant was utilized for the construction of said Panchayat Ghar.

18. In *Abdulla Mohammed Pagarkar Versus State (Union Territory of Goa, Daman and Diu),* (1980) 3 SCC 110, the apex Court has clarified that suspicion, however strong, cannot be a substitute for proof.

19. In view of the ratio of law laid down by Hon'ble Supreme Court of India in *Radha Pisharassiar Amma Versus State of Kerala,* (2007) 13 SCC 410, it cannot be said that prosecution has been able to prove that the appellant herein dishonestly misappropriated or converted to his own use or dishonestly used the government money, in violation of any provisions of law.

20. Thus, in view of the above discussion, it cannot be said that prosecution has been able to establish the essential ingredients of criminal breach of trust or misconduct, as required in law.

21. Findings returned by the trial Court, convicting the accused, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stands wrongly convicted for the charged offence.

22. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence, dated 17.08.2011/18.08.2011, passed by Special Judge, (Additional Sessions Judge), Mandi, H.P., in C.C. No.2 of 2007, titled as *State Versus Mohinder Kumar Sharma,* is set aside and accused Mohinder Kumar Sharma is acquitted of the charged offences. Accused is already on bail as such bonds are discharged. Amount of fine, if deposited by the accused, be refunded to him accordingly. Appeal stands disposed of, so also pending application(s), if any.

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

FAO No. 285 of 2014 alongwith FAO No.150 of 2015.
Date of decision: May 21, 2015

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1. **FAO No. 285 of 2014**

National Insurance Company Ltd. …… Appellant

Vs.

Smt. Jhanpli Devi alias Mukka Devi and others ….. Respondents

2. **FAO No. 150 of 2015**

Smt. Jhanpli Devi alias Mukka Devi and others …… Appellants

Vs.

Sher Singh and others ….. Respondents

Code of Civil Procedure, 1908 - Order 16- Insurance Company relied upon the verification report issued by the Licensing Authority- owner produced another driving license, which was put for the first time to RW-2 –Insurance Company filed an application to lead additional evidence by placing on record certain documents to show that license was fake- application was allowed and last opportunity was granted to produce the witnesses on self

responsibility- adjournment prayed was declined on the ground that Petition was old and was filed in the year 2011- held, that Commissioner should not have imposed cost when Insurance Company was not at fault and the license was produced for the first time by the claimants- further, Commissioner had refused to provide any assistance for summoning the witnesses and had directed the company to produce the witnesses from Manipur on self responsibility – order passed by the Commissioner to close the evidence of the Insurance Company was not sustainable - Petition allowed and the Commissioner directed to allow the Insurance Company to lead additional evidence. (Para-6 to 16)

For the Appellants	:	Mr. Ashwani K. Sharma, Advocate, in FAO No. 285 of 2014 and for respondent No.2 in FAO No. 150 of of 2015.
For the Respondents	:	Mr. J.L.Bhardwaj, Advocate, for respondents No.1,3 and 4, in FAO No. 285 of 2014 and for appellants in FAO No. 150 of 2015. Mr. O.C. Sharma, Advocate, for respondent No. 5 in FAO No. 285 of 2014 and for respondent No.1 in FAO No. 150 of 2015.

The following judgment of the Court was delivered:

<u>Tarlok Singh Chauhan, Judge (Oral)</u>

Both these appeals are directed against the award dated 1.4.2014 passed by learned Commissioner, Employee's Compensation, Solan, District Solan, H.P. in WCA No. 1/2 of 2011 whereby the compensation of Rs. 7,94,212/- alongwith interest at the rate of 12% per annum has been awarded in favour of the claimants.

2. The claimants are aggrieved as no penalty as envisaged under Employee's Compensation Act (for short 'Act') has been imposed, while the insurance company is aggrieved because the liability has been fastened upon it.

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

4. Bearing in mind the nature of order I propose to pass, it is not necessary to state in detail the relevant facts. The claimants are the legal heirs of deceased Vinod Singh and have sought compensation on account of his death. The specific defence of the Insurance Company was that deceased Vinod Singh was not possessed of a valid and effective driving licence, rather his licence was fake. The Insurance Company relied upon the verification report Ex.PW-3/A issued by the Licensing Authority, Motor Vehicles Department, Dehradun in respect of driving licence Ex. RA. But the owner thereafter produced another driving licence Ex. R-1X, which for the first time was put to RW-2 Narinder Kumar, in his cross-examination held on 31.7.2013.

5. The Insurance Company immediately thereafter filed an application for grant of permission to lead additional evidence by placing on record certain documents to show that the licence i.e. Ex. R-1X was fake.

6. The application came up for consideration on 11.11.2013 and was fixed for reply and consideration on 10.12.2013. On 10.12.2013, the Commissioner passed the following order:

> *"At this stage, ld. counsel for the respondents made no objection in case the application under Section 151 CPC for production of additional evidence be allowed. In view of no objection made by the ld. counsel for the respondents,*

> *the petition in hand stand allowed. Subject to cost of Rs.500/-. Cost not paid. Be paid on the next date of hearing. Now to come up for cross-examination of the dealing clerk of motor vehicle authority being last date granted on self responsibility. Steps be taken within 10 days. Let the case file be put up on 12.3.2014."*

7. When the matter was fixed on 12.3.2014, learned Commissioner passed the following orders:

> *"No RW present. One more adjournment prayed by the ld. counsel for the respondent but since it was last opportunity and petition is old one which was filed in the year 2011, hence I do not find justification to grant more opportunities for remaining respondent evidence and accordingly the remaining evidence of respondent No.2 is closed by the order of the Court. Now to come up for arguments on 14.3.2014."*

On 14.3.2014, the Commissioner heard the arguments and reserved the order, which was ultimately announced on 1.4.2014.

8. Can the Courts, Tribunals and Authorities proceed rashly with the cases only because these are old and targeted ones? Is the Court rendering any favour while granting assistance to the parties by issuing process to the witnesses summoned? These are certain questions which are required to be considered in these appeals.

9. Of late, there appears to be a rising trend in the Subordinate Courts where they are totally oblivious of their duties to render not only justice but do complete justice to the parties. This is particularly so when the cases are relatively old and targeted ones.

10. Firstly, I see no reason why the Commissioner should have imposed cost while allowing the aforesaid application preferred by the Insurance Company more particularly, when the appellant/ insurance company was not at fault, because admittedly it was the claimants who for the first time had confronted RW-2 in his cross-examination with driving licence Ex.R-1X and immediately thereafter the Insurance Company had moved the application for permission to lead additional evidence.

11. Secondly, it is not understandable as to why the Court refused to render any assistance for summoning the witnesses through Court process and directed the Insurance Company to produce the witnesses from the office of District Transport Officer, Senapati District Manipur on self responsibility. It needs to be re-emphasized and re-stated that the Courts do no favour to any party by summoning witnesses through its process. The same is rather a right granted under the law to the parties in lis.

12. Order 16 of the Code of Civil Procedure casts an obligation on the Court to render all assistance to summoning of the witnesses. As a general rule, the parties are entitled as of right to obtain summons to witnesses, though in certain cases the time frame may be an exception.

13. The learned Commissioner below also appears to be totally oblivious of the provisions of Rule 19 of Order 16 CPC, because admittedly Manipur is more than 500 kilometers distance from the Court house. This Rule reads as under:

> ***"R.19. No witness to be ordered to attend in person unless resident within certain limits. –*** *No one shall be ordered to attend in person to give evidence unless he resides –*
>
> *(a) within the local limits of the Court's ordinary original jurisdiction, or*

(b) without such limits but at a place less than one hundred or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than five hundred kilometers distance from the Court-house:

Provided that where transport by air is available between the two places mentioned in this rule and the witness is paid the fare by air, he may be ordered to attend in person.

14. It is further difficult to comprehend as to how the learned Commissioner below expected the witness to present himself without process of Court when admittedly the witness was not an employee of the Insurance Company but was a government servant, who was subject to various rules including conduct rules, leave rules etc. Would a Government servant simply come to give evidence on the asking of the Insurance Company? The learned Commissioner ought to have considered all these aspects before directing the Insurance Company to produce its evidence on self responsibility.

15. In view of the aforesaid discussion, the impugned award dated 1.4.2014 passed by the learned Commissioner below in case WCA No. 1/2 of 2011 cannot be sustained and is accordingly set-aside and is remitted back to the Commissioner for deciding the same afresh after permitting the Insurance Company to lead additional evidence and needless to say the claimants and the other parties will not only have a right to cross-examine the witnesses but they shall also be at liberty to lead evidence though only with respect to licence Ex.R-1X.

16. Both the appeals are accordingly disposed of in the aforesaid terms. The parties through their counsel are directed to appear before the learned Commissioner on 01.06.2015.

The learned Commissioner shall make all efforts to decide the case as expeditiously as possible and in no event later than 30th September, 2015. The Registry is directed to send the records forthwith, so as to reach the Court below well before the date fixed. Copy dasti.

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

Pankaj Sharma son of Dina Nath …..Petitioner.
Vs.
State of Himachal Pradesh ….Non-petitioner.

Cr.MP(M) No. 425 of 2015.
Order reserved on: 15.5.2015
Date of Order: May 21, 2015.

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 307 and 323 read with Section 34 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- in the present case, challan has already been filed in the

Court, investigation is complete and no recovery is to be effected from the petitioner- trial of the case will be concluded in due course of time, therefore, petition allowed. (Para-7 to 9)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra Vs. Central Bureau of Investigation, 2012 Cri.L.J 702

For the petitioner: Mr. Ajay Kochhar, Advocate.
For non-petitioner: Mr. M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 63 of 2015 dated 2.4.2015 registered under Sections 307, 323 read with Section 34 IPC at Police Station Sadar Shimla District Shimla HP.

2. It is pleaded that petitioner is innocent and petitioner did not commit any criminal offence as alleged by investigating agency. It is further pleaded that investigation of the case is complete and petitioner is government employee and there is no possibility of fleeing from the proceedings of court. It is further pleaded that continue custody of the petitioner would adversely effect the career and would also effect the family members of the petitioner who are totally dependent upon him. It is further pleaded that any condition imposed by the Court will be binding upon the petitioner and petitioner will not tamper with the prosecution witness in any manner. It is further pleaded that bail petition filed by petitioner was dismissed by learned Sessions Judge Shimla on dated 10.4.2015. Prayer for acceptance of bail petition sought.

3. Per contra police report filed. There is recital in police report that on dated 2.4.2015 information was received by way of telephone at Police Station Sadar Shimla that quarrel took place at HHH Shimla and injured person was brought for his medical treatment to IGMC Shimla. There is further recital in police report that statement of Kashish Khana was recorded. There is further recital in police report that Kashish Khana is a shopkeeper at lower market Shimla and on dated 2.4.2015 at about 8.15 night Kashish Khana along with his cousin brother Abhay Kumar went to HHH Shimla for consuming coffee and when Kashish Khana came out of the restaurant after consuming coffee one ambassador car was parked at the entrance of restaurant. There is further recital in police report that Kashish Khana told the driver of car to shift the car and in the meanwhile altercation took place and two persons came from behind and started quarreling with Kashish Khana. There is further recital in police report that one of co-accused namely Pankaj Sharma had fired from his service pistol and Kashish Khana sustained injuries in his right feet. There is further recital in police report that other co-accused namely Rakesh Kumar had inflicted injury with stick. There is further recital in police report that MLC of injured person was obtained from IGMC Shimla and the statements of the witnesses were recorded under Section 161 Cr.P.C and site plan was prepared. There is further recital in police report that co-accused Pankaj Sharma has fired from his service pistol and both accused persons were arrested on dated 3.4.2015. There is further recital in police report that sticks were recovered as per disclosure statement of co-accused Rakesh Kumar. There is further recital in police report that no

recovery is to be effected from accused persons. There is further recital in police report that challan stood filed in the Court of learned Chief Judicial Magistrate Shimla on dated 7.5.2015. There is further recital in police report that accused persons are influential persons and if bail is granted to the petitioner then petitioner would cause disappearance of the evidence and would also threat prosecution witness. Prayer for rejection of bail application sought.

4. Court heard learned Advocate appearing on behalf of petitioner and Court also heard learned Additional Advocate General appearing on behalf of State.

5. Following points arise for determination in the present bail application:

(1) Whether bail application filed under Section 439 of the Code of Criminal Procedure 1973 is liable to be accepted after the filing of challan and after completion of investigation and after discharged of injured from hospital as alleged?.

(2) Final Order.

<u>Finding upon Point No.1</u>.

6. Submission of learned Advocate appearing on behalf of the petitioner that petitioner is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that investigation is completed and challan stood filed in the Court and no recovery is to be effected from the petitioner and injured already stood discharged from hospital and on this ground bail application be allowed is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered (i) Nature and seriousness of offence (ii) Character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) Larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri.L.J 702 SC titled Sanjay Chandra Vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. In the present case challan already stood filed in the Court on dated 7.5.2015, investigation is completed, no recovery is to be effected from the petitioner, injured already stood discharged from hospital and trial of the case will be concluded in due course of time. It is well settled law that accused is presumed to be innocent till proven guilty by the competent Court of law. Court is of the opinion that if petitioner is released on bail at this stage then interests of the general public or the State will not be adversely effected keeping in view the concept that bail is rule and jail is exception.

8. Submission of learned Additional Advocate General that if the petitioner is released on bail then petitioner will induce and threat prosecution witness and on this ground bail petition be rejected is devoid of any force for the reason hereinafter mentioned.

Court is of the opinion that conditions will be imposed in the bail order that petitioner will not induce or threat prosecution witnesses. If petitioner will flout terms and conditions of bail order then prosecution agency or investigating agency will be at liberty to file application for cancellation of bail provided under Section 439(2) of the Code of Criminal Procedure 1973 in accordance with law. Point No.1 is answered in affirmative.

Point No.2 (Final order).

9. In view of my findings on point No.1 bail application filed by petitioner is allowed. It is ordered that petitioner will be released on bail on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That petitioner will join investigation as and when called for by the Investigating Officer in accordance with law. (ii) That petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That petitioner will not leave India without prior permission of the Court. (iv) That petitioner will not commit similar offence qua which he is accused. (v) That petitioner will give his residential address to the Investigating Officer in written manner so that petitioner can be located after giving short notice. (vi) That petitioner will attend the proceedings of learned trial Court regularly till conclusion of the trial. Observation made hereinabove is strictly for the purpose of deciding the present bail petition and it shall not effect merits of case in any manner. Bail petition disposed of. All pending application(s) if any also disposed of.

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

Rakesh Kumar son of Gola Ram. .....Petitioner.
Versus
State of Himachal Pradesh. ....Non-petitioner.

Cr.MP(M) No. 424 of 2015.
Order reserved on: 15.5.2015
Date of Order: May 21, 2015.

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 307 and 323 read with Section 34 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- in the present case, challan has already been filed in the Court, investigation is complete and no recovery is to be effected from the petitioner- trial of the case will be concluded in due course of time, therefore, petition allowed. (Para-7 to 9)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra Vs. Central Bureau of Investigation, 2012 Cri.L.J 702 S.C

For the petitioner: Mr. Ajay Kochhar, Advocate.

For non-petitioner: Mr. M.L.Chauhan, Addl. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 63 of 2015 dated 2.4.2015 registered under Sections 307, 323 read with Section 34 IPC at Police Station Sadar Shimla.

2. It is pleaded that petitioner is innocent and petitioner did not commit any criminal offence as alleged by investigating agency. It is further pleaded that investigation of the case is complete and petitioner is government employee and there is no possibility of fleeing from the proceedings of court. It is further pleaded that continue custody of the petitioner would adversely effect the career and would also effect the family members of the petitioner who are totally dependent upon him. It is further pleaded that any condition imposed by the Court will be binding upon the petitioner and petitioner will not tamper with the prosecution witness in any manner. It is further pleaded that bail petition filed by petitioner was dismissed by learned Sessions Judge Shimla on dated 10.4.2015. Prayer for acceptance of bail petition sought.

3. Per contra police report filed. There is recital in police report that on dated 2.4.2015 information was received by way of telephone at Police Station Sadar Shimla that quarrel took place at HHH Shimla and injured person was brought for his medical treatment to IGMC Shimla. There is further recital in police report that statement of Kashish Khana was recorded. There is further recital in police report that Kashish Khana is a shopkeeper at lower market Shimla and on dated 2.4.2015 at about 8.15 night Kashish Khana along with his cousin brother Abhay Kumar went to HHH Shimla for consuming coffee and when Kashish Khana came out of the restaurant after consuming coffee one ambassador car was parked at the entrance of restaurant. There is further recital in police report that Kashish Khana told the driver of car to shift the car and in the meanwhile altercation took place and two persons came from behind and started quarreling with Kashish Khana. There is further recital in police report that one of co-accused namely Pankaj Sharma had fired from his service pistol and Kashish Khana sustained injuries in his right feet. There is further recital in police report that other co-accused namely Rakesh Kumar had inflicted injury with stick. There is further recital in police report that MLC of injured person was obtained from IGMC Shimla and the statements of the witnesses were recorded under Section 161 Cr.P.C and site plan was prepared. There is further recital in police report that co-accused Pankaj Sharma had fired from his service pistol and both accused persons were arrested on dated 3.4.2015. There is further recital in police report that sticks were recovered as per disclosure statement of co-accused Rakesh Kumar. There is further recital in police report that no recovery is to be effected from accused persons. There is further recital in police report that challan stood filed in the Court of learned Chief Judicial Magistrate Shimla on dated 7.5.2015. There is further recital in police report that accused persons are influential persons and if bail is granted to the petitioner then petitioner would cause disappearance of the evidence and would also threat prosecution witness. Prayer for rejection of bail application sought.

4. Court heard learned Advocate appearing on behalf of petitioner and Court also heard learned Additional Advocate General appearing on behalf of State.

5. Following points arise for determination in the present bail application:

(1) Whether bail application filed under Section 439 of the Code of Criminal Procedure 1973 is liable to be accepted after the filing of challan and after completion of investigation and after discharged of injured from hospital as alleged?.

(2) Final Order.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the petitioner that petitioner is innocent and he has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on its merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that investigation is completed and challan stood filed in the Court and no recovery is to be effected from the petitioner and injured already stood discharged from hospital and on this ground bail application be allowed is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered (i) Nature and seriousness of offence (ii) Character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) Larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri.L.J 702 S.C titled Sanjay Chandra Vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. In the present case challan already stood filed in the Court on dated 7.5.2015, investigation is completed, no recovery is to be effected from the petitioner, injured already stood discharged from hospital and trial of the case will be concluded in due course of time. It is well settled law that accused is presumed to be innocent till proven guilty by the competent Court of law. Court is of the opinion that if petitioner is released on bail at this stage then interests of the general public or the State will not be adversely effected keeping in view the concept that bail is rule and jail is exception.

8. Submission of learned Additional Advocate General that if the petitioner is released on bail then petitioner will induce and threat prosecution witness and on this ground bail petition be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that conditions will be imposed in the bail order that petitioner will not induce or threat prosecution witnesses. If petitioner will flout terms and conditions of bail order then prosecution agency or investigating agency will be at liberty to file application for cancellation of bail provided under Section 439(2) of the Code of Criminal Procedure 1973 in accordance with law. Point No.1 is answered in affirmative.

Point No.2 (Final order).

9. In view of my findings on point No.1 bail petition filed by petitioner is allowed. It is ordered that petitioner will be released on bail on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That petitioner will join

investigation as and when called for by the Investigating Officer in accordance with law. (ii) That petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That petitioner will not leave India without prior permission of the Court. (iv) That petitioner will not commit similar offence qua which he is accused. (v) That petitioner will give his residential address to the Investigating Officer in written manner so that petitioner can be located after giving short notice. (vi) That petitioner will attend the proceedings of learned trial Court regularly till conclusion of the trial. Observation made hereinabove is strictly for the purpose of deciding the present bail petition and it shall not effect merits of case in any manner. Bail petition disposed of. All pending application(s) if any also disposed of.

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

Sandeep Gupta .....Petitioner.
Versus
Indu Gupta ..... Respondent.

Cr.MMO No. 248 of 2014.
Date of decision: 21.05.2015.

Code of Criminal Procedure, 1973- Section 482- Husband was directed to pay monthly maintenance @ Rs.4,000/- to wife and minor child and to provide one room in the shared household – husband contended that accommodation belongs to his mother and will not fall in the definition of shared household- he is ready to hire a separate accommodation for the wife and the child- held, that wife does not have a right to reside in a particular property – she only has a right in the property of her husband - husband had failed to prove that house belongs exclusively to his mother- it has come on record that he along with his mother had taken a loan for building and he was repaying the loan – therefore, his contention that house is not shared household cannot be accepted- petition dismissed. Para-5 to 7)

Case referred:
S.R.Batra & Anr. versus Taruna Batra AIR 2007 SC 1118

For the Petitioner : Mr.Maan Singh, Advocate.
For the Respondent : Mr.Raman Prashar and Kanwar Virender Singh, Advocates.

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, Judge* (Oral).**

This petition under Section 482 Cr.P.C. is directed against the judgment passed by learned Additional Sessions Judge, Kullu, on 21.10.2014 whereby he affirmed the order passed by learned Chief Judicial Magistrate, Kullu, directing the petitioner to provide one room to the aggrieved person in the newly constructed shared household for residence purpose.

2. The matrimonial relationship interse parties is not denied. The learned Courts below have concurrently found the respondent to be the legally wedded wife of the

petitioner. The marriage between the parties had been solemnized as per Hindu rites and ceremonies on 04.11.2007 and out of this wedlock a son was born to them. On the application of the wife, the respondent was directed to pay monthly maintenance at the rate of Rs.4,000/- to her and their minor child and provide one room in the shared household.

3. The learned counsel for the petitioner has argued that instead of petitioner being compelled to provide the respondent with the shared household, he is ready to hire a separate accommodation for the respondent and their child and, therefore, the orders of the Courts below to provide a shared household be quashed and set aside. He further argued that once the accommodation belongs to his mother, the same cannot be said to be a shared household and, therefore, the respondent has no right to claim residence in such premises.

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

4. Section 19 of the Protection of Women from Domestic Violence Act, 2005 (for short the 'Act') reads thus:-

> *"**19. Residence Orders.-**(1)* While disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order-
>
> *(a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;*
>
> *(b) directing the respondent to remove himself from the shared household;*
>
> *(c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;*
>
> *(d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;*
>
> *(e) restraining the respondent from renouncing his rights in the shared household except with the leave of the Magistrate; or*
>
> *(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:*
>
> *Provided that no order under clause (b) shall be passed against any person who is a woman.*
>
> *(2) The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of such aggrieved person.*
>
> *(3) The Magistrate may require from the respondent to execute a bond with or without sureties, for preventing the commission of domestic violence.*
>
> *(4) An order under sub-section (3) shall be deemed to be an order under Chapter VIII of the Code of Criminal Procedure, 1973 (2 of 1974) and shall be dealt with accordingly.*
>
> *(5) While passing an order under sub-section (1), sub-section (2) or sub-section (3), the Court may also pass an order directing the officer in-charge of the nearest police station to give protection to the aggrieved person or to assist*

her or the person making an application on her behalf in the implementation of the order.

(6) While making an order under sub-section (1), the Magistrate may impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties.

(7) The Magistrate may direct the officer in-charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order.

(8) The Magistrate may direct the respondent to return to the possession of the aggrieved person her stridhan or any other property or valuable security to which she is entitled to."

5. Insofar as the first contention of the petitioner is concerned, it is only after the petitioner has invited adverse findings from the learned Courts below that such an offer of hiring separate premises is being made. In terms of the Act, the wife has a right of residence which does not mean a right to residence in a particular property. Though the same essentially is a right of residence in a commensurate property, but this action does not translate into a right to reside in a particular property. But, then there should be some plausible reason as to why the petitioner is not ready to provide a residence in the shared household. It is not a case where a house has been allotted to a higher functionary or that the petitioner is residing in government accommodation for which exception for providing residence in the shared household can always be carved out. Therefore, in such facts and circumstances, the wife definitely has a right in the property over which her husband has a right, title and interest to claim residence. The offer of the husband at the initial stage to provide a commensurate alternate residence could have been considered, but not now when the petitioner has lost in both the Courts below.

6. In support of his second contention regarding the household belonging to the mother and, therefore, the same being incapable of being provided as shared household, the learned counsel for the petitioner has relied upon the judgment of the Hon'ble Supreme Court in ***S.R.Batra & Anr.*** *versus* ***Taruna Batra AIR 2007 SC 1118.*** It was held therein that the claim of the wife for a shared household is only available against the husband and not against her in-laws or other relatives and in case the shared household belongs to mother-in-law, the same does not become "shared household" only because of the wife had shared that house with her husband earlier. For enforcing this claim, the house has to be owned and taken by the husband on rent or a house which belongs to a joint family of which husband is a member.

7. There can be no quarrel with the aforesaid exposition of law. But, then the petitioner has failed to prove on record that the house belongs exclusively to his mother. Rather, it has come on record that he alongwith his mother had taken a loan for building the house and he was repaying the loan amount in monthly installment of Rs.7,000/-. He also admitted that his salary was Rs.25,000/- per month, whereas, his mother had retired from a government job in the year 2010 and his father was handicapped. The petitioner himself has admitted that there are 9-10 rooms in the old and new houses and once this is the position, the petitioner cannot back out from his legal obligation of providing residence to the respondent in the shared household.

8. In view of the aforesaid discussion, there is no merit in this petition and the same is dismissed alongwith pending application(s), if any, leaving the parties to bear their own costs.

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

1. Babu Ram son of Mushu Ram
2. Hem Lata d/o Mushu Ram .....Appellants.

Vs.

State of Himachal Pradesh. .....Respondent.

Cr.Appeal No. 4230 of 2013
Judgment reserved on: 1st May, 2015
Date of Judgment: May 22, 2015

Indian Penal Code, 1860- Sections 363, 366, 376 and 120-B- Accused kidnapped the prosecutrix with an intention to force her to marry the co-accused 'B'- accused 'H' told the father of the minor prosecutrix to send her to tailoring centre- accused 'H' took the prosecutrix towards the bridge where she was pushed inside the car- accused 'H' caught the prosecutrix and threatened to kill her- minor prosecutrix was brought to the Court and her age was wrongly disclosed- the documents relating to her marriage with accused 'B' were prepared – she was kept in the house where she was raped – testimony of the prosecutrix is trustworthy, reliable and inspires confidence- it is corroborated by the medical evidence- the age of the prosecutrix was proved to be less than 16 in the certificate issued by Registrar of Birth and Death and Middle standard examination certificate- father of the prosecutrix had specifically mentioned that age of the prosecutrix was 15 years- accused 'H' had called the prosecutrix from her home and had dragged her in the vehicle- father of the prosecutrix had not consented to taking away of the prosecutrix- therefore, accused were rightly convicted- appeal dismissed. (Para-10 to 17)

Cases referred:

Rajesh Patel vs. State of Jharkhand, (2013)3 SCC 791
State of Rajasthan vs. Baboo, (2013)4 SCC 206
Deepak vs. State of Haryana, (2015)4 SCC 762
Chuni Lal and another vs. State of H.P, 1996 Cri.L.J.3864 (H.P.)
Harpal Singh vs. State of H.P. (Full Bench), AIR 1981 SC 361
Vidyadhar vs. Mohan, ILR 1978 HP 174
Murugan @ Settu vs. State of Tamil Nadu, AIR 2011 SC 1691
Chitru Devi vs. Ram Dai, AIR 2002 HP 59
Bodhisattwa Gautam vs. Miss Subhra Chakraborty, AIR 1996 SC 922
Mohd. Alam vs. State (NCT of Delhi), 2007 Cri..L.J. 803 (Delhi)
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 of H.P. vs. Lekh Raj and another, (2000)1 SCC 247
Madan Gopal Kakkad Vs. Naval Dubey and another, (1992) 3 SCC 204
State of Maharashtra vs. Chander Prakash, (1990)1 SCC 550
State of U.P. vs. Chotte Lal, (2011)2 SCC 550
Pratapbhai Hamirbhai Solanki vs. State of Gujarat, 2012 (10) JT 286
Parkash vs. State of Haryana, (2004)1 SCC 339
Thakorlal D. Vadgama vs. State of Gujarat, AIR 1973 SC 2313
Kuldeep K. Mahato vs. State of Bihar, AIR 1998 SC 2694
Radha Bhallabh & others vs. State of U.P., 1995(4) JT 206

For the Appellant: Mr. S.D. Gill, Advocate & Ms. Prem Lata Negi ,Advocate.
For the Respondent: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S.Rana Judge

Present appeal is filed against the judgment and sentence passed by learned Sessions Judge Mandi in Sessions Trial No 27 of 2007 titled State vs. Babu Ram and others decided on dated 24.4.2012.

Brief facts of the case as alleged by the prosecution:-

2. It is alleged by the prosecution that on dated 9.7.2007 at Dehar accused persons kidnapped minor prosecutrix in vehicle No. HP-03(T)-4217 with intention to force her to marry with co-accused Babu Ram. It is alleged by prosecution that in pursuance of criminal conspiracy accused persons kidnapped minor prosecutrix aged 15½ years out of lawful guardianship of father of prosecutrix without his consent. It is further alleged by prosecution that co-accused Hem Lata called father of minor prosecutrix on dated 9.7.2007 and told the father of minor prosecutrix to send minor prosecutrix to tailoring centre at Dehar. It is alleged by prosecution that co-accused Hem Lata also personally talked to minor prosecutrix and asked her to come to Dehar tailoring centre. It is alleged by prosecution that thereafter minor prosecutrix went to Dehar and co-accused Hem Lata met the minor prosecutrix at Sheetla temple and took the minor prosecutrix towards bridge. It is also alleged by prosecution that at bridge a white coloured car came and minor prosecutrix was pushed inside the car. It is alleged by prosecution that co-accused Hem Lata gagged the mouth of prosecutrix and threatened the minor prosecutrix to kill her in case she would raise hue and cry. It is alleged by prosecution that thereafter minor prosecutrix was took to Shimla and thereafter co-accused Hem Lata pursuaded the minor prosecutrix to marry with co-accused Babu Ram. It is alleged by prosecution that thereafter minor prosecutrix was brought to Court and her age was wrongly disclosed and documents relating to marriage were prepared with co-accused Babu Ram. It is alleged by prosecution that thereafter co-accused Babu Ram and Hem Lata took the minor prosecutrix to their village Barara Tehsil Sunni and prosecutrix was kept in the house w.e.f. 10.7.2007 till 15.7.2007. It is alleged by prosecution that thereafter in village Barara Tehsil Sunni minor prosecutrix was raped by co-accused Babu Ram. It is alleged by prosecution that when minor prosecutrix did not return to her residential house Hari Dass filed a criminal complaint in P.P. Salapar. It is alleged by prosecution that FIR Ext.PW19/A was recorded and thereafter investigation was started and site plan Ext.PW18/A was prepared and photographs Ext.PW7/A-1 to Ext.PW7/A-4 along with negatives Ext.PW7/A-5 to Ext.PW7/A-8 prepared. It is further alleged by prosecution that thereafter certified copy of family register Ext.PW4/A and copy of birth and deaths register Ext.PW4/B were obtained by Investigating Agency. It is alleged by prosecution that thereafter minor prosecutrix was brought to Salapar on dated 16.7.2007. It is also alleged by prosecution that medical examination of prosecutrix was conducted and as per opinion of medical officer the minor prosecutrix was exposed to sexual intercourse. It is alleged by prosecution that MLC Ext.PW12/A was obtained and thereafter minor prosecutrix was handed over to her parents vide memo Ext.PW1/C. It is alleged by prosecution that application was filed for medical examination of co-accused Babu Ram and thereafter medical examination of co-accused Babu Ram was conducted and as per medical opinion it was found that co-accused Babu Ram was capable of performing sexual intercourse. It is alleged by prosecution that thereafter prosecutrix was referred to zonal hospital Mandi for second opinion where Dr. Namita Verma had given opinion that possibility of sexual

intercourse could not be ruled out. It is alleged by prosecution that thereafter vehicle having registration No. HP-03(T)-4217 was seized along with documents vide seizure memo Ext.PW6/A. It is alleged by prosecution that spot was identified by minor prosecutrix and map Ext.PW18/F was prepared. It is alleged by prosecution that site plan of village Brara where minor prosecutrix was confined in the home Ext.PW18/G was prepared and further alleged that case property was deposited in malkhana with PW11 Raj Kumar on dated 17.7.2007. It is alleged by prosecution that articles were sent to FSL Junga through C. Sant Ram PW8 vide RC No. 8/2007 and further alleged that middle class certificate of prosecutrix Ext.PW16/A was obtained. It is also alleged by prosecution that as per chemical analyst report human semen was found on underwear of co-accused Babu Ram and shirt of minor prosecutrix. It is alleged that human blood was also found upon salwar of prosecutrix.

3. Learned trial Court on dated 2.1.2008 framed charge against co-accused Babu Ram under Section 376 IPC and learned trial Court framed charge against co-accused Devender Singh, Hem Lata and Bheem Singh under Sections 120-B, 363 and 366 IPC. All accused persons did not plead guilty and claimed trial.

4. Prosecution examined twenty one oral witnesses. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	*Description.*
Ext.PW1/A	*Copy of daily diary.*
Ext.PW1/B	*Memo regarding identification*
Ext.PW1/C	*Memo*
Ext.PW3/A	*Memo*
Ext.PW3/B	*Memo*
Ext.P1	*Shirt*
Ext.P2	*Salwar*
Ext.DA	*Affidavit*
Ext.PW4/A	*Copy of birth register issued by Registrar (Births and Deaths)*
Ext.PW4/B	*Copy of birth register issued by Registrar (Births and Deaths).*
Ext.PW5/A	*Memo regarding affidavit of Maya & Babu Ram*
Ext.PW6/A	*Memo*
Ext.PW7/A-1 to Ext.PW7/_4	*Photographs*
Ext.PW7/A-5 to Ext.PW7/A-8	*Negatives*
Ext.PW10/A	*Opinion*
Ext.PW11/A	*Copy of Malkhana register*
Ext.PW11/B	*Copy of RC*
Ext.PW12/A	*MLC of prosecutrix*
Ext.PW14/A	*Report of Chemical Examiner*
Ext.PW16/A	*Middle standard certificate*
Ext.PW17/A	*MLC*
Ext.PW18/A	*Spot map*
Ext.PW18/B	*Copy of Family register*

Ext.PW18/C	*Affidavit*
Ext.PW18/D & Ext.PW18/E	*Copies of application*
Ext.PW18/F	*Spot map*
Ext.PW18/G	*Spot map*
Ext.PW18/H	*Statement of Kesar Singh*
Ext.PW18/J &Ext.PW18/K	*Statements of witnesses*
Ext.PW19/A	*FIR*

5. Learned trial Court convicted co-accused persons namely Hem Lata, Devinder and Bhim Singh under Sections 363, 366 read with Section 120-B IPC and co-accused namely Babu Ram was convicted by learned trial Court under Section 376 IPC. Learned trial Court convicted co-accused Hem Lata, Devinder and Bhim Singh to undergo rigorous imprisonment for a period of three years and fine to the tune of Rs.5,000/- (Rupees five thousand only) and in default of payment of fine to undergo simple imprisonment for six months for offence under Sections 363 read with Section 120-B IPC. Learned trial Court further convicted co-accused Hem Lata, Devinder and Bhim Singh to undergo rigorous imprisonment for a period of five years and to pay fine of Rs.5000/- (Rupees five thousand only) for commission of offence punishable under Section 366 IPC read with Section 120-B IPC and in default of payment of fine to undergo simple imprisonment for six months. Learned trial Court further directed that both substantive sentences of imprisonment shall run concurrently. Learned trial Court convicted appellant Babu Ram to undergo rigorous imprisonment for a period of seven years and fine to the tune of Rs.20,000/- (Rupees twenty thousand only) for criminal offence punishable under Section 376 IPC and further directed that in default of payment of fine the convicted shall further undergo simple imprisonment for a period of one year. Learned trial Court further directed that amount of fine so recovered would be disbursed to prosecutrix as compensation.

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court appellants namely Babu Ram and Hem Lata filed present appeal. Court heard learned Advocate appearing on behalf of the appellants and learned Additional Advocate General appearing on behalf of the respondent-State and also perused the entire record carefully.

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

8. ORAL EVIDENCE ADDUCED BY PROSECUTION:

8.1. PW1 Hari Dass has stated that he is father of three children including the prosecutrix. He has stated that age of prosecutrix is 15½ years and further stated that date of birth of prosecutrix was 15.12.1991. He has stated that prosecutrix was undergoing the training of stitching and tailoring at Tailoring Centre Dehar. He has stated that Hem Lata co-accused is resident of Shimla and further stated that on dated 9.7.2007 Hem Lata rang him at 11.45 AM and told to send the minor prosecutrix to her tailoring centre Dehar. He has stated that co-accused Hem Lata also talked with minor prosecutrix. He has stated that thereafter minor prosecutrix went to Dehar and in the evening of dated 9.7.2007 he rang up co-accused Hem Lata on her mobile phone and inquired about whereabouts of minor prosecutrix but co-accused Hem Lata replied that she did not know about minor prosecutrix. He has stated that next day he went to Salapar and reported the matter in

police station. He has stated that copy of daily diary report is Ext.PW1/A. He has further stated that thereafter after 3-4 days police officials came to his village and his statement was recorded. He has stated that about 15 days prior to incident co-accused Hem Lata came to his house with proposal to settle the marriage of prosecutrix with her brother co-accused Babu Ram but he declined the proposal because prosecutrix was minor. He has stated that he also went to residential room of co-accused Hem Lata at Dehar and came to know that co-accused Hem Lata had vacated the rented room about one week ago. He has stated that on dated 16.7.2007 co-accused Hem Lata brought the prosecutrix to police station Salapar and custody of minor prosecutrix was handed over to him. He has stated that accused persons have kidnapped the minor prosecutrix without his consent. He has denied suggestion that police officials did not come to his house. He has denied suggestion that co-accused Hem Lata did not kidnap the minor prosecutrix. He has denied suggestion that co-accused Hem Lata did not ring him and also denied suggestion that age of prosecutrix was about 18 years.

8.2 PW2 Raksha Devi has stated that she was undergoing the stitching and tailoring training at tailoring centre Dehar. She has stated that co-accused Hem Lata told that she would go to Shimla for one week and training centre would remain closed for one week. She has stated that there were only two students undergoing the training at training centre Dehar. She has stated that training centre Dehar remained closed for one week.

8.3 PW3 prosecutrix has stated that she has qualified her matriculation examination in the year 2007. She has stated that after qualifying her matriculation examination she joined tailoring and stitching centre of co-accused Hem Lata at Dehar. She has stated that on dated 1.7.2007 co-accused Hem Lata went to her home and told that she would inform her on telephone as and when she would come from her home. She has stated that on dated 9.7.2007 co-accused Hem Lata rang her father through her mobile phone and told her father to send her to tailoring centre at Dehar and thereafter co-accused Hem Lata also talked to her on mobile cell and told her to come to her tailoring centre at Dehar. She has stated that thereafter she went to tailoring centre at Dehar and co-accused Hem Lata met her at Dehar on Sheetla temple and took her towards the bridge where a white coloured car came. She has stated that thereafter co-accused Hem Lata forcibly pushed her into the car and co-accused Hem Lata gagged her mouth with scarf and also threatened that in case she would raise cry she would kill. She has stated that co-accused Bhim Singh was driving the car. She has stated that co-accused Devender was also present in car. She has stated that she was brought to Shimla in vehicle. She has stated that after reaching Shimla co-accused Hem Lata introduced the prosecutrix to her brother co-accused Babu Ram present in Court. She has stated that co-accused Hem Lata told her that she should marry her brother i.e. co-accused Babu Ram. She has stated that co-accused Hem Lata pressurized her to marry with co-accused Babu Ram and thereafter she was brought to Court and illegal documents of marriage were prepared with co-accused Babu Ram. She has stated that after marriage co-accused Hem Lata brought minor prosecutrix to her village Barara in Tehsil Sunni and kept in her house w.e.f. 10.7.2007 to 15.7.2007. She has stated that during aforesaid period co-accused Babu Ram had committed sexual intercourse with her forcibly. She has stated that thereafter on dated 16.7.2007 co-accused Hem Lata and Babu Ram brought her to police post Salapar. She has stated that her date of birth is 15.12.1991. She has further stated that her statement was recorded on dated 20.7.2007 and she was also medically examined. She has stated that thereafter she was handed over to her parents. She has stated that during investigation she was brought to Shimla and she located the house where she was kept in Shimla. She has stated that thereafter she was brought to village Barara and she located the house of co-accused Hem Lata and Babu Ram where she was kept and wherein she was subjected to sexual intercourse. She has stated that police

prepared the spot map and further stated that she handed over shirt Ext.P1 and salwar Ext.P2 to doctor at zonal hospital Mandi. She has stated that there were only two students in tailoring centre. She has stated that tailoring centre was opened in rented house. She has stated that co-accused Hem Lata came to her house to settle her marriage with her brother co-accused Babu Ram but her father declined the proposal. She has denied suggestion that she has disclosed her age in document as 19 years. Self stated that age was wrongly dictated by accused persons. She has denied suggestion that she had given consent to her marriage. She has denied suggestion that she accompanied the accused persons voluntarily with her consent. She has denied suggestion that no car came to bridge and also denied suggestion that she was not kidnapped.

8.4 PW4 Anita Devi has stated that she is posted as Secretary G.P. since 1996 and she issued copy of family register Ext.PW4/A on the request of police officials. She has stated that she had also issued birth certificate Ext.PW4/B on the request of police officials. She has stated that she has brought the births and deaths register and Ext.PW4/A and Ext.PW4/B are true copies of original record. She has denied suggestion that entries in family register and births and deaths register are not correct.

8.5 PW5 Jai Lal has stated that on dated 16.7.2007 he was called by one boy to P.P. Salapar. He has stated that prosecutrix along with 2/3 persons were sitting in police post. He has stated that co-accused Babu Ram was one of them. He has stated that document Ext.PW1/B was prepared which was signed by him and further stated that thereafter prosecutrix was handed over to her father. Witness was declared hostile by prosecution. He has admitted that affidavit was took into possession vide memo Ext.PW5/A.

8.6 PW6 Lekh Ram has stated that he is posted as Constable and on dated 27.7.2007 driver Bhim Singh handed over esteem car No. HP-03(T)-4217 along with documents which were took into possession vide memo Ext.PW6/A.

8.7 PW7 Devinder Kumar has stated that he is running the studio shop at Salapar. He has stated that on dated 10.7.2007 he was associated in investigation of case and he took photographs Ext.PW7/A-1 to Ext.PW7/A-4 and negatives of photographs are Ext.PW7/A-5 to Ext.PW7/A-8.

8.8 PW8 Sant Ram has stated that he is posted as Constable in P.S. Sundernagar. He has stated that on dated 25.7.2007 MHC Raj Kumar No. 920 handed over to him one sealed parcel containing plastic container sealed with seal of Civil Hospital Sundernagar, one sealed envelope, one parcel sealed with seal impression NSCB vide RC No. 60 of 2007 and he took the aforesaid parcels to FSL Junga and deposited there. He has stated that receipt issued by office of chemical examiner was deposited with Additional MHC and further stated that parcels remained intact in his custody.

8.9 PW9 Sukhchain Singh has stated that during investigation of case he along with police officials and prosecutrix went to Shimla in vehicle Tata Sumo and prosecutrix identified the room. He has stated that thereafter he along with police officials and prosecutrix went to Tatapani side to a village and prosecutrix located the house where she was raped in the room. He has stated that one bed sheet was also seen and identification memo Ext.PW3/B was prepared at the spot. He has denied suggestion that he did not go with police officials and also denied suggestion that house was not located by prosecutrix.

8.10 PW10 Dr. Namita Verma medical officer zonal hospital Mandi has stated that she is posted in zonal hospital for the last two years and prosecutrix was referred to her for opinion and on the basis of clinical examination she has given the opinion that possibility of sexual intercourse with prosecutrix could not be ruled out. She has stated that she had given opinion Ext.PW10/A and also stated that she has given the opinion on the basis of

medical examination of prosecutrix and on the basis of clinical examination of prosecutrix. She has stated that Dr. Renu Behl was bed ridden. She has denied suggestion that victim was habitual of sexual intercourse.

8.11 PW11 Raj Kumar has stated that he is posted as MHC in P.S. Sundernagar since June 2007 and on dated 17.7.2007 MHC Krishan Chand deposited with him parcels and thereafter he sent the aforesaid parcels vide RC No. 60/2007 to FSL Junga. He has stated that parcels remained intact in his custody. He has denied suggestion that parcels were not deposited with him and also denied suggestion that he did not send the aforesaid parcels to FSL Junga.

8.12 PW12 has stated that she is posted as medical officer in Zonal Hospital Mandi since September 1993 and further stated that she had worked with Dr. Renu Behl who conducted the medical examination and she was conversant with hand writing and signatures of Dr. Renu Behl. She has stated that Dr. Renu Behl was bed ridden and was unable to attend the Court. She has brought original MLC conducted by Dr. Renu Behl. She has stated that signatures of Renu Behl are Ext.PW12/A.

8.13 PW13 C. Gopal Singh has stated that he is posted as MHC in P.P. Salapar since 2006 and he brought the original daily diary Ext.PW1/A of rapat No. 10 dated 10.7.2007 which is correct as per original record.

8.14 PW14 Inspector Dilshad Mohammad has stated that he remained as Inspector/SHO in P.S. Sundernagar w.e.f. March 2007 to March 2008. He has stated that on completion of investigation he prepared challan and further stated that thereafter he received the chemical examiner report Ext.PW4/A and prepared the supplementary challan.

8.15 PW15 Kesar Singh has stated that he is owner of esteem vehicle. He has stated that he does not remember the number of vehicle. He has stated that he does not know who was driver of vehicle during the year 2007. He has stated that his statement was not recorded by police officials on dated 10.10.2007. Witness was declared hostile. He has admitted that he is owner of vehicle No. HP-03(T)-4217. He has stated that vehicle was took into possession by police officials relating to offence under Section 376 IPC. He has stated that vehicle was released in his favour by order of Court and co-accused Bhim Chand was driving the vehicle who is co-accused in present case. He has stated that he does not know who used to drive the vehicle as he had given the vehicle to his son.

8.16 PW16 Om Parkash Headmaster of school has stated that he is working as Headmaster in Senior Secondary School Dawal since the year 2005. He has stated that he had attested the middle standard examination certificate of prosecutrix which is Ext.PW16/A after comparing with original and thereafter handed over the same to police.

8.17 PW17 Dr. Jatinder Singh has stated that he is working as eyes specialist in Zonal Hospital Sundernagar since June 2006 and on dated 16.7.2007 at about 10 PM co-accused Babu Ram was brought to hospital for his medical examination. He has stated that on examination co-accused Babu Ram was found conscious well oriented to time place and person. He has stated that co-accused Babu Ram was capable of performing sexual intercourse. He has stated that he issued MLC Ext.PW17/A which is in his hands and bears his signatures. He has stated that he has also brought original MLC in Court.

8.18. PW18 Ami Chand has stated that he is posted as Incharge of P.P. Salapar and on dated 10.7.2007 Hari Dass filed report in P.P. Salapar. He has stated that thereafter same was recorded in roznamcha and thereafter FIR was registered and he conducted investigation of case. He has stated that on dated 11.7.2007 he went to spot at village Jaho and took photographs through photographer Devinder Kumar and prepared spot map Ext.PW18/A. He has stated that thereafter he recorded statements of Hari Dass, Soma Devi

and Raksha Devi under Section 161 Cr.P.C. He has stated that thereafter he moved an application to Secretary G.P. Kangu to issue certificate Ext.PW4/B and also copy of family register Ext.PW18/B which were took into possession. He has stated that on dated 16.7.2007 co-accused Hem Lata and Babu Ram and one driver and Som Kali brought prosecutrix to police post Salapar and he prepared memo Ext.PW1/B. He has stated that prosecutrix was handed over to her parents. He has stated that he also recorded statement of prosecutrix and further stated that thereafter he took the prosecutrix and co-accused Babu Ram to Civil Hospital Sundernagar for their medical examination. He has stated that medical examination of Babu Ram was conducted in civil hospital Sundernagar and thereafter prosecutrix was referred to Zonal Hospital Mandi for her medical examination. He has stated that thereafter he arrested co-accused Babu Ram and Hem Lata. He has stated that thereafter on 17.7.2007 prosecutrix was took to Zonal Hospital Mandi for her medical examination and her medical examination was conducted and MLC was also collected from medical officer. He has stated that thereafter on dated 27.7.2007 co-accused Bhim Singh driver and Devinder Kumar came to police post Salapar with vehicle No. HP-03(T)-4217 along with driving licence and RC and they were also took into possession. He has stated that on dated 20.9.2007 prosecutrix identified the place from where she was kidnapped and place at Shimla where she was kept. He has stated that spot map Ext.PW18/F was prepared and he also prepared spot map of house of accused at village Brara where prosecutrix was confined and further stated that thereafter he handed over the file to SHO P.S. Sundernagar who prepared challan and filed in Court. He has stated that he recorded statements of prosecution witnesses correctly as per their versions. He has stated that he also received report of FSL Junga Ext.PW14/A and thereafter prepared supplementary challan and filed in Court. He has identified the accused in Court. He has denied suggestion that prosecutrix did not identify the place at Sanjauli and Barara. He has denied suggestion that spot maps Ext.PW18/F and Ext.PW18/G were not prepared as per location shown by prosecutrix. He has denied suggestion that he did not visit the spot and also denied suggestion that false case filed against accused persons. He has denied suggestion that he did not record the statements of prosecution witnesses as per their versions. He has denied suggestion that age of prosecutrix was 19 years. He has denied suggestion that prosecutrix has voluntarily consented for marriage with co-accused Babu Ram. He has denied suggestion that prosecutrix was not kidnapped in vehicle. He has denied suggestion that prosecutrix has left her father's house with her own sweet will.

8.19 PW19 ASI Amar Nath has stated that he remained posted in P.S. Sundernagar in the year 2006 and further stated that HHC Krishan Lal came to police station on dated 10.7.2007 and presented copy of entry No. 10 dated 10.7.2007 on which FIR Ext.PW8/A was registered. He has stated that he made the endorsement in the copy of rapat and handed over the case file to SHO Krishan Lal to take the same to spot.

8.20 PW20 Jitender Thakur has stated that stamp paper of affidavit Ext.PA was sold by him to co-accused Babu Ram on dated 10.7.2007. He has stated that anybody can buy the stamp paper in the name of any person.

8.21 PW21 Bishamber has stated that he remained posted as Naib Tehsildar (Urban) w.e.f July 2005 till July 2007 and he attested affidavit Ext.DA. He has stated that both parties came to him along with Advocate Hardev Singh and further stated that both parties disclosed their age and there was no influence of any person.

9. Statements of accused persons recorded under Section 313 Cr.P.C. They have stated that they are innocent. Accused persons did not lead any evidence in defence.

10. Submission of learned Advocate appearing on behalf of appellants that learned trial Court had convicted co-appellant Babu Ram under Section 376 IPC contrary to

law and contrary to oral as well as documentary evidence placed on record is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the testimony of minor prosecutrix PW3. Minor prosecutrix has specifically stated in positive manner that on dated 9.7.2007 co-accused Hem Lata telephoned her father to send minor prosecutrix to tailoring centre Dehar. Minor prosecutrix has stated that co-accused Hem Lata sister of co-accused Babu Ram also telephoned minor prosecutrix and told the minor prosecutrix to come to tailoring centre and thereafter minor prosecutrix was dragged into vehicle No. HP-03(T)-4217 and thereafter minor prosecutrix was brought to Barara and thereafter in village Barara co-accused Babu Ram kept co-accused Hem Lata w.e.f. 10.7.2007 to 15.7.2007 and co-accused Babu Ram had committed sexual intercourse with minor prosecutrix at village Barara during the period when minor prosecutrix was kept in house at village Barara. Testimony of minor prosecutrix is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of minor prosecutrix.

11. Testimony of minor prosecutrix is corroborated with medical evidence Ext.PW12/A wherein it has been specifically mentioned that minor prosecutrix was exposed to sexual intercourse. Testimony of minor prosecutrix is further corroborated by medical evidence of co-accused Babu Ram Ext.PW17/A wherein it has been specifically mentioned that co-accused Babu Ram was capable of performing sexual intercourse. It was held in case reported in ***(2013)3 SCC 791 titled Rajesh Patel vs. State of Jharkhand*** that the testimony of prosecutrix is sufficient to convict accused if it inspires confidence. ***(Also see (2013)4 SCC 206 titled State of Rajasthan vs. Baboo. Also see (2015)4 SCC 762 titled Deepak vs. State of Haryana)***

12. Submission of learned Advocate appearing on behalf of appellants that present case is a case of consent in view of affidavit Ext.DA placed on record and on this ground appeal filed by appellants be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused affidavit Ext.DA placed on record. There is recital of word "attested" in Ext.DA by Executive Magistrate. There is no endorsement in affidavit Ext.DA that contents of document were read over and explained to deponent who admitted the contents as correct. It is held that affidavit Ext.DA was not attested in accordance with law in absence of endorsement that it was read over and explained to deponent who admitted the contents as correct. In view of defective attestation of affidavit Ext.DA no benefit can be given to accused persons on the basis of affidavit Ext.DA. ***(See 1996 Cri.L.J.3864 (H.P.) titled Chuni Lal and another vs. State of H.P.)***

13. Another submission of learned Advocate appearing on behalf of the appellants that age of prosecutrix was more than 16 years and on this ground appeal filed by appellants be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused certificate Ext.PW4/A placed on record issued by the Registrar (Births and Deaths) wherein date of birth of prosecutrix has been shown as 15.12.1991. Even in document Ext.PW4/B issued by Registrar (Births and Deaths) under Section 12/17 of Births and Deaths Registration Act 1969. date of birth of prosecutrix has been shown as 15.12.1991. Even as per middle standard examination certificate placed on record Ext.PW16/A date of birth of prosecutrix has been shown as 15.12.1991. Even, as per family register certificate Ext.PW18/B date of birth of prosecutrix has been shown as 15.12.1991. Above said documents have been prepared by public servants in discharge of their official duties and are relevant facts as per Section 35 of Indian Evidence Act. Entries in above said documents are made prior to the incident. Appellants did not adduce any positive cogent and reliable evidence on record in order to rebut the above said documents. It was also held in case reported in ***AIR 1981 SC 361 titled Harpal Singh vs. State of H.P. (Full Bench)*** that entry made by public officials in discharge of official duty in public

record is relevant fact under Section 35 of Indian Evidence Act. ***(Also see ILR 1978 HP 174 titled Vidyadhar vs. Mohan)*** Even entry in birth register is much prior to incident of rape. It was held in case reported in ***AIR 2011 SC 1691 titled Murugan @ Settu vs. State of Tamil Nadu*** that document made *ante litem motam* can be relied upon safely when such document is admissible under Section 35 of Indian Evidence Act 1872. It was held in case reported in ***AIR 2002 HP 59 titled Chitru Devi vs. Ram Dai*** that entries in birth register kept by competent authority under Birth and Death Registration Act 1969 is admissible in evidence. Rape is not only a crime against a person of a victim but it is a crime against the entire society. It destroys the entire psychology of woman and pushed the woman into deep emotional crisis. Rape is a crime against the basic human rights and is violative of the victim's most cherished fundamental rights as mentioned in Article 21 of Constitution of India. ***(See AIR 1996 SC 922 titled Bodhisattwa Gautam vs. Miss Subhra Chakraborty)*** It is well settled law that sole testimony of prosecutrix is enough to convict the person if the testimony is free from blemish reliable. ***(See 2007 Cri..L.J. 803 (Delhi) titled Mohd. Alam vs. State (NCT of Delhi).*** It is well settled law that testimony of prosecutrix must be appreciated in the background of entire case and Courts should be alive to its responsibility and should be sensitive while dealing with cases involving sexual molestation. ***(See (1996)2 SCC 384 titled State of Punjab vs. Gurmit Singh and others, See (2000)5 SCC 30 titled State of Rajasthan vs. N.K. the accused, See (2000)1 SCC 247 titled State of H.P. vs. Lekh Raj and another, (1992) 3 SCC 204 Madan Gopal Kakkad Vs. Naval Dubey and another. Also see (1990)1 SCC 550 titled State of Maharashtra vs. Chander Prakash. Also see (2011)2 SCC 550 titled State of U.P. vs. Chotte Lal)***

14. In present case PW1 Hari Dass father of prosecutrix has specifically mentioned that age of prosecutrix was 15 years. Even prosecutrix when appeared in witness box has stated that she was born on dated 15.12.1991. Testimony of PW1 Hari Dass and prosecutrix are corroborated by documentary evidence i.e. certificate Ext.PW4/A placed on record issued by the Registrar (Births and Deaths) wherein date of birth of prosecutrix has been shown as 15.12.1991, document Ext.PW4/B in which date of birth of prosecutrix has been shown as 15.12.1991, middle standard examination certificate placed on record Ext.PW16/A in which date of birth of prosecutrix has been shown as 15.12.1991, family register certificate Ext.PW18/B in which date of birth of prosecutrix has been shown as 15.12.1991. There is no positive cogent and reliable evidence on record to rebut the above said public documents prepared by public officials while discharging their official duty. Hence it is held that prosecutrix was minor at the time of incident and it is further held that consent of minor prosecutrix is immaterial in present case because theory of consent is not applicable upon minor prosecutrix according to law as per description number six mentioned in Section 375 of Indian Penal Code 1860 as amended up to date.

15. Another submission of learned Advocate appearing on behalf of appellants that conviction of co-accused Hem Lata under Section 120-B IPC is contrary to law and contrary to proved facts is rejected being devoid of any force for reasons hereinafter mentioned. It is well settled law that element of criminal conspiracy is a crime to do illegal act and can be proved either by direct evidence or by circumstantial evidence or by both. It is well settled law that direct evidence to prove conspiracy is rarely available and thereafter circumstances proved before, during and after the incident have to be considered to decide about the complicity of accused. ***(See 2012 (10) JT 286 titled Pratapbhai Hamirbhai Solanki vs. State of Gujarat.)*** In present case it is proved beyond reasonable doubt that co-accused Hem Lata telephonically called minor prosecutrix from her residential house and thereafter dragged the minor prosecutrix in vehicle No. HP-03(T)-4217 and thereafter took minor prosecutrix to place Barara and thereafter kept the prosecutrix at Barara w.e.f. 10.7.2007 to 15.7.2007 and thereafter brother of co-accused Hem Lata namely co-accused

Babu Ram forcibly committed sexual intercourse with minor prosecutrix. It is held that criminal offence under Section 120-B of Indian Penal Code is proved against co-accused Hem Lata beyond reasonable doubt in criminal case as per oral as well as documentary evidence placed on record.

16. Another submission of learned Advocate appearing on behalf of the appellants that no offence under Sections 363 and 366 IPC is proved against co-accused Hem Lata in present case is also rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that kidnapping is of two types. (1) Kidnapping from India as defined under Section 360 of Indian Penal Code. (2) Kidnapping from lawful guardianship, as defined under Section 361 of Indian Penal Code 1860. It is well settled law that whoever takes or entices any minor girl below 18 years out of custody of lawful guardian of minor is liable to be punished in accordance with law. In present case it is proved on record that age of minor prosecutrix was below 16 years at the time of incident of kidnapping and it is also proved on record beyond reasonable doubt that PW1 Hari Dass was natural guardian of minor prosecutrix. PW1 Hari Dass natural guardian of minor prosecutrix when appeared in witness box has specifically stated in positive manner that minor prosecutrix was kidnapped by co-accused Hem Lata without his consent. Testimony of PW1 Hari Dass is corroborated by PW2 Raksha Devi, PW3 prosecutrix and other corroborative witnesses namely PW4 Anita Devi, PW5 Jai Lal, PW6 Lekh Raj, PW7 Sant Ram, PW8 Sukhchain, PW10 Dr. Namita Verma, PW11 Raj Kumar. PW13 C. Gopal, PW14 Dilshad Mohammad, PW15 Kesar Singh, PW16 Om Parkash, PW17 Dr. Jatinder Singh, PW18 Ami Chand, PW19 Amr Nath, PW20 Jitender Thakur. Kidnapping of minor prosecutrix without consent of lawful guardianship is proved on record beyond reasonable doubt against co-accused Hem Lata in present case. It is well settled law that offence under Sections 363 and 366 IPC is primarily an offence committed against the guardian. ***(See (2004)1 SCC 339 titled Parkash vs. State of Haryana. See AIR 1973 SC 2313 titled Thakorlal D. Vadgama vs. State of Gujarat. See AIR 1998 SC 2694 titled Kuldeep K. Mahato vs. State of Bihar. See 1995(4) JT 206 titled Radha Bhallabh & others vs. State of U.P.)***

17. In view of above stated facts and case law cited supra appeal filed by appellants is dismissed. Judgment and sentence passed by learned trial Court are affirmed. It is held that learned trial Court had properly appreciated oral as well as documentary evidence placed on record and it is further held that no miscarriage of justice has been caused to appellants in present case. File of learned trial Court be sent back forthwith along with certified copy of judgment. 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. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Courts on its own motion …..Petitioner.

Versus

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

CWPIL No.14 of 2014.
Judgment reserved on : 12.05.2015.
Date of decision: May 22,2015.

Constitution of India, 1950- Article 226- The newspaper reported that the shopkeepers in the lower bazaar had encroached upon the road and as against the time of five minutes, it

was taking more than one hour fifteen minutes to cover the distance from one corner of the Lower Bazaar to the another - this news item was treated as a Public Interest Litigation- M.C. Shimla admitted the contents of the news item and stated that shopkeepers re-encroach soon after the removal of the encroachment- Chief Fire Officer also pointed out that it took more than 40 minutes to ply the vehicle from one corner to another, whereas, it should not take more than 6 minutes in any case- fire tenders faced difficulties in reaching at the spot where the fire had broken out due to encroachment made by shopkeepers - held, that shopkeepers did not have any right to encroach upon the public street and the Corporation is duty bound to remove all the encroachments- the Government was bringing out the policy of regularization which increases the encroachment- further, Shimla falls in a high Seismic Zone and it would be improper for the Government to regularize the deviation and to put the life of citizens in danger- therefore, direction issued to remove encroachment, to implement the provisions of law and to remove the illegal projections. (Para-9 to 43)

Cases referred:

Yoginder Lal Sharma versus Municipal Corporation, Shimla and others, 1983 (12) ILR 457
Municipal Board, Manglaur Vs. Mahadeoji Maharaj, AIR 1965 SC 1147
Olga Tellis and others Vs. Bombay Municipal Corporation and others, AIR 1986 SC 180,
Municipal Corporation of Delhi Vs. Gurnam Kaur, AIR 1989 SC 38
Ahmedabad Municipal Corporation Vs. Dilbag Singh Balwant Singh and others, 1992 Supp.(2) SCC 630,
M/s Gobind Pershad Jagdish Pershad Vs. New Delhi Municipal Committee, AIR 1993 SC 2313
Maharashtra Ekta Hawkers Union and another Vs. Municipal Corporation, Greater Mumbai and another, AIR 2004 SC 416

For the Petitioner : Mr.Vinay Kuthiala, Senior Advocate, as Amicus Curiae with Mr.Gaurav Sharma, Advocate.

For the Respondents : Mr.Shrawan Dogra, Advocate General with Mr.Romesh Verma, Additional Advocate General and Mr.J.K.Verma, Deputy Advocate General, for respondents No.1 to 7, 9 and 11.
Mr.Hamender Chandel, Advocate, for respondent No.8.
Mr.Satyen Vaidya, Advocate, for respondent No.10.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Spread across seven hills in the northwest Himalayas among lush valleys and forests of oak, rhododendron and pines is 'Shimla' the capital of Himachal Pradesh that once was the summer capital of colonial India.

2. The Town and Country Planning Department introduces heritage of Shimla in the following manner:-

> "Perceived and established by the British during colonial period in first half of 19th century as their Summer Capital, Shimla acquired global fame by the time they left in the year 1947. At the dawn of independence, Shimla was known as '**Capua of India**', the Indian Mount Olympus, the Viceroy's "shooting box" "Home of the heaven born", "abode of little tingods". It was popularly known as "**Jewel of Orient**", "**Queen of Hill Stations**", "**Star of**

Hill Resorts" and "**Town of Dreams**". Located at a commanding site in the interior Himalayas, connected by road, rail and air, it has traditionally been a preferred destination for tourists from all over the world. Thousands of miles away from their mother land, amidst picturesque Himalayan environs, Shimla can be called 'a Wonder of Colonial Era'. The British established many architectural masterpieces such as Vice Regal Lodge, Gorton Castle, Railway Board Building, Gaiety Theatre, Town Hall, Auckland House, Ellerglie, Barnes Court, Bungalows, Churches and Challet Day School. Shimla also has a building called North Bank where in 1907 Nobel Laureate writer Rudyard Kipling lived in 1907. It was a dreamland of cool comfort in a very hot land, and full of promise of fun and frivolity. The 96.5 kilometre section of Kalka-Shimla railway line with 103 tunnels is an engineering feat and provides unique experience to those who travel by this historic route. It is the most spectacular narrow gauge railway line in the world. The city possesses distinct British heritage including institutional buildings, bungalows, churches, socio-cultural spaces, hotels, cemeteries, coffee houses, clubs, theatres, schools, hospitals, street pattern and street furniture, immensely add to grace of the city with their distinct expressions. The facades of buildings, sloping roofs, dormers, windows, doors, entrances and chimneys of numerous types replicated from European buildings leave an ever-lasting impact on one's mind and provide an opportunity to understand the Western saga of art and architecture. Shimla has become a multifunctional city alongwith dominance of tourism, administration and institutional activities."

3. A popular holiday destination not only for domestic but overseas tourists also, Shimla is a place where one would love to visit any time of the year and it is for this reason that Shimla finds a place in the global tourists map. Why then is the Administration permitting it to be converted into a slum? Why have the authorities at the helm of affairs turned a blind eye to the encroachments being made and have not cared to remove the same in the Bazars of Shimla despite repeated directions issued by this Court.

4. More than three decades back, this Court on 28th September, 1983, in the case of ***Yoginder Lal Sharma*** *versus* ***Municipal Corporation, Shimla and others, 1983 (12) ILR 457*** had passed the following directions:-

"21.A grievance has been made that the Corporation has failed to ensure that the Lower Bazar is kept free from various types of projections, obstructions and encroachments with the result that during the day even the ambulances cannot move in that Bazar to help the sick. Of this fact we can take judicial notice. This Bazar is the one which is frequented by everyone in Shimla. The shopkeepers are in the habit of displaying their goods on a part of the street. Some of them are in the habit of setting up projections during the day for the same purpose. Some also store their goods on the road. Unauthorized hawkers are in such abundance that at places it becomes difficult even to walk. We were informed that some of the shopkeepers have the backing of some political persons and, therefore, nothing can be done. It is unfortunate indeed that the Corporation has failed to keep this Bazar clear of the encroachments etc. The authorities must remember that a very substantial part of population of Shimla lives near about this Bazar and in case of need it is impossible for the needy to be removed to the hospital etc. God forbid if at any time a fire breaks out in this overcrowded place since all the houses and shops are of wood and there will be a very heavy loss of life. It is, therefore, necessary to keep this Bazar

clear in order to ensure that the ambulances as well as the fire brigade can easily move. We have already referred to section 242 of the Act which prohibits projections upon the streets and the powers of the Commissioner to remove all obstructions. We direct the Commissioner to start performing his duties to keep this Bazar clear of all projections etc. in order to ensure the free movements of ambulances and the fire brigade. Again, since the malady has existed for a long time, we will expect the commissioner to ensure that within the next one month this Bazar is cleared of all obstructions."

"It seems that the Municipal Corporation has forgotten that such directions were issued by this Court. In fact the position has worsened in the last few years. The unauthorized hawkers have now invaded the Mall Road also. Unscrupulous shopkeepers are projecting their goods and storing their goods on the Mall Road. We reiterate the directions given by this Court in Yoginder Lal Sharma's case (supra) and direct the Commissioner, Municipal Corporation to ensure that all obstructions and over-hanging projections and unauthorized covering on the drains on the Mall Road and in the Lower Bazar are removed positively by 28th February, 2008. The Commissioner, Municipal Corporation shall also ensure that in future no such projections are allowed and unseemly display of goods is not permitted especially on the Mall Road.

We are well aware that some shopkeepers do not mind paying fines off and on and continue to violate the law with impunity. We would therefore impress upon the Municipal Corporation to consider framing some bye-laws where if any shopkeeper continues to violate such directions his license to run the shop can be suspended for some period and in case of repeated violations can be cancelled permanently. It is only if such deterrent punishment is provided that the traditional glory of Shimla can be revived."

5. The aforesaid directions were conveniently forgotten by all stakeholders including the Municipal Corporation till the time a public interest litigation again came to be filed at the instance of one Smt. Neelam Sharma, who as a probono publico complained about the encroachments made in Shimla town, she also complained about the alleged inaction on part of the Municipal Corporation to remove the encroachments. She specifically alleged that the shopkeepers had extended their shops over the road and were displaying their goods on road and placing overhangings over the roads and public drains. This petition was registered as CWP No.300 of 2006 and this Court on 02.01.2008 passed a detailed order, the relevant portion whereof reads as follows:-

"Another prayer made in this application is that in the markets of Shimla some shopkeepers are in the habit of projecting their goods for sale on to the road and over the drains. The petitioner complains that in fact these shopkeepers are encroaching upon the Mall Road and have covered the drains which leads to blockage of the drains. Some photographs have been attached along with this application which show that the projections have been made by a number of shopkeepers over the drains as well as the public street including the Mall Road & Lower Bazar.

Section 227 of the H.P. Municipal Corporation Act, 1994 reads as follows:

"227.(1)Except as provided in section 228, no person shall erect, setup, add to or place against or in front of any premises any structure or fixture which will---

(a) overhang, jut or project into, or in anyway encroach upon and obstruct in any way the safe or convenient passage of the public along, any street; or

(b) jut or project into or encroach upon any drain or open channel in any streets so as in any way to interfere with the use or proper working of such drain of channel or to impede the inspection or cleansing thereof.

(2)The Commissioner may by notice require the owner or occupier of any premises to remove or to take such other action as he may direct in relation to any structure or fixture which has been erected, set-up, added to or placed against, or in front of the said premises in contravention of this section.

(3)If the occupier of the said premises removes or alters any structure or fixture in accordance with such notice, he shall be entitled, unless the structure or fixture was erected, set-up or placed by himself, to credit into account with the owner of the premises for all reasonable expenses incurred by him in complying with the notice."

A bare perusal of this section clearly shows that no person can erect, setup or place any structure or fixtures which will overhang, jut out or project on or in any way encroach upon the passage of any public path or drain. Any construction which can impede the inspection or cleansing of a drain is also not permitted.

Shimla has a hoary past. The Mall Road of Shimla is the prime attraction of Shimla. Visitors from all over the world visit Shimla. It should be the endeavour of all, including the residents, the shopkeepers, the Municipal Corporation as well as the State Government to ensure that the pristine glory of Shimla is maintained. The Mall Road has buildings built in a traditional style of architecture. We feel that there should be some uniformity in the way the shops are designed so that the whole Mall Road gives a uniform look. This should make the market look neat and clean. This would also result in preserving the heritage of Shimla. We, therefore, direct the Commissioner, Municipal Corporation to frame a policy in consultation with the Mayor for maintaining uniform and proper façades of the buildings on the Mall Road.

As noted by us above many shopkeepers on the Mall Road as well as the Lower Bazar are hanging their articles meant for sale in such a manner that they project and jut out on to the road. This mars the beauty of the market and also impedes the free flow of the pedestrian traffic in these markets. This also prevents the effective cleansing of the drains. As already pointed out above no person can even raise or place any "fixture" in such a manner. This practice must be got stopped immediately since it is against the law.

In respect of the Lower Bazar this Court as far back as 28th September, 1983 in case Yoginder Lal Sharma vs. Municipal Corporation Shimla and others, 1983 (12)ILR 457, had given the following directions: ………" (quoted supra).

6. Subsequently, when this petition came up for consideration on 03.08.2009, a detailed order to the following effect was passed:-

"On 6.5.2008, the Commissioner, Municipal Corporation filed an affidavit in which it was stated that the policy for maintaining uniform and

proper facades of the buildings on the Mall Road has been referred to the Heritage Advisory Committee. We had directed the Heritage Advisory Committee to finalise the entire guidelines within a period of six weeks and the Commissioner was directed to convey the order of this Court to the members of the Heritage Advisory Committee. Notices to 118 persons, who had either engaged in overhanging or encroachment in lower bazaar, were issued and all those 118 persons have been served personally or by affixation. A large number of shopkeepers had filed undertakings that they will not violate the municipal laws and shall not encroach upon or raise any overhanging on the public drains and streets.

Now, an application has been filed before us being CMP No. 3026 of 2007. Alongwith this application photographs have been annexed which show that both on the Mall Road as well as in the Lower Bazar people have not only encroached upon the road but they have also displayed their wares/goods for sale by putting platforms over the municipal drains and some of them on the road itself. The petitioner is directed to co-relate the photographs with the names of the persons and inform us whether such persons have filed any affidavit before us or not.

We can also take notice of the fact that despite the orders passed by this Court, the encroachments by the shopkeepers on the roads and municipal drains have become rampant and the time has now come when we may have to use the powers vested in us under Article 215 of the Constitution of India and the Contempt of Courts Act to take action against those persons who violate our orders.

Before we do so, we would like to give one last opportunity to the persons who have violated the orders of this Court. We direct the Commissioner, Municipal Corporation and all functionaries of the Corporation to ensure that the orders of this Court passed from time to time in this writ petition especially the order dated 2.1.2008, quoted here-in-above, are complied with in letter and spirit. We shall hold the Commissioner, Municipal Corporation personally liable for the implementation of these orders. We had also requested the Heritage Advisory Committee to decide the matter regarding uniform and proper facades on the Mall Road within six weeks. We direct the Secretary (Town and Country Planning) as well as the Secretary of the Heritage Advisory Committee to file their affidavits in this regard within two weeks from today.

We had in our earlier orders noted that the shopkeepers are willing to pay small fine of Rs.50/- and Rs.100/- for encroaching on the road and the time has now come to ensure that more serious penalties are levied upon them, such as, penal provision like being sent to jail or canceling of the license to run a shop. If a person does not run a shop in a manner which is convenient to the general public, in our opinion, he has no business to run such a shop and his license should be revoked. People, who have shops on the Mall and on the lower bazaar, put their wares and goods on the roads, obstructing the public street, which makes it very difficult for the pedestrians to even cross the markets. The situation in the lower bazaar is very deplorable and it is difficult for any person, especially ladies, to cross the bazaar. There is another human angle involved. In case of disaster, like fire, etc. the fire brigade or ambulance cannot even reach the scene of occurrence because by the time the wares are taken away and encroachments are removed, the damage is done. This Court

is concerned with the larger public interest. This Court also wants to ensure that the rule of law prevails and bye-laws, etc. framed by the Corporation are not flouted by the shopkeepers and other persons who are doing so right now.

We may make it clear that the Commissioner, Municipal Corporation can approach the Superintendent of Police, for police assistance, if required to remove the encroachments/over-hangings on the Mall Road/Lower Bazar. We further direct the Superintendent of Police to ensure that the requisite police force is made available to the Municipal Corporation for ensuring the compliance of the orders of this Court.

The Commissioner, Municipal Corporation, Shimla, the Principal Secretary (Town and Country Planning) and the Secretary of the Heritage Advisory Committee are directed to file their respective affidavits giving the latest status regarding the compliance of these orders latest by 20th August, 2009.

List the matter on 26th August, 2009. Affidavits by all concerned, be filed by 24th August, 2009. We may make it clear that after today any citizen of the city can bring to our notice the fact that any person has disobeyed our orders and has encroached upon the Municipal street or drain or displayed his goods in such a manner as to overhang on the Municipal drain/street, by writing a plain letter alongwith photographs giving the date of encroachment to the Registrar General of this Court and this Court shall take action on the basis of the same.

We direct the Commissioner, Municipal Corporation, to ensure that the gist of this order is published and circulated widely in the town of Shimla as well as broadcast on the radio and cable T.V. network within four days from today to make the general public as well as the shopkeepers aware of their rights and duties."

7. When the matter came up again on 28.08.2009, this Court passed further directions, relevant portion whereof reads as under:-

"We have passed a detailed order on 3.8.2009 directing the Municipal Corporation, Shimla to remove the encroachments/over-hangings made by the Shopkeepers on the roads and municipal drains on the Mall Road and Lower Bazaar in Shimla. We are happy to note that the Municipal Corporation, Shimla has earnestly and sincerely complied with the directions given by us and there is a visible impact of this drive in Shimla town. We place on record our appreciation for the work done by the Officers and staff of the Municipal Corporation, Shimla. We are satisfied with the action taken by the Municipal Corporation and the affidavit of Sh.A.N. Sharma, Commissioner, Municipal Corporation in this regard.

Having said so, we are also firmly of the view clear that such a drive to keep public property free from encroachments and the streets clean should not be a one time affair. This effort must continue and in future also no encroachment should be permitted. In fact, the time has now come to extend the orders passed by us to the entire Municipal area falling within the jurisdiction of Municipal Corporation, Shimla. We therefore direct that the Municipal Corporation in a phased manner, keeping in view the staff available with it, shall take action to remove encroachments and over-hangings etc. as detailed in our previous order in the entire Shimla Town.

Section 227 of the H.P. Municipal Corporation Act prohibits any person from erecting, setting up or placing any structure or fixture which overhangs, juts out or projects on or in any way encroaches upon the passage on any public path or drain. We therefore, direct that now the Municipal Corporation may enforce the provisions of this Section in the entire municipal area of Shimla. Though it is for the Municipal Corporation to prioritize the areas, we may at the outset mention a few of the areas where such action is immediately required:

1) Sanjauli bazaar
2) Ram Bazaar and Bus Stand Shimla
3) Boileauganj
4) Totu Bazar
5) Khalini
6) Chhota Shimla Bazaar
7) Kasumpti Bazaar
8) Lakkar Bazar

In addition thereto the roads connecting the circular roads to the Mall Road shall also be taken up on priority basis.

It has been brought to our notice at the Bar that when the Officers/officials of the Municipal Corporation were implementing our orders certain persons objected to the same by raising slogans etc. We may make it clear that if any person is aggrieved by any portion of our order and has a genuine grievance he is free to approach this Court for modification/ clarification of the orders passed by us by filing an appropriate application. However, no person can be permitted to take the law in his own hands. When the Officers and staff of the Municipal Corporation are implementing the orders of this Court they are acting on our behalf i.e. under the orders of the Court and in case any person raises slogans or causes obstruction to the implementation of our orders we may be compelled and would not hesitate to take action under the Contempt of Courts Act against such person(s).

At the same time we expect the Officers of the Municipal Corporation to act fairly treating all persons equally. They should also not be unnecessarily harsh. It has been contended before us that sometimes while removing the encroachment/obstruction/over-hanging, damage is caused to the property of the shop owners. We therefore direct that in case the Municipal Corporation finds some encroachment, over-hanging etc. of a type which has to be removed by breaking it, then if the person concerned files an undertaking with the Municipal Corporation undertaking to remove the encroachment, over-hanging etc. himself within a period of 48 hours the officials of the Municipal Corporation will grant such time to the person concerned to remove the encroachment. However, in case such a person does not remove the encroachment within the aforesaid period then the Officers of the Municipal Corporation shall take immediate action thereafter to remove the encroachment.

We also direct that no Civil court in Shimla shall entertain any proceedings or pass any stay order in any proceedings filed in regard to encroachments which are being removed under the orders of this Court. The persons aggrieved can approach this Court. A copy of this order be sent to the

District Judge, Shimla and to all the courts subordinate to him for information and necessary action.

We further direct that the Municipal Corporation shall not permit unauthorized hawkers to sell their goods/wares in any bazaar in Shimla town. The Municipal Corporation may before the next date identify certain spots where fruit venders can be relocated.

It has been brought to our notice that a number of shopkeepers allow hawkers to sit outside their shops and in fact some of them charges money from the hawkers on daily basis. We make it clear that it shall be the responsibility of the Shopkeeper in front of whose premises the hawker is doing business, to inform the Municipal Corporation immediately to take appropriate steps to remove him and deal with him in accordance with law. In case the shopkeeper fails to do so it shall be presumed that the hawker is working with his approval and on his behalf and therefore such shopkeeper may be liable for having disobeyed our orders under the Contempt of Courts Act. However, this portion of the order shall not be applicable in respect of Sundays when the market is closed.

The Municipal Corporation shall also ensure that under the garb of removing the encroachments the shopkeepers do not raise the height of their buildings or add mezzanine floor to their buildings/premises. Such floors are not only illegal but also a fire hazard and cannot be permitted.

We had in our orders requested the "Heritage Advisory Committee" to decide the matter regarding the maintenance of uniform and proper facades within six weeks. All that has been done in response is that the "Heritage Advisory Committee" in its meeting reiterated its guidelines. We are unhappy with the manner in which the Members of the "Heritage Advisory Committee" treated the orders of this court. They have made no effort whatsoever to suggest some proper façades for the shops. We again direct the "Heritage Advisory Committee" to consider this matter in another meeting. Their job is not only to reiterate the guidelines given but to make a positive suggestion with regard to the maintenance of the façades of the shops. Some of the facades have already been changed and the Advisory Committee should make specific suggestions with regard to each block of shops starting from the CTO Building till the shops near the Combermere Bridge. The mere reiteration of the guidelines is not sufficient. The "Heritage Advisory Committee shall consider this matter and make necessary recommendations by 30th September, 2009 on the affidavit of the Secretary of the "Heritage Advisory Committee."

Ms.Sarojini Ganju Thakur, Principal Secretary, Town and Country Planning has filed an affidavit that the Government has taken up a proposal with the Director, 'Kamla Raheja Vidyanidhi Institute for Architectural & Environmental Studies' to take up a project and develop a proposal for uniform shop frontages on the Mall. We hope and expect that such a proposal is ready by the next date. The Principal Secretary (TCP) shall file her affidavit on or before the next date giving latest status in this regard.

We have impleaded the Beopar Mandal Shimla as a party respondent in this case. We may make it clear that in case all the shopkeepers comply with the law and the orders passed by this Court then on special occasions such as Diwali etc. if appropriate application is moved we may permit certain shopkeepers to display their goods outside their shops for a short period up to a limited extent. We may make it clear that in case in regular course

encroachments are found and the goods are displayed on the roads and drains then we shall not grant such permissions even during festivals.

We further direct the Special Magistrate and other officials of the Municipal Corporation, Shimla to ensure that they visit the areas in question especially the Lower Bazaar, Ram Bazaar etc. on regular basis at random at least twice in a week. Some of these visits can be made in the evening hours also. If they find violation of these orders or violation of the Municipal Laws they shall take action against the offending persons and also bring the same to the notice of this Court.

We reiterate our earlier directions that the Superintendent of Police, Shimla shall provide adequate police force to the Municipal Corporation as and when required."

8. It appears that certain difficulties regarding implementation of the aforesaid orders during festival days were being faced by the shopkeepers which led to the impleadment of the 'Beopar Mandal', Shimla and on their application this Court on 29.09.2009 passed the following orders:-

"Keeping in view all these factors in mind, we are of the view that even during these festival days if the Shopkeepers are to be permitted to display their goods/items outside the shops, the projection on the road should not be more than two feet in any event. In case the road is narrow, the projection can be less than two feet. To ensure that on the spot this is actually done, we hereby direct the Assistant Commissioner, Municipal Corporation Shimla to visit the Lower Bazar. He will after measuring the road, in case the same is wide enough, earmark a space of two feet in front of the shop for the shopkeeper(s) to display their goods/items for the short period when the Courts specifically permits the shopkeepers to do so. It is for him to decide whether the space to be granted is two feet or less, keeping in view the total width of the Lower Bazar at the particular point. In case there are shops on both sides and it is not possible to permit any display of goods/items on the road, he shall also indicate accordingly in his report to be submitted to us. The Assistant Commissioner Shimla shall submit his report to us within the next one week, in which he shall clearly indicate that in front of which shops display of goods can be allowed during the festival season. He will also clearly indicate where display can be of two feet and also the shops where the display is to be less than two feet. He shall also clearly state where the road is narrow and no permission can be granted."

9. The petition filed by Smt.Neelam Sharma came to be closed by the order of this Court dated 09.12.2013. However, it appears that the orders passed by this Court from time to time for some reason did not expressly form part of the final order. Resultantly, certain unscrupulous encroachers taking advantage of this fact had again resorted to encroachment and this fact was highlighted in the news item carried out in the Hindi daily 'Amar Ujala' in its edition dated 30th October 2014. It is reported that as against the time of five minutes, it took Fire Brigade more than one hour fifteen minutes to cover the distance from one corner of the Lower Bazar to the other corner. This Court took suo motu cognizance of the news item and issued notice to the respondents.

10. In response to the notice issued by this Court, the Municipal Corporation, Shimla, in its reply admitted the contents of the news item and pointed out that during removal of encroachments/ overhanging projections, it had been observed that certain shopkeepers/hawkers are in the habit of encroachment/overhanging projections on the

streets and drains. These hawkers immediately remove overhanging projections and temporary encroachments before the entry of Corporation Staff in the area and start re-encroaching the drains/streets immediately after the Corporation Staff leave the market. This practice is common in Lower Bazar and Ram Bazar, especially, in odd hours.

11. It was further pointed out that the Corporation had identified certain points in Lower Bazar area where the problem of overhanging projection and temporary encroachment on the street was required to be dealt with on top priority as in this area the movement of unauthorized hawkers was frequent and the shopkeepers had been violating the directions of this Court.

12. It was also averred that certain shopkeepers had extended foldable tarpaulin outside their shops by projecting the same towards street/road and certain shopkeepers are putting articles for sale in a hanging position under the said tarpaulin which are causing un-necessary hindrance to the general public as well as free flow of emergency vehicles.

13. The Chief Fire Officer in compliance to the orders of this Court on 24.11.2014 filed a status report wherein he not only pointed out obstruction points in the Lower Bazar but he also made certain startling disclosures. It was pointed out that fire vehicles were plied from D.C. Office to 'Sher-e-Punjab' on 23.08.2013, 19.10.2013, 29.10.2014, 27.11.2014 and it took about 40 minutes, 50 minutes, 40 minutes and 53 minutes respectively, whereas, the reasonable time to reach at the scene of fire incidence from Fire Station Office, on the Mall Road, should be 3-6 minutes or to say should not be more than six minutes in any way. It was also pointed out that a fire broke out in Lower Bazar in a liquor shop on 28.01.2014 and the fire tenderers faced a lot of difficulties and obstructions to reach the spot due to the material displayed by the vendors and shopkeepers outside the shops and also because of the permanent projection of angle iron outside the shops.

14. It is well settled that the hawkers have no fundamental right under Article 21 of the Constitution of India to carry on business at the place of their choice and convenience. The rights of hawkers, kiosk- users and vendors can never be absolute, but have to be limited and subservient to over all public interest.

15. In the ***Municipal Board, Manglaur Vs. Mahadeoji Maharaj, AIR 1965 SC 1147***, the Hon'ble Supreme Court observed that the roads and its sidewalks are laid for passage only and for no other purpose.

16. In ***Bombay Hawkers' Union and others Vs. Bombay Municipal Corporation and others, AIR 1985 SC 1206***, the Hon'ble Supreme Court has held that:

> *"8……No one has any right to do his or her trade or business so as to cause nuisance, annoyance or inconvenience to the other members of the public. Public streets, by their very nomenclature and definition, are meant for the use of the general public. They are not laid to facilitate the carrying on of private trade or business. If hawkers were to be conceded the right claimed by them, they could hold the society to ransom by squatting on the center of busy thoroughfares, thereby paralyzing all civic like. Indeed, that is what some of them have done in some parts of the city. They have made it impossible for the pedestrians to walk on footpaths or even on the streets properly so-called."*

17. In the case of ***Olga Tellis and others Vs. Bombay Municipal Corporation and others, AIR 1986 SC 180***, the Hon'ble Supreme Court has held that a municipality is empowered to cause to be removed encroachments on footpaths or pavements over which

the public have a right of passage or access. In the said case, the Hon'ble Supreme Court also observed that:-

> *"43……In the first place, footpaths or pavements are public properties which are intended to serve the convenience of the general public. They are not laid for private use and indeed, their use for a private purpose frustrates the very object for which they are carved out from portions of public streets….."*

18. The Hon'ble Supreme Court rejected the misplaced arguments resting on life and liberty by those who were claiming occupation of the public streets. In this regard, it was observed that:

> *"43……There is no substance in the argument advanced on behalf of the petitioners that the claim of the pavement dwellers to put up construction on pavements and that of the pedestrians to make use of the pavements for passing and repassing, are competing claims and that the former should be preferred to the latter……"*

19. In ***Municipal Corporation of Delhi Vs. Gurnam Kaur, AIR 1989 SC 38***, the Hon'ble Supreme Court reiterated the law that to remove an encroachment to the public road is the obligation of the municipality and that an injunction could not be granted to suffer an encroachment of a public place like a street which is meant for the use of the pedestrians. The Hon'ble Supreme Court rejected the plea of life and liberty raised in the context of carrying on trade or business on a public road. The Hon'ble Supreme Court further held that there can be no fundamental right of a citizen to occupy a particular place where he can squat and engage in trading business.

20. In ***Ahmedabad Municipal Corporation Vs. Dilbag Singh Balwant Singh and others, 1992 Supp.(2) SCC 630***, the Hon'ble Supreme Court negatived the plea of a occupier of a public street when he obtained an injunction in a suit to prevent the removal of an encroachment. Reaffirming and reiterating its earlier decision, the Hon'ble Supreme Court upheld the removal of encroachment.

21. In ***M/s Gobind Pershad Jagdish Pershad Vs. New Delhi Municipal Committee, AIR 1993 SC 2313***, the Hon'ble Supreme Court while dealing with a case where the verandah in front of the shop had been for long used for passing and re-passing by the public, it was held that this space could be held to be a street under the Municipal Act.

22. In ***Maharashtra Ekta Hawkers Union and another Vs. Municipal Corporation, Greater Mumbai and another, AIR 2004 SC 416***, the Hon'ble Supreme Court while holding that every municipal corporation has a statutory obligation to provide free flow of traffic and pedestrians to pass and re-pass freely and safely; as its concomitant, the corporation/municipality have a statutory duty to have the encroachments removed.

23. On the basis of the aforesaid exposition of law, it can safely be concluded that the respondent Corporation is expected to be vigilant and cannot and should not allow encroachments in any form, be it the illegal extension of shops, its projections, eaves, the pavements or even the footpaths. Public streets and road cannot be blocked or encroached by any one, not even by the government and they are to be kept clear for the purposes of passage only and for no other purpose.

24. It appears that the temptation and enticement to indulge in lateral, vertical and horizontal illegal expansion of structures is on account of the retention/regularization policy introduced by the successive governments which in the teeth of the judgment

rendered by this Court in ***CWP No.122 of 1995*** titled ***Raj Kumar Singla versus State of Himachal Pradesh and another,*** decided on 16.09.1997 wherein this Court held as under:-

> *"18. It is rather surprising that the State Government should think of legalizing an illegal act and part with the government property or public property in favour of those persons, who are guilty of committing such illegal acts. It is the duty of the government to prevent encroachment on public property. If the government decides to make a gift of the public property to those, who have encroached thereon it will tantamount to the government accepting and admitting its inability to prevent the encroachment….."*

25. It was further held that:-

> *"20.Though in this case, the State Government has not expressly pleaded its inability to prevent encroachments on government land and the public property and the encroachment policy issued by the State Government would only show that the government is not in a position to handle the situation. It is a pity that the government with its powerful machinery is not in a position to protect its property, which is really a property of the people of the State and goes to the extent of making a gift of the property on which unscrupulous people have encroached by violating the provisions of law. We cannot but express our anguish and exclaim woe unto the government which seeks to legalize an illegality by an executive action."*

26. Lastly, it was held that:-

> *"28. On the facts of the case, it is evident that the encroachment policy issued by the government cannot minimize the vice of encroachment on the government land or other public property, but on the other hand, it will only encourage the members of the public to encroach upon such land and wait for regularization or legalization of such encroachments. It will also lead to corruption among the officials of the State Government."*

27. Further, the respondents do not seem to have learnt any lesson from the recent earthquakes which have devastated the Himalayan region, particularly, Nepal. As per the latest studies, majority of Himachal Pradesh falls in Seismic Zone-V and the remaining in region-IV and yet this fact has failed to shake the authorities in Shimla out of their slumber. The quake-prone erstwhile summer capital of Raj cannot avert a Himalayan tragedy of the kind that has killed thousands and caused massive destruction in Nepal.

28. It has been reported that Shimla's North slope of Ridge and open space just above the Mall that extends to the Grand Hotel in the West and Lower Bazar in the East is slowly sinking. We can only fasten the blame on the haphazard and illegal construction being carried out and all out efforts being made for converting the once scenic seven Himalayas of this Town into a concrete Jungle. A high intensity quake can turn Shimla into a tomb of rubble as it falls in its Seismic Zone IV-V.

29. Fourteen major localities in Shimla are located at 70-80 degree slope, whereas, the majority of the buildings infringe byelaws and building norms and have not even adhered to the seismic building norms. Most buildings are precariously hanging on the steep slopes and clinging to one another. A moderate and high intensity temblor can be catastrophic for congested settlements with no escape routes and they are likely to collapse like a pack of cards, more particularly, when none of the authorities has ever cared to carry out the seismic pounding effects in buildings aimed at studying seismic gap between

adjacent buildings by dynamic and push over analysis. No particular parametric study has been conducted to investigate the minimum seismic pounding gap between two adjacent structures.

30. According to the report prepared by the Himachal Pradesh State Disaster Management Authority, seismically, the State lies in the great Alpine-Himalayan seismic belt running from Alps Himalayan through Serbia, Croatia, Turkey, Iran, Afghanistan, Pakistan, India, Nepal, Bhutan and Burma.

31. On April 4, 1905, an earthquake of 7.8 magnitude hit Kangra killing 20,000 people, 53,000 domestic animals while one lakh houses were destroyed. Economic Cost of recovery was estimated at Rs.29 lakhs during that time. On January 19, 1975, a quake of 6.8 magnitude hit Kinnaur killing 60 people while 100 others were badly injured. About 2,000 dwellings were devastated and more than 2,500 people were rendered homeless. On April 26, 1986 in Dharamshala a tremor of 5.5 magnitude had killed six people and caused extensive damage to buildings and the loss was estimated at Rs.65 crore. In Chamba, on March 24, 1995, an earthquake of 4.9 magnitude had left over 70% houses with cracks. Similarly, on July 29, 1997, a quake of 5.0 magnitude had left around 1,000 houses damaged in Sundernagar.

32. Once such gruesome realities exist, can the unauthorized structures still be regularized by encouraging violators only to contribute to the rapid haphazard urban growth in the hope that the government will finally regularize the structures? This simply cannot be done. It cannot be denied that haphazard, unplanned and illegal constructions have marred the beauty of hill towns in Himachal Pradesh, more particularly, its capital Shimla. It is high time that the building byelaws are suitably amended by taking into consideration the recent seismic activity that has taken place in the entire Himalayan region.

33. It has been noticed that even though the buildings are connected by road, yet no provision for parking even for one vehicle has been kept. In many cases, building or part thereof is put to commercial use, while the vehicles are parked on the roadside that too without paying for the same. Therefore, it becomes imperative that the byelaws be suitably amended by making it mandatory for all the buildings connected by road to have parking space for atleast one vehicle that too without permitting encroachment upon public property.

34. Despite the settled legal position and repeated directions from this Court, the respondents have failed to take care of these problems and the only reason which can be ascribed for such failure is lack of will to efficiently implement the directions as passed by this Court from time to time.

35. The Criminal Procedure Code, 1973, the Indian Penal Code and the Himachal Pradesh Police Act, 2007, apart from the Municipal Corporation Act, all contain provisions for removal of obstruction on a street, or committing a nuisance or obstruction in general. There are penalties provided like simple fine or even arrest or imprisonment for non-appearance before the Court.

36. Section 133 of the Code reads as follows:-

> *"133. Conditional order for removal of nuisance.---(1) Whenever a District Magistrate or a Sub- Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers-*

(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

(c) that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed, confined or otherwise disposed of,

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order---

(i) to remove such obstruction or nuisance; or
(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii) to prevent or stop the construction of such building, or to alter the disposal of such substance; or

(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or
(vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order; or,

if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the Order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation.- A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes."

37. Section 268 IPC reads as follows:-

"268. Public nuisance.- A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

A common nuisance is not excused on the ground that it causes some convenience or advantage."

38. Similarly, Section 114 of the Himachal Pradesh Police Act, 2007 reads as follows:-

"114. Powers of Police Officers in respect of certain offences on roads or public places.

(1) It shall be lawful for any Police Officer in uniform to take into custody, without warrant, any person who within his personal view, has committed any of the following offences on any road, public place or thoroughfare causing obstruction, annoyance, risk, danger or damage to residents or passersby, namely :—

(i) slaughters or wantonly commits cruelty to any animal: or

(ii) drives or rides furiously any cattle or horses; or

(iii) obstructs the taking up or setting down of passengers at a public transport halting place; or

(iv) exposes any good for sale; or

(v) is found drunk and incapable or riotous; or

(vi) indecently exposes himself, urinates or defecates in a public place or in public view; or

(vii) unauthorizedly affixes any bill, notice or other paper to, or defaces, any property belonging to the State or Central Government or any public authority; or

(viii) commits willful trespass into any property belonging to the State or Central Government or any public authority; or

(ix) willfully damages any public alarm or any other public emergency assistance system; or

(x) harasses or stalks a woman or makes indecent advances or makes obscene remarks or gestures to a woman; or

(xi) begs or seeks alms."

(2) Any person, so arrested, if not immediately released on bail, shall be produced as soon as possible, but not later than 24 hours, before the nearest Judicial Magistrate having jurisdiction."

39. Section 396 of the Himachal Pradesh Municipal Corporation Act, 1994, reads as follows:-

"*396. Penalty for breaches of bye-laws. [1](1) Any bye-law made under this Act may provide that a contravention thereof shall be punishable,-*

(a) with fine which may extend to [2] [fifty thousand] rupees; or

(b) with fine which may extend to [fifty thousand] rupees and in the case of continuing contravention, with an additional fine which may extend to [five thousand] for every day during which such contravention continues after conviction for the first contravention; or

(c) with fine which may extend to [five thousand] for every day during which the contravention continues, after the receipt of a notice from the Commissioner or any Corporation Officer duly authorized in that behalf by the person contravening the bye-law requiring such person to discontinue such contravention.

(2) Any such bye-law may also provide that a person contravening the same shall be required to remedy, so far as lies in his power, the mischief, if any, caused by such contravention."

40. During the course of arguments, the learned Amicus Curiae has pointed out that it is not streets in the bazar area of Shimla which alone have been encroached, but even public roads have been choked making it difficult for the emergency vehicles like ambulance, fire brigade etc. to reach their destination on time.

41. After decades of haphazard development (if at all it can be called development) and environmental degradation-destroying activities, both by the Municipal Corporation as also the residents of Shimla, there is finally a ray of hope in the prospects of Shimla getting the "UNESCO World Heritage Site Tag". We have learnt that US Government Agencies for international development has selected three cities from across the world as resource cities for development- Town Ville in Australia, Summer Ville at Massachusetts and Shimla, the only city in the entire South area, but can the city get the status in the current scenario where the encroachers are having a heyday and the roads are completely choked?

42. Law breakers and law abiders cannot be placed at an equal pedestal. It is unfortunate that despite repeated directions passed by this Court in more than three decades back in ***Yoginder Lal Sharma's*** case (supra) and thereafter in ***Neelam Sharma's*** case, the same has not had the desired effect upon the encroachers. It, therefore, makes it imperative that we issue certain stringent directions.

43. Accordingly, the following directions are issued which shall apply to the entire Municipal Area of Shimla:-

i) That no shopkeeper(s)/hawker(s) throughout Shimla irrespective of its locality would be permitted to display his/their goods on the drains and the sides of the streets.

ii) No shop will be permitted to have overhanging projections including collapseable tarpaulin.

iii) No unauthorized hawkers shall be permitted to sit outside a shop by encroaching upon the public drain or sell their goods/wares in any bazaar in Municipal area of Shimla.

iv) The Municipal Corporation shall strictly implement the provisions of Section 227 of the Himachal Pradesh Municipal Corporation Act, 1994, as also byelaws called "Overhanging Project Byelaws" and in case of first three violations, the fine as envisaged under the aforesaid provisions shall be levied. But, in case of fourth default, the licence to run the shop shall be suspended for one month and in case of another default for another six

months and in case there is yet another default, then his licence shall be permanently revoked.

v) It is only once that the action would be taken against the encroachers under Section 133 Cr.P.C., Section 283 IPC or Section 114 of the H.P. Police Act or Section 396 of the Himachal Pradesh Municipal Corporation Act, 1994 and thereafter recommendations for suspension of licence shall be made and the Municipal Corporation shall thereafter act in accordance with the direction No.(iv).

vi) The persistent defaulters already identified by the Corporation shall be given only one chance to improve and thereafter their licences shall be suspended in a manner set out in direction No.iv.

vii) The Municipal Corporation shall demolish within a period of six weeks all illegal projections including projections in the form of collapseable tarpaulin as have come to the notice of the Corporation including those projections as mentioned in the affidavit of the Chief Fire Officer. After demolition of the illegal structure, the Corporation would conduct G.P.S. demarcation of the entire area so that the same works as a ready referencer in dealing with fresh encroachments.

viii) It is made clear that during the festival days, the order passed by this Court on 29.09.2009 in ***Neelam Sharma's*** case shall be applicable.

ix) The Special Magistrate and Officials of the Municipal Corporation, Shimla shall visit the areas in question, especially, Lower Bazar, Ram Bazar etc. on regular basis at random atleast in a week.

x) The Municipal Corporation in light of the observations made in this judgment shall suitably frame/amend its byelaws, till and so long the respondents do not frame the byelaws, no building or part thereof which is unauthorized shall be permitted to be regularized under any policy, guidelines or instructions. Till the building byelaws are not framed, the Municipal Corporation will be authorized to have the electricity and water connections of these illegal structures disconnected and any instruction issued on behalf of the Corporation to the HPSEBL or the IPH will be imperative and mandatory.

xi) The Chief Fire Officer shall carry out an unscheduled and unannounced mock-drill every month where the Fire Brigade shall be made to pass through the entire length and breadth of the Lower Bazar and any hindrance in its movement shall be dismantled and demolished there and then at the spot.

xii) The respondents are directed to ensure that there is no undue let, obstruction or hindrance in plying of emergency vehicles like the fire brigade, ambulance etc. It is clarified that any vehicle carrying a serious patient would be treated as an ambulance for all intents and purposes.

xiii) While implementing the orders of this Court, the Officers of the Municipal Corporation shall act uniformly and fairly by treating all persons equally.

xiv) We also direct that no Civil Court in Shimla shall entertain any proceedings or pass any order in any proceedings filed with regard to encroachments which are being removed under the orders of this Court. However, the person(s) aggrieved is/are free to approach this Court.

xv) The respondents shall ensure that no unauthorized construction is carried out within the Municipal limits of Shimla.

xvi) The Commissioner, Municipal Corporation and Superintendent of Police, Shimla, shall work in tandem to give effect to the aforesaid orders and quarterly status reports shall be submitted by them to the Registry of this Court.

xvii) Any violation of this order needless to say shall be viewed seriously and any person is free to approach this Court by addressing a letter and appending therewith his name and permanent address as also the photographs of the encroacher alongwith his other details like name, address etc. etc.

xviii) It shall be the personal responsibility of the Collector, Superintendent of Police and the Commissioner, Municipal Corporation, Shimla that the directions issued hereinabove are carried out in their letter and spirit.

xix) The respondents are further restrained from introducing any retention/regularization policy, guidelines or instructions thereby permitting regularization of unauthorized structures.

xx) The respondents shall not permit any free parking on the main public road and it is only after proper identification the parking would be permitted that too subject to payment.

xxi) We direct that henceforth no new vehicle which is intended to be plied primarily within Shimla Municipal area will not be registered in the State unless the intending purchaser produces a certificate from the Collector, Shimla that he has a parking space and the said certificate shall be issued only after a report to this effect that too after physical inspection and verification is issued by the SHO of the Police Station in whose jurisdiction the area falls.

xxii) We also direct that our directions should be implemented in letter and spirit and any dereliction of duty or negligence on the part of the authorities concerned will amount to contempt of this Court's orders for which necessary action shall be initiated.

44. The petition is accordingly disposed of in the aforesaid terms, so also the pending application(s), if any.

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

Dharma Devi ...Appellant.
Versus
State of H.P. ...Respondent.

Criminal Appeal No.333 of 2011
Reserved on : 29.4.2015
Date of Decision : May 22, 2015.

N.D.P.S. Act, 1985- Section 20(b)(ii)(c)- Accused was carrying a rucksack on her back- she tried to throw away the rucksack and run away from the spot on seeing the police- she was apprehended- rucksack was searched and 2.5 kg of charas was recovered- testimonies of

police officials were clear, consistent, cogent and reliable – minor variations regarding the time are not sufficient to make the prosecution case doubtful - link evidence was also proved- accused had failed to discharge the burden to account for the possession of charas- she had failed to discharge the presumption that possession was not conscious - therefore, she was rightly convicted by the trial Court. (Para-10 to 37)

Cases referred:
Dharampal Singh v. State of Punjab, (2010) 9 SCC 608
Madan Lal and another vs. State of H.P., 2003 (7) SCC 465
Dehal Singh v. State of Himachal Pradesh, (2010) 3 SCC (Cri) 1139
Shivaji Sahabrao Bobade & another vs. State of Maharashtra, (1973) 2 SCC 793
Sama Alana Abdulla v. State of Gujarat, (1996) 1 SCC 427
Ravindra Shantram Savant v. State of Maharashtra, (2002) 5 SCC 604
Girija Prasad (dead) by LRs v. State of M.P., (2007) 3 SC (Cri) 475
Radha Mohan Singh v. State of U.P., (2006) 2 SCC 450
State of Rajasthan v. Bhawani, (2003) 7 SCC 291
State of U.P. v. Krishna Gopal and another, (1988) 4 SCC 302,
State of Punjab v. Baldev Singh, (1999) 6 SCC 172

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

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Dharma Devi, hereinafter referred to as the accused, has assailed the judgment dated 28.10.2010/29.10.2010, passed by Special Judge Kullu, Himachal Pradesh, in Sessions Trial No.51 of 2009, titled as *State v. Dharma Devi*, whereby she stands convicted of the offence punishable under the provisions of 20(b)(ii)(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the Act), and sentenced to undergo rigorous imprisonment for a period of ten years and pay fine of Rs.1,00,000/- and in default of payment thereof, to further undergo simple imprisonment for a period of six months.

2. It is the case of prosecution that on 29.3.2009, HC Om Parkash (PW-3), alongwith police officials Parveen Kumar (PW-1) and Bahadur Singh (PW-2), was on a patrol duty near village Chohki and Malana Dam. At about 5.30 p.m., they noticed a lady carrying a rucksack on her back. Seeing the police party, she got perplexed and tried to throw away the rucksack so carried by her. She also tried to flee, but was apprehended. On questioning, she disclosed her name as Dharma Devi. Om Parkash suspected that she may be carrying some contraband substance. After complying with the statutory provisions and obtaining her consent vide memo (Ex. PW-1/D), he searched the bag, from which six packets containing Charas, in the shape of sticks, were recovered. Same were weighed and found to be 2.5 kgs. Two samples, each weighing 25 grams, were drawn and sealed with seal impression 'H'. Remaining bulk parcel was also sealed with the very same seal impression. Sample of the seal was taken on a piece of cloth (Ex. PW-1/E). NCB forma (Ex. PW-3/A) were filled up in triplicate. Ruka (Ex. PW-3/B) was taken by Bahadur Singh, on the basis of which FIR No.133, dated 29.3.2009 (Ex. PW-8/B), under the provisions of Section 20 of the

Act, was registered at Police Station, Sadar, Kullu, by SHO Prem Dass (PW-8). After the file was taken back to the spot, accused was arrested and remaining formalities completed. HC Om Parkash produced the contraband substance before SHO Prem Dass, who resealed the same with his seal impression 'T', whereafter it was handed over to MHC Roop Singh (PW-6), who deposited the same in the Malkhana. Om Parkash deposited the sealed samples with the Forensic Science Laboratory, Junga. Report (Ex. PA) of the laboratory revealed the contraband substance to be Charas. With the completion of investigation, which prima facie, revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 20 of the Act, to which she did not plead guilty and claimed trial.

4. During the pendency of trial, entire bulk parcel was also sent for analysis. HC Ram Krishan (PW-9) handed over the same to HHC Tek Singh (PW-10), who deposited it with the Forensic Science Laboratory, Junga and report (Ex. PB) was produced before the Court.

5. In order to establish its case, prosecution examined as many as 11 witnesses and statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which she took the following defence:

> "I am innocent. On 29.3.2009 I along with Smt. Kekti Devi and her minor son were waiting for a bus in the rain shelter at Jari in order to go CHC Jari as on that day I was suffering from fever due to chickenpox. The son of Smt. Kekti was also suffering from fever due to chickenpox. Smt. Kekti Devi wife of Hej Raj was suffering with fracture in her arm. At about 10.00 a.m. 2-3 police personnels came in the rain shelter. They noticed an unclaimed bag lying in the rain shelter. The ownership of the said bag was ascertained from the persons who were sitting in the rain shelter. Every body denied to owe the said bag. Thereafter, those police officials opened the said back and some black coloured substance was found in it wrapped in 15-16 different packets. On 1-2 packets the words "Malana Cream" was printed. Thereafter, our names and addresses were ascertained by those police officials, upon which I and Smt. Kekti Devi disclosed our names and addresses and also disclosed that we are the residents of Malana. Thereafter I alongwith Smt. Kekti Devi and minor son were taken to PP Jari. When our conditions deteriorated due to the said diseases, we were taken to CHC Jari, where Dr. was not present the police summoned the Doctor from his residence who had given us treatment. Thereafter the police again took up to police post Jari and child of Smt Kekti Devi wife of Hem Raj was handed over to my father who was also summoned in the police post and thereafter I and Kekti Devi were falsely implicated by the police."

No evidence in defence was led.

6. Based on the testimonies of witnesses and the material on record, trial Court convicted and sentenced the accused, as aforesaid.

7. It is contended by Mr. Chitkara, learned counsel for the accused that the accused stands falsely implicated and the defence set up by her stands probablized. In this connection, he also invites our attention to document (Ex. PW-5/A), revealing the fact that accused Dharma Devi was suffering from chickenpox.

8. On the other hand, Mr. V.S. Chauhan, learned Additional Advocate General, has supported the judgment and findings so rendered by the trial Court for the reasons contained therein.

9. Having heard learned counsel for the parties, we are of the considered view that no case for interference is made out in the present appeal.

10. We find from the testimony of Bahadur Singh that father of Dharma Devi was asked to come to Odidhar. We also find from the testimony of Sher Singh (PW-4) that a lady Constable was also called on the spot. But then these facts would, in no manner, probablize the defence of the accused or render the prosecution version to be false. Significantly, when the accused was produced before the Magistrate, no protest was made. Also, there is no suggestion, much less proof of the custody of the child of Kekti Devi being handed over to the father of Dharma Devi, who also has not been examined as a defence witness. It is not the case of the accused that she and Kekti are close relatives or there was none in the family of Kekti, who could have looked after the child. Also, there is no positive evidence that in fact father of Dharma Devi did come to Odidhar. In fact Bahadur Singh states that till such time he remained on the spot, such persons had not come. It is not that the rain shelter of Jari was located at an isolated place, having no habitation around. Accused admits presence of other persons on the spot, as she states that "every body denied to owe the said bag". Now, who is this 'every body'? who are these persons present on the spot? Why is it that the ladies did not protest against their false implication? Why would police take them to the Police Post? Now, all these questions remain unanswered by the accused. It has not come on record that police harboured any animosity or on suspicion had taken them to the Police Post.

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

12. In *Dharampal Singh v. State of Punjab,* (2010) 9 SCC 608, the Hon'ble Supreme Court of India, held that the initial burden of proof of possession lies on prosecution and once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused. It needs no emphasis that the expression possession is not capable of precise and completely logical definition of universal application in context of all the statutes. Possession is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18/20 of the Act once possession is established, the accused who claims that it was not a conscious possession has to establish it because it is within his special knowledge. Section 54 of the Act raises presumption from possession of illicit articles.

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

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

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

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

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

17. In the instant case, no independent witness has been associated by the police party, while carrying out the search and seizure operations. Thus, the prosecution case rests on the testimony of police officials.

18. It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. However, the rule of prudence demands that the Court should be conscious before putting blind reliance upon the testimonies of police officials. Thus, if the testimony of the police official is consistent and credible in nature and satisfies the trust of truthfulness, there is no bar to base conviction upon such testimony of the police officials.

19. In *Sama Alana Abdulla v. State of Gujarat, (1996) 1 SCC 427,* the Court held that the evidence of police witnesses cannot be rejected on the ground that they are police witnesses and were members of the raiding party. Also, the Court held that evidence of police officer cannot be discarded merely because he is police official, in absence of hostility to the accused. In the present case also, there is no enmity between the Investigating Officer and the accused. Had there been any intention of the Investigating Officer to plant the contraband substance on the accused, then he might have planted small quantity of Charas.

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

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

22. We find the prosecution to have established its case, beyond reasonable doubt, through the testimonies of police officials Parveen Kumar (PW-1), Bahadur Singh (PW-2) and Om Parkash (PW-3), who conducted the search and seizure operations. Their testimonies are clear, consistent, cogent and the witnesses reliable. There is nothing in their testimonies, which would render their testimonies to be doubtful or the witnesses to be unreliable or not worthy of credence.

23. Om Parkash (PW-3) states that on 29.3.2009, he alongwith Bahadur Singh and Parveen Kumar was present at Odidhar. At about 3.30 p.m., a lady came from Malana side, carrying a pithu (rucksack) on her back. Seeing the police party, who were in uniform, the lady turned back and tried to throw away the bag which she was carrying. She was apprehended and on query disclosed her name to be Dharma Devi, so identified as the accused in the Court. He clarifies that the place was lonely, and no independent witness was either available or could be associated. As such, he associated his companions. Since he suspected the accused to have carried some contraband substance, in her bag, after informing her of her statutory rights and obtaining her consent (Ext. 1/D) for searching the bag, he searched the same. He states that from the bag (Ext. P-3) on which 'North Face' was written, six packets of khaki colour were recovered, which contained Charas. Contraband substance was weighed and found to be 2.5 kgs. Two samples, each weighing 25 grams (Ext. P-2), were drawn and sealed with four seal impression of seal 'H' and remaining bulk parcel (Ext. P-2) was sealed with six seals of the very same seal impression. Samples of the seal were taken on a piece of cloth (Ex. PW-1/E). NCB form (Ex. PW-3/A) was filled up in

triplicate. Ruka (Ex. PW-3/B) was sent through Bahadur Singh to the Police Station for registration of the FIR. He completed proceedings on the spot and sent Special Report (Ex. PW-3/E) to the Deputy Superintendent of Police. At the Police Station, he deposited the contraband substance with the SHO, who resealed the same with four seals of impression 'T'. Despite extensive cross-examination, we do not find his testimony to have been shattered or rendered doubtful, in any manner. In fact, his version stands duly corroborated by Parveen Kumar and Bahadur Singh, on material points.

24. There is some variation and discrepancy with regard to the time within which accused was apprehended. But then, this fact alone would not render the witnesses to be unreliable, their testimonies unbelievable or the prosecution case to be doubtful. In our considered view, presence of the accused, recovery of the contraband substance from her conscious possession, stands proved, beyond reasonable doubt.

25. In *Radha Mohan Singh v. State of U.P.*, (2006) 2 SCC 450, the Court further held that it is for the Judge to consider in each case whether the witness stands thoroughly discredited or can be still believed in regard to a part of his evidence. If the evidence is not completely shaken, the Court may after considering the evidence as to whole with due care and caution except in the light of other evidence on the record. That part of his evidence which is found creditworthy and act upon it, the testimony of such witness may not be rejected out rightly. Also in *State of Rajasthan v. Bhawani*, (2003) 7 SCC 291, the Court held that corroboration is rule of prudence for satisfying test of reliability. That part of witness's evidence found believable can be used for the purpose of corroborating the evidence of other witnesses. Evidence which is not shaken by the cross-examination cannot be brushed aside.

26. There can be no dispute with the proposition that benefit of every doubt has to go to the accused, but before such a benefit can be extended, the doubt must be reasonable and not each and every doubt, which may arise. Explaining this principle, the Hon'ble Supreme Court of India, in *State of U.P. v. Krishna Gopal and another,* (1988) 4 SCC 302, has held that:

> "Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. *To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehension. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case."* (Emphasis supplied).

27. As pointed out by the Hon'ble Supreme Court of India in *State of Punjab v. Baldev Singh,* (1999) 6 SCC 172, drug abuse is a social malady. While drug addiction casts into the vitals of the society, drug trafficking not only casts into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. It has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. Reference in the said decision has also been made to certain Conventions of the United Nations against illicit trafficking in Narcotic Drugs, which the Government of India has ratified. It is, therefore, absolutely imperative that those who indulge in these kind of nefarious activities should not go scot-free on technical pleas which come handy to their advantage.

28. Applying the test laid down by the Hon'ble apex Court in the present case, there is nothing on record, which can be called as a reasonable doubt. On the other hand, the prosecution evidence has been corroborated in material particulars both by ocular version and documentary proof, including the report(s) of the chemical analyst.

29. We find the prosecution case to have been established even by way of link evidence. SHO Prem Dass is categorical in his deposition that on the basis of ruka, so received at the Police Station, FIR was registered and file handed over to Bahadur Singh. Also, when Om Parkash produced the case property before him, he resealed the same with seal impression 'T'. Necessary entries were made in the NCB form (Ext. PW-3/A) and the case property deposited, alongwith the NCB form, in the Malkhana. Till such time, the case property remained with him, it was not tampered with.

30. Testimony of Roop Singh (PW-6), MHC, is also to the effect that entry of the contraband substance was made in the Malkhana Register (Ex. PW-6/A) and the sealed samples were handed over by him, alongwith the Road Certificate (Ex. PW-6/B) to be taken to the Forensic Science Laboratory. Om Parkash (PW-7), after depositing the case property at the Laboratory, deposited the receipt, copy of which is Ex.PW-7/C. Version of this witness also stands corroborated by Om Parkash (PW-3), both of whom have also deposed that so long as the property remained in their possession, it was not tampered with. The witnesses have deposed truthfully. Their depositions are clear, consistent and there is nothing which would render the same to be doubtful. Bulk parcel was also deposited with the Forensic Science Laboratory for analysis. HC Ram Krishan (PW-9), who was posted as MHC at the relevant time, sent the same through Tek Singh (PW-10) to the Laboratory. Even they have deposed that so long as the parcel remained with them, it was kept in safe custody and not tampered with.

31. Reports of the Forensic Science Laboratory (Ex. PA & PB) reveal the contraband substance, so recovered from conscious possession of the accused, to be charas.

32. It be also observed that before leaving the Police Post, entry of departure was made by the police party, which stands proved by the prosecution witnesses. Thus, genesis of the prosecution story also cannot be said to be false.

33. Also, we find that Special Report (Ex. PW-5/A) was promptly sent to the superior Officer, which fact is evident from the testimony of HC Harbans Kumar (PW-5).

34. So, in view of the above discussion, evidence in hand and the law laid down by the Hon'ble Supreme Court of India, the prosecution has successfully proved beyond all reasonable doubt that accused was in conscious and exclusive possession of Charas.

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

36. In our considered view, prosecution has been able to establish guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

37. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

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

FAOs (MVA) No. 386 of 2014 & 157 of 2015.
Date of decision: 22.05.2015.

1. FAO No.386 of 2014.

Joginder Singh & another	.....Appellants
Versus	
Chanan Ram and others	...Respondents.

2. FAO No 157/2015.

ICICI Lombard General Insurance Co. Ltd	.....Appellant
Versus	
Joginder Singh and others	...Respondents.

Motor Vehicle Act, 1988- Section 166- MACT treated income of the deceased as Rs. 15,000/-, deducted 50% and assessed loss of dependency as Rs. 7,500/-- applying multiplier of 11, assessed the loss of income as Rs. 9,80,000/- and awarded total compensation of Rs. 10,40,000/- which cannot be said to be excessive or meager- appeal dismissed. (Para-7)

For the appellant(s):	Mr. Raman Sethi, Advocate, in FAO No. 386 of 2014 and Mr. Jagdish Thakur, Advocate, in FAO No. 157 of 2015.
For the respondent(s):	Mr.Ankur Sood, Advocate, for respondents No. 4 and 5 in FAO No. 386 of 2014. Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

CMP(M) No.60 of 2015 in FAO No. 157/2015.

This application has been filed in FAO No. 157 of 2015, for condonation of 55 days' delay, which has crept-in in filing the appeal. For the reasons stated in the application, the application is granted and the delay in filing the appeal is condoned. The application stands disposed of.

2. These two appeals are outcome of a common judgment and award dated 15.7.2014, passed by the Motor Accident Claims Tribunal Shimla, H.P. Circuit Court Theog in MAC Petition No.43-T/2 of 13/10, whereby compensation to the tune of Rs.10,40,000/-

alongwith 7.5% interest came to be awarded in favour of the claimants and insurer came to be saddled with the liability.

3. Both these appeals are being taken up together for disposal in order to avoid conflicting judgments.

4. The claimants have filed FAO No. 386 of 2014 for enhancement of compensation and the insurer has filed appeal No.157 of 2015, for exonerating them from the liability and saddling the insured with the liability.

5. The insured and driver have not questioned the impugned on any ground, thus it has attained finality so far as it relates to them.

6. The questions to be determined in these appeals are whether the amount awarded is excessive and whether the insurer has been rightly saddled with the liability?

7. I have gone through the impugned award. The Tribunal has awarded the just and appropriate compensation, which cannot be said to be meager in any way. It is apt to reproduce paras 39 and 40 of the impugned judgment and award herein:

> *"39. Therefore, in the totality of the facts and circumstances, it is presumed that had Miss Ambika been alive, she would have got job and earned at least Rs.15,000/- per month as salary. The plea of the petitioners that deceased had 100% chances of placement, cannot be accepted in view of clause No.23 of the agreement Ext. PW3/A which clearly stipulates that after completion of course, there is "NO JOB GUARANTEE".*
>
> *40.The prospective monthly income of the deceased on the basis of course being perused by her is assessed to Rs.15,000/- per month. Therefore, in view of the ratio laid down by the Hon'ble Supreme Court in **Sarla Verm's** case supra, sum of Rs.7500/- per month can be taken as contribution to the family. Hence annual income would be Rs.7500x12=Rs.90,000/-. Having considered age of the parents and accepting the fact that age of mother was between 45 to 50 years and of father more 50 years at the time of accident, the appropriate multiplier would be 11 (eleven). Therefore, the compensation works out to Rs.90,000/- x11=Rs.9,90,000/-. Apart from this, the petitioners are also entitled for a sum of Rs.25,000/- for loss of love and affection and additional sum of Rs.25,000/- as funeral expenses in view of the ratio laid down by the Hon'ble Supreme Court in **Rajesh & others vs. Rajbir Singh & Ors., 2013 (3) Civil Court Cases 015 (S.C.).** Therefore, actual calculation of compensation under different heads is as under:-*
>
> *(i) Loss of dependency to the family Rs.9,90,000/-*
> *(ii) Loss of love and affection Rs.25,000/-*
> *(iii) Funeral Expenses Rs.25,000/-*
> *Total compensation Rs.10,40,000/-*
> *(Rupees ten lacs, forty thousand only)."*

8. The compensation awarded can neither be said to be excessive nor meager at all. Keeping in view the facts and circumstances of the case, I hold that the compensation awarded is just and appropriate.

9. The insurer, through the medium of appeal filed by them, has sought exoneration on the ground which stands already discussed by the Tribunal in para 42 of the impugned award. It is apt to reproduce para 42 of the impugned award herein:

> *"42.Admittedly, respondent No. 3 is the insurer of Tempo No.PB-03T-4804 as per goods carrying package policy Ext. RW-1/B. The vehicle was duly insured w.e.f 25.3.2009 to 24.3.2010. The accident took place on 10.9.2009 during subsisting period of the insurance. There is nothing on record to infer that offending vehicle was being plied in contravention of the insurance policy Ext. RW-1/B and against the provisions of Motor Vehicle Act, 1988. Therefore, the respondent No.3, being the insurer of Tempo No. PB-03T-4804 is liable to indemnify the compensation award."*

10. I have gone through the findings returned by the Tribunal, which are legal one, need no interference.

11. Accordingly, both the appeals are dismissed along with pending applications, if any. The impugned award is upheld.

12. The insurer is directed to deposit the amount within six weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award. Send down the record forthwith.

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

Kekti Devi ...Appellant.

Versus

State of H.P. ...Respondent.

Criminal Appeal No.87 of 2011
Reserved on : 29.4.2015
Date of Decision : May 22, 2015.

N.D.P.S. Act, 1985- Section 20(b)(ii)(c)- Accused was carrying a rucksack on her back- she tried to throw away the rucksack and run away from the spot on seeing the police- she was apprehended- rucksack was searched and 2.5 kg of charas was recovered- testimonies of police officials were clear, consistent, cogent and reliable – minor variations regarding the time are not sufficient to make the prosecution case doubtful - link evidence was also proved- accused had failed to discharge the burden to account for the possession of charas- she had failed to discharge the presumption that possession was not conscious - therefore, she was rightly convicted by the trial Court. (Para-10 to 37)

Cases referred:

Dharampal Singh v. State of Punjab, (2010) 9 SCC 708
Madan Lal and another vs. State of H.P., 2003 (7) SCC 465

Dehal Singh v. State of Himachal Pradesh, (2010) 3 SCC (Cri) 1139
Shivaji Sahabrao Bobade & another vs. State of Maharashtra, (1973) 2 SCC 793
Sama Alana Abdulla v. State of Gujarat, (1996) 1 SCC 427
Ravindra Shantram Savant v. State of Maharashtra, (2002) 5 SCC 604
Girija Prasad (dead) by LRs v. State of M.P., (2007) 3 SC (Cri) 475
Radha Mohan Singh v. State of U.P., (2006) 2 SCC 450
State of Rajasthan v. Bhawani, (2003) 7 SCC 291
State of U.P. v. Krishna Gopal and another, (1988) 4 SCC 302
State of Punjab v. Baldev Singh, (1999) 6 SCC 172

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

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Kekti Devi, hereinafter referred to as the accused, has assailed the judgment dated 28.10.2010/29.10.2010, passed by Special Judge Kullu, Himachal Pradesh, in Sessions Trial No.50 of 2009, titled as *State v. Kekti Devi*, whereby she stands convicted of the offence punishable under the provisions of 20(b)(ii)(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the Act), and sentenced to undergo rigorous imprisonment for a period of ten years and pay fine of Rs.1,00,000/- and in default of payment thereof, to further undergo simple imprisonment for a period of six months.

2. It is the case of prosecution that on 29.3.2009, ASI Bhup Singh (PW-2), alongwith Constable Sohan Singh (PW-1) and lady Constable Veena Devi (not examined), was on a patrol duty. At about 4 p.m., when they reached near a place known as Jari Ban Jungle (near Baladhi bridge), the noticed a lady, carrying a rucksack on her back, coming from Baladhi side. Seeing the police party, she got perplexed and tried to throw away the rucksack. She also tried to flee, but was apprehended. On questioning, she disclosed her name as Kekti Devi. ASI Bhup Singh suspected that she may be carrying some contraband substance. After complying with the statutory provisions and obtaining her consent vide memo (Ex. PW-1/A), he searched the bag, from which five stick like (Gullanuma) packets, wrapped in polythene, which contained Charas, were recovered. Same were weighed and found to be 2.5 kgs. Two samples, each weighing 25 grams, were drawn and sealed with seal impression 'A'. Remaining bulk parcel was also sealed with the very same seal impression. NCB forma (Ex. PW-2/B) were filled up in triplicate. Ruka (Ex. PW-2/C) was taken by Constable Sohan Lal, on the basis of which FIR No.134, dated 29.3.2009 (Ex. PW-5/A), under the provisions of Section 20 of the Act, was registered at Police Station, Sadar, Kullu, by SHO Prem Dass (PW-5). After the file was taken back to the spot, accused was arrested and remaining formalities completed. ASI Bhup Singh produced the contraband substance before SHO Prem Dass (PW-5), who resealed the same with his seal impression 'H', whereafter it was handed over to MHC Roop Singh (PW-9), who deposited the same in the Malkhana. HHC Om Parkash (PW-4) deposited the sealed samples with the Forensic Science Laboratory, Junga. Report (Ex. PA) of the laboratory revealed the contraband substance to be Charas. With the completion of investigation, which prima facie, revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 20 of the Act, to which she did not plead guilty and claimed trial.

4. During the pendency of trial, entire bulk parcel was also sent for analysis. HC Ram Krishan (PW-6) handed over the same to HHC Tek Singh (PW-7), who deposited it with the Forensic Science Laboratory, Junga and report (Ex. PB) was produced before the Court.

5. In order to establish its case, prosecution examined as many as 9 witnesses and statement of the accused under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which she took the following defence:

> "I am innocent. Last year on 29.3.2009 alongwith my minor son and one Dharma Devi were sitting in the rain shelter at a place known as Jari. We were waiting for the bus in order to reach C.H.C. Jari. At about 9.30 AM some policemen came there. They found an unclaimed bag containing some black substance in it. Police enquired about the ownership of the said bag. When nobody claimed the said bag, the police opened the said bag and found some black substance which was wrapped in polythene paper. The police also found the word "Malana Cream" printed on some of the packets. Our name and addresses were ascertained. We disclosed to the policemen that we both are residents of Malana. Thereafter, the said policemen took us to P.P. Jari. On that day my son was suffering from fever and my arm was also fractured, whereas, Dharma Devi was down with chicken pox. On the same evening the police called father of Dharma Devi and handed over my minor son to him. We both have been falsely detained in the case and two different cases have been foisted against us."

No evidence in defence was led.

6. Based on the testimonies of the witnesses and the material on record, trial Court convicted and sentenced the accused, as aforesaid.

7. It is contended by Mr. Chitkara, learned counsel for the accused, that the accused stands falsely implicated and the defence set up by her stands probablized. In this connection, he also invites our attention to document (Ex. D-1), revealing the fact that accused Dharma Devi was suffering from chickenpox.

8. On the other hand, Mr. V.S. Chauhan, learned Additional Advocate General, has supported the judgment and the findings so rendered by the trial Court, for the reasons contained therein.

9. Having heard learned counsel for the parties, we are of the considered view that no case for interference is made out in the present appeal.

10. Significantly, when the accused was produced before the Magistrate, no protest was made. Also, there is no suggestion, much less proof of the custody of the child of Kekti Devi being handed over to the father of Dharma Devi, who also has not been examined as a defence witness. It is not the case of the accused that she and Dharma Devi are close relatives or there was none in the family of Kekti, who could have looked after the child. Also, there is no positive evidence that in fact, father of Dharma Devi did come to Odidhar. It is not that the rain shelter of Jari was located at an isolated place, having no habitation around. Accused admits presence of other persons on the spot, as she states that "police enquired about the ownership of the said bag". Now, who are these persons? Why is it that the ladies did not protest against their false implication? Why would police take them to the

Police Post? Now, all these questions remain unanswered by the accused. It has not come on record that police harboured any animosity or on suspicion had taken them to the Police Post.

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

12. In *Dharampal Singh v. State of Punjab,* (2010) 9 SCC 708, the Hon'ble Supreme Court of India, held that the initial burden of proof of possession lies on prosecution and once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt. But what is required to prove innocence by the accused would be preponderance of probability. Once plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence. Offences under the Act being more serious in nature higher degree of proof is required to convict an accused. It needs no emphasis that the expression possession is not capable of precise and completely logical definition of universal application in context of all the statutes. Possession is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18/20 of the Act once possession is established, the accused, who claims that it was not a conscious possession, has to establish it because it is within his special knowledge. Section 54 of the Act raises presumption from possession of illicit articles.

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

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

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

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

> "6. Even at this stage we may remind ourselves of a necessary social perspectives in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of

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

17. In the instant case, no independent witness has been associated by the police party, while carrying out the search and seizure operations. Thus, the prosecution case rests on the testimony of police officials.

18. It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. However, the rule of prudence demands that the Court should be conscious before putting blind reliance upon the testimonies of police officials. Thus, if testimony of the police official is consistent and credible in nature and satisfies the trust of truthfulness, there is no bar to base conviction upon such testimony of the police officials.

19. In *Sama Alana Abdulla v. State of Gujarat, (1996) 1 SCC 427,* the Court held that the evidence of police witnesses cannot be rejected on the ground that they are police witnesses and were members of the raiding party. Also, the Court held that evidence of police officer cannot be discarded merely because he is police official, in absence of hostility to the accused. In the present case also, there is no enmity between the Investigating Officer and the accused. Had there been any intention of the Investigating Officer to plant the contraband substance on the accused, then he might have planted small quantity of Charas.

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

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

22. We find the prosecution to have established its case, beyond reasonable doubt, through the testimonies of police officials ASI Bhup Singh (PW-2) and Constable Sohan Singh (PW-1), who conducted the search and seizure operations. Their testimonies are clear, consistent, cogent and the witnesses reliable. There is nothing in their testimonies, which would render their testimonies to be doubtful or the witnesses to be unreliable or not worthy of credance.

23. ASI Bhup Singh (PW-2) states that on 29.3.2009, he alongwith Constable Sohan Singh(PW-1) and a lady Constable Veena Devi was on patrol duty. At about 4 p.m., a lady came from village Baladhi side, carrying a pithu (rucksack) on her back. Seeing the police party, who were in the uniform, the lady turned back and tried to throw away the bag, which she was carrying. She was apprehended and on query disclosed her name to be Kekti Devi, so identified as the accused in the Court. He clarifies that the place was lonely and no independent witness was either available or could be associated. As such, he associated his companions. Since he suspected the accused to have carried some contraband substance, in her bag, after informing her of her statutory rights and obtaining her consent (Ex. PW-1/A) for searching the bag (Ex. P-3), he searched the same. He states that from the bag on which 'One Polar' was written, so searched her bag, from which five stick like packets, wrapped in polythene, containing Charas were recovered. Contraband substance was weighed and found to be 2.5 kgs. Two samples, each weighing 25 grams (Ex.P-2), were drawn and sealed with four seal impression of seal 'A' and remaining bulk parcel (Ex.P-1) was sealed with the very same seal impression. NCB form (Ex. PW-2/B) was filled up in triplicate. Ruka (2/C) was sent through Sohan Singh to the Police Station for registration of the FIR. He also completed proceedings on the spot and sent Special Report (Ex. PW-2/F) to the Deputy Superintendent of Police. At the Police Station, he deposited the contraband substance with the SHO, who resealed the same with four seals of impression 'H'. Despite extensive cross-examination, we do not find his testimony to have been shattered or rendered doubtful, in any manner. In fact, his version stands duly corroborated by Constable Sohan Singh, on material points.

24. There is some variation and discrepancy with regard to the time within which accused was apprehended. But then, this fact alone would not render the witnesses to be unreliable, their testimonies unbelievable or the prosecution case to be doubtful. In our considered view, presence of the accused, recovery of the contraband substance from her conscious possession, stands proved, beyond reasonable doubt.

25. In *Radha Mohan Singh v. State of U.P.*, (2006) 2 SCC 450, the Court further held that it is for the Judge to consider in each case whether the witness stands thoroughly discredited or can be still believed in regard to a part of his evidence. If the evidence is not completely shaken, the Court may after considering the evidence as to whole with due care and caution except in the light of other evidence on the record. That part of his evidence which is found creditworthy and act upon it, the testimony of such witness may not be rejected out rightly. Also in *State of Rajasthan v. Bhawani*, (2003) 7 SCC 291, the Court held that corroboration is rule of prudence for satisfying test of reliability. That part of witness's evidence found believable can be used for the purpose of corroborating the

evidence of other witnesses. Evidence which is not shaken by the cross-examination cannot be brushed aside.

26. There can be no dispute with the proposition that benefit of every doubt has to go to the accused, but before such a benefit can be extended, the doubt must be reasonable and not each and every doubt, which may arise. Explaining this principle, the Hon'ble Supreme Court of India, in *State of U.P. v. Krishna Gopal and another,* (1988) 4 SCC 302, has held that:

> "Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. *To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehension. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case."* (Emphasis supplied).

27. As pointed out by the Hon'ble Supreme Court of India in *State of Punjab v. Baldev Singh,* (1999) 6 SCC 172, drug abuse is a social malady. While drug addiction casts into the vitals of the society, drug trafficking not only casts into the vitals of the economy of a country, but illicit money generated by drug trafficking is often used for illicit activities including encouragement of terrorism. It has acquired the dimensions of an epidemic, affects the economic policies of the State, corrupts the system and is detrimental to the future of a country. Reference in the said decision has also been made to certain Conventions of the United Nations against illicit trafficking in Narcotic Drugs, which the Government of India has ratified. It is, therefore, absolutely imperative that those who indulge in these kind of nefarious activities should not go scot-free on technical pleas which come handy to their advantage.

28. Applying the test laid down by the Hon'ble apex Court in the present case, there is nothing on record, which can be called as a reasonable doubt. On the other hand, the prosecution evidence has been corroborated in material particulars, both by ocular version and documentary proof, including the report (s) of the chemical analyst.

29. We find the prosecution case to have been established even by way of link evidence. SHO Prem Dass is categorical in his deposition that on the basis of ruka, so received at the Police Station, FIR was registered and file handed over to Sohan Singh. Also, when ASI Bhup Singh produced the case property before him, he resealed the same with seal impression 'H'. Necessary entries were made in the NCB form (Ex.PW-2/B) and the case property deposited, alongwith the NCB form, in the Malkhana. Till such time, the case property remained with him, it was not tampered with.

30. Testimony of Roop Singh (PW-9), MHC, is also to the effect that entry of the contraband substance was made in the Malkhana Register (Ex. PW-9/A) and the sealed samples were handed over by him, alongwith the Road Certificate (Ex. PW-9/B) to be taken to the Forensic Science Laboratory. Om Parkash (PW-4), after depositing the case property at the Laboratory, deposited the receipt with the MHC. He states that so long as the samples remained in his possession, the same were not tampered with. Their depositions are clear, consistent and there is nothing which would render the same to be doubtful. Bulk parcel was also deposited with the Forensic Science Laboratory for analysis. HC Ram Krishan (PW-6), who was posted as MHC at the relevant time, sent the same through Tek Singh (PW-7) to the Laboratory. Even they have deposed that so long as the parcel remained with them, it was kept in safe custody and not tampered with.

31. Reports of the Forensic Science Laboratory (Ex. PA & PB) reveal the contraband substance, so recovered from the conscious possession of the accused, to be charas.

32. It be also observed that before leaving the Police Post, entry of departure was made by the police party, which stands proved by the prosecution witnesses. Thus, genesis of the prosecution story also cannot be said to be false.

33. Also, we find that Special Report (Ex. PW-2/F) was promptly sent to the superior Officer, which fact is evident from the testimony of HC Harbans Kumar (PW-3).

34. So, in view of the above discussion, evidence in hand and the law laid down by the Hon'ble Supreme Court of India, prosecution has successfully proved beyond all reasonable doubt that the accused was in conscious and exclusive possession of Charas.

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

36. In our considered view, prosecution has been able to establish guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

37. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

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

Cr. Appeal No. 469 of 2012 with
Cr. Appeal No. 4029 of 2013.
Reserved on: May 20, 2015.
Decided on: May 22, 2015.

1. Cr. Appeal No. 469 of 2012

Mandeep ……Appellant.
Versus
State of H.P. …….Respondent.

2. Cr. Appeal No. 4029 of 2013

Yog Raj alias Raju ……Appellant.
Versus
State of H.P. …….Respondent.

Indian Penal Code, 1860- Sections 302 and 120-B – Construction work of IPH Sub Division at Village Gharyana Brahmana, District Hamirpur was allotted to the deceased- deceased had engaged accused as a sub-contractor to execute the electrical fitting and paint work- accused was not carrying out the work to the satisfaction of the deceased and due to the deficiency, payment of the accused was withheld by the deceased- deceased visited the construction site to supervise the work where he expressed his dissatisfaction with the work done by the accused- he also refused to make the payment till the deficiency was removed- accused left the spot - he returned with the co-accused armed with a baseball bat and hit the deceased due to which the deceased became unconscious and died- witnesses duly proved the presence of the accused at the spot- accused made a disclosure statement on the basis of which baseball bat was recovered- keys of the vehicle, clothes and danda were also recovered- medical evidence proved that deceased had died due to the head injury and injury to brain leading to neurogenic shock and death- injury could have been caused by means of baseball bat- held, that in these circumstances, guilt of the accused was duly proved.

For the appellant(s): M/S. A.K.Vashista and Chaman Negi Advocates for respective accused.
For the respondent: Mr. P.M.Negi, Dy. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since both the appeals have arisen from a common judgment, the same were taken together for hearing and are being disposed of by a common judgment.

2. These appeals are directed against the common judgment dated 19/30.10.2012, rendered by the learned Addl. Sessions Judge, Hamirpur, H.P., in Sessions Trial No. 16 of 2011, RBT No. 7 of 2012, whereby the appellants-accused (hereinafter referred to as the "accused"), were charged with and tried for offence punishable under Sections 302 and 120-B IPC. Appellant Mandeep, in Cr. Appeal No. 469 of 2012 was convicted and sentenced to undergo imprisonment for life and to pay fine of Rs. 25,000/- under Section 120-B IPC. Appellant Yog Raj alias Raju in Cr. Appeal No. 4029 of 2013 was convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs.25,000/- for the offence punishable under Section 302 IPC and to further undergo imprisonment for life and fine of Rs. 25,000/- for the offence punishable under Section 120-B IPC.

3. The case of the prosecution, in a nut shell, is that deceased Subhash Verma son of Sh. Shingar Singh Verma was a Govt. Contractor and executing construction work of IPH Sub Division Office Building at Village Gharyana Brahmana, Distt. Hamirpur, H.P. pursuant to an award of construction by the Ex. Engineer, Hydrology Construction and Maintenance Division, Chakkar, Distt. Shimla, H.P. The construction work commenced w.e.f. 13.5.2010. The deceased Subhash Verma had engaged accused Mandeep as a sub-contractor to execute the electrical fitting and paint work in the building. The accused Mandeep was not performing the job to the satisfaction of the deceased and due to deficiency in his work, his payment had been withheld by the deceased, due to which he was nursing grudge against him. Accused Mandeep on the basis of telephonic conversation with the deceased, knew that he will be visiting the construction site to supervise the work on 12.5.2011. On 11.5.2011, the accused persons hatched a criminal conspiracy to eliminate

the deceased and in pursuance of the agreement, committed his murder on 12.5.2011 at 8:45 AM inside the under-construction building. The accused Mandeep visited the construction site on 12.5.2011, at about 7:00 AM to confirm the visit of the deceased where he met the complainant Dhani Ram being a mason who was working overtime in the building. The deceased Subhash Verma came to the construction site in his Car No. DL-6CG-5791 at about 8:15 AM and met the complainant Dhani Ram, who told him about the visit of accused Mandeep in the morning. At about 8:33 AM, the deceased and the accused Mandeep had a telephonic conversation and after about 10 minutes, he came on the spot on his motorcycle. The deceased Subhash Verma expressed his dissatisfaction with the electrical fitting and paint work done by the accused Mandeep. The deceased also refused to make the payment till the deficiency was made good. Thereafter, the accused Mandeep left the spot angry. Accused Mandeep shortly thereafter returned back alongwith accused Yog Raj alias Raju duly armed with a baseball bat. The mason Dhani Ram (complainant) had left the spot by that time. On reaching the construction site, the accused Mandeep stood guard outside near the Santro Car of the deceased and accused Yog Raj went inside the building armed with the baseball bat and hit the contractor Subhash Verma on his head, due to which he fell down unconscious and sustained fatal injuries. The accused Yog Raj alias Raju took out the keys of the Car and purse from the pocket of the deceased and thereafter came out of the building running towards the vehicle. The accused Yog Raj tried to start the Car of the deceased but on seeing the complainant Dhani Ram and one Sanjeev Kumar coming on the spot, both the accused left the vehicle and ran towards the path through the bushes alongwith the weapon of offence. The complainant Dhani Ram and Sanjeev Kumar on seeing the accused persons running from the spot alongwith the baseball bat, went inside the building and saw the contractor Subhash Verma lying unconscious and injured inside the room with head injuries. The complainant immediately called for the Ambulance and took the injured Subhash Verma to RH Hamirpur. Injured Subhash Verma was examined by Dr. Sanjeev Krishan Dhiman. Subhash Verma died due to injury received by him at 12:05 PM. Inquest papers were prepared. Viscera for chemical examination was preserved. The dead body was handed over to the relative Pankaj Dhadwal. Statement of Dhani Ram under Section 154 Cr.P.C. was recorded, on the basis of the disclosure of facts by the complainant, case under Section 302/34 IPC at PS Hamirpur Sadar was registered vide FIR No. 105/11 dated 12.5.2011. The spot was visited and photographs were taken by the police. Blood stains from the room were preserved. Santro Car was taken into possession. The accused were arrested. On 13.5.2011, accused Yog Raj made disclosure statement to the effect that he had concealed the baseball bat and could facilitate its recovery. The baseball bat was recovered at Garne-Da-Galu. It was measured and taken into possession by the police. The baseball had blood stains. On 14.5.2011, accused Yog Raj made another disclosure statement to the effect that he had concealed the keys of Car and clothes worn by him at the time of murder in his house and could facilitate its recovery. The clothes and keys were recovered vide separate memos. On 16.5.2011, accused Mandeep made disclosure statement to the effect that purse (wallet) of deceased Subhash Verma containing documents etc. has been concealed in his residence and he could facilitate its recovery therefrom. The same was recovered. It was sealed and taken into possession. The memo was signed by accused and two independent witnesses R.S.Chandel and Baljeet Singh. The test identification parade of the accused Yog Raj was conducted by the learned Judicial Magistrate, Ist Class (III), Hamirpur at Sub Jail, Hamirpur, H.P., on 25.5.2011. The police also procured the details of mobile numbers 91293-64695 (used by accused Yog Raj), 98167-93665 (used by accused Mandeep) and 93187-33777 (used by deceased Subhash Verma). The subscriber record with respect to mobile Nos. 98167-93665 and 91293-64695, was also procured. The post mortem examination was got conducted. The report of the FSL

was received. 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 33 witnesses. The accused were also examined under Section 313 Cr.P.C. They have denied the prosecution case. According to them, they were falsely implicated. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, these appeals on behalf of the accused persons.

5. Mr. A.K.Vashista, Advocate and Mr. Chaman Negi, Advocate for the respective accused, have vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. P.M.Negi, learned Dy. AG, for the State has supported the judgment of the learned trial Court dated 19/30.10.2012.

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

7. PW-1 Sanjeev Kumar, deposed that he used to do work of shuttering of contractor Subhash Verma. Subhash Verma met him at Vill. Gharyana Brahmana on 8.5.2011 and told to meet him on 12.5.2011 at Daryana Brahmana. On 12.5.2011, he went to Village Gharyana Brahmana and reached there at 9:00 AM. There was a temple on left side of the path. He offered prayers in the temple and there was also a tiala and he went to the tiala of tree of 'but'. There was a Santro Car parked on right side on the road. Mandeep Singh was standing adjoining the said vehicle. Mandeep Singh accused was standing nearby the vehicle. Mandeep Singh was seeing towards all sides. There was DL number on the said Santro Car. In the meantime, one young boy came running to the spot from the side of under construction building towards the Car. He identified him as Raju in the Court. He was carrying a baseball bat in his hand. Raju immediately sat in the Car. As soon as Raju sat in the Car, one person came from upper side shouting as Contractor-Contractor and on hearing so, both Raju as well as Mandeep Singh ran towards the path through bushes. He came to know that the person who came from upwards and calling Contractor-Contractor was Dhani Ram, mason. He immediately went inside the under construction building. He alongwith Dhani Ram mason saw Subhash Verma, Contractor lying injured inside a room of the building and there were injuries on his head. Villagers including 3-4 ladies also came on the spot. Subhash Verma was lying unconscious. After about 20 minutes, Ambulance came and Subhash Verma was taken to the hospital. He identified accused Raju in District Jail, Hamirpur. He also identified base ball bat Ext. P-1. He denied the suggestion in his cross-examination that he was shown the bat by the police earlier. He did not raise hue and cry. He did not remember the number of Santro Car. He did not run after Raju and Mandeep Singh nor he attempted to chase them. Volunteered that he never knew about the occurrence initially and he did not raise hue and cry. The accused, according to him, ran away from the spot. He also went to the Jail for identification. He came to Police Station about 5 days after the occurrence. Dhani Ram did not meet him when he came to the police station after the occurrence. Dhani Ram did not accompany him when he went to District Jail, Hamirpur, for identification. When they went to the Jail, they sat at the main Gate and made entry in the register. There were 10-12 persons when he identified the accused. All were standing in a line. They were not asked to walk or run. He did not come to Hamirpur after identification parade in the jail. He went to jail for identification after lunch hours. His statement was recorded on 12.5.2011. He did not see who attached Subhash Verma.

8. PW-2 Ail Kumar deposed that at about 8:30 AM, accused Mandeep came on his bullet motorcycle. He stopped it and had a talk with him. Mandeep told him that he was executing work of the building and then he also went with him on his motorcycle to the

under construction house of a Govt. building at Village Gharyana. He was introduced to Contractor Subhash Verma and then he also started talking to Dhani Ram Mason. Mandeep and Contractor Subhash Verma were talking about the construction work of the building. Contractor and Mandeep were having normal talk about work of the window. They were saying that work of the window was not satisfactory. Thereafter, he and Mandeep came from there on the motorcycle of Mandeep. He was declared hostile and cross-examined by the learned P.P. He admitted that when they came from the spot, they met a person on the road. That person was not personally known to him. He could not say that his name was Yog Raj alias Raju. He did not identify Raju in the Court.

9. PW-3 Gurdev Jagota, deposed that he alongwith Up Pradhan Baljeet Singh went to the spot. On reaching, they saw that the Contractor was lying unconscious in a room of the under construction building. The employees of I & PH department told him that the name of Contractor was Subhash Verma. Ambulance came on the spot. Dhani Ram was working as labourer in the building. The police came to the spot and collected blood stains from the spot and put the same in a vile and the vile was sealed. Memo Ext. PW-3/A was prepared and signed by him alongwith Baljeet Singh and Tara Singh. He was again called by the police to the spot on 13.5.2015. Raju made disclosure statement that he would get danda recovered vide Ext. PW-3/C. It was signed by him as well as Baljeet Singh, Up Pradhan. Accused got the danda recovered from behind the bushes. It was taken into possession vide memo Ext. PW-3/D. It was sealed in a cloth parcel. He signed the same. On 14.5.2011, Raju made another disclosure statement that he would get recover key of vehicle and clothes which he had kept in his house vide Ext. PW-3/E.

10. PW-4 Tara Chand, deposed that the accused got the danda recovered vide memo Ext. PW-3/B. The danda is Ext. P-1.

11. PW-5 Ashwani Kumar, deposed that the accused Raju handed over the keys which were taken from the house on 14.5.2011.

12. PW-6 Rasam Singh Chandel deposed that Mandeep made disclosure statement vide Ext. PW-6/A. It was signed by him and Baljeet. They went to the Village Kohli. Mandeep opened the gate of the house and went into a room and got recovered one purse from below the mattresses from a double bed.

13. PW-7 Kusum Lata Verma is the widow of late Subhash Verma. According to her, on 11.5.2011, her husband came from Shimla in Santro Car. He was executing construction work of I & PH department in Distt. Hamirpur. He came to make payment to the labourers. Her husband was having mobile phone No. 93187 33777.

14. PW-8 Swarup Chand deposed that he was going on the road at Gharyana Brahmana towards I & PH Tank and in the meantime, Dhani Ram was coming running on the road from the tank side shouting that they had to chase the killers of the Contractor.

15. PW-9 Ajay Kapoor deposed that the deceased was his brother-in-law. He had given Car No. DL-6CG-5791 to his brother-in-law.

16. PW-12 Ramesh Chand, has proved report Ext. PW-12/A qua the Car.

17. PW-14 Dhani Ram, deposed that he was employed as mason with I & PH department in construction of a building near Village Gharyana Brahmana. Subhash Verma was executing the construction work as Contractor. He had further assigned the work of electric fitting to some other person and he did not remember his name. On 12.5.2011, he went at about 7:00 AM at the site of construction of the building in order to make holes in the stairs. At that time the person who was executing electric fitting work came there. That

sub-contractor asked him about his working there at the early hours and he told him that he was working as over time as he was to go somewhere else to work after 9:00 AM. The paint work was also being done by the same person and he told him that the contractor was not making payment of the work done by him. Thereafter, that sub-contractor went away from the site. Contractor Subhash Verma came at the site at about 8:30 AM. After Subhash Verma came there, he was talking to someone on his mobile phone. Sub contractor alongwith another person came there on a bullet motorcycle. He identified the accused in the Court. Thereafter, Subhash Verma and sub-contractor went inside the building. Subhash Verma asked the sub contractor to execute the electricity fitting work correctly as the electricity wires were hanging from the ceiling and then the sub contractor did not say anything. Thereafter, sub contractor alongwith the second person went away on the bullet motorcycle and the contractor Subhash Verma was at the construction site and he went to take meals. After taking meals, when he was going to attend the second work and when he was walking near the water tank, he saw a person alighting from the car of Subhash Verma. He could see that person from his back, who was wearing white shirt and he asked him to stop, but he ran away. He was holding something in his hand, but he could not see his face. He was declared hostile and cross-examined by the learned P.P. In his cross-examination, he deposed that he had went inside the under construction building and saw Subhash Verma lying injured. He shouted that the contractor has been killed. Then, he rushed towards the village and he met a fitter Swarup of IPH department and he told him that one person wearing white shirt had injured Subhash Verma contractor, who was lying inside the building. He also went to village and told Daulat Ram Sharma and other villagers about the incident. The villagers appeared on the spot. He admitted that accused Mandeep was executing electrical work of the building. He identified him in the Court. In his cross-examination by the Advocate on behalf of the accused, he admitted that Mandeep along with other person went away from the site of work at 8:30 AM. He saw only white shirt person for the second time. He came to know about the name of Raju only at the Police Station.

18. PW-15 Rajeev Sharma, told that Subhash Verma asked him to execute the electrical work in the building being constructed by him at different places. He was already over busy and then he introduced Mandeep to Contractor Subhash Verma.

19. PW-16 Dr. Sanjeev Krishan Dhiman examined the deceased on 12.5.2011 at 10:15 AM. He also conducted the post mortem examination. The MLC is Ext. PW-16/B. The post mortem examination report is Ext. PW-16/C. According to his opinion, the deceased died due to head injury (depressed fracture of skull) and injury to brain leading to neurogenic shock and death. He gave his opinion after examining the base ball bat. The depressed fracture could be possible with Ext. P-1 and the injury was sufficient in ordinary course to cause death.

20. PW-17 Bhagirath deposed that his no relative remained subscriber of phone No. 91293 64695. He never filled the form Ext. PW-17/A to become subscriber.

21. PW-18 Kanta Devi deposed that she has not filled form Ext. PW-18/A.

22. PW-20 Const. Anil Kumar has taken the case property to RFSL, Gutkar.

23. PW-21 Devender Verma, deposed that on the request of the police, he issued call details of mobile No. 98167 93665 w.e.f. 1.5.2011 to 12.5.2011 vide Ext. PW-21/A. It was computer generated.

24. PW-22 Madan Lal Sharma, has proved original computerized record of mobile No. 93187 33777 w.e.f. 2.5.2011 to 12.5.2011 vide Ext. PW-22/A.

25. PW-23 Vishal Thakur has proved computerized record of mobile No. 91293-64695 w.e.f. 11.5.2011 to 12.5.2011 vide Ext. PW-23/A.

26. PW-24 Const. Suresh Kumar deposed that at 12:05 PM, an information was received from RH Hamirpur through ASI Bhup Singh, that Subhash Verma Contractor who was brought to the hospital has died.

27. PW-25 HC Sunil Kumar deposed that the case property deposited with him was sent to RFSL Gutkar, Mandi by him.

28. PW-26 ASI Bhup Singh deposed that he moved an application for preparation of MLC vide Ext. PW-16/A.

29. PW-27 Const. Raj Kumar deposed that the motorcycle was taken into possession alongwith its key vide memo Ext. PW-27/A.

30. PW-28 HC Amar Nath deposed about the articles recovered from the possession of accused Mandeep.

31. PW-29 Yashwant Singh deposed about the articles recovered from the possession of accused Yog Raj.

32. PW-30 ASI Jai Dev deposed that Const. Anil Kumar has brought one statement of Dhani Ram Ext. PW-14/A to the PS, on the basis of which computerized FIR was registered.

33. PW-31 ASI Parveen Kumar deposed that he has collected the information in respect of mobile numbers 98167 93665, 93187 33777 and 91293 64695 from the concerned Nodal Officer of the Airtel.

34. PW-32 SI Rajinder Kumar has recorded the statement of Hari Dass, Sr. Assistant, IPH Office, Shimla.

35. PW-33 Insp. Anant Ram deposed that on 12.5.2011, M.O. R.H. Hamirpur formed PS Hamirpur that a person in an injured and unconscious condition had been brought to the hospital. He visited the spot in a private vehicle. At 12:05 PM, ASI Bhup Singh informed the PS Hamirpur that the person named Subhash Verma has died. Rapat to this effect was registered. The statement of Dhani Ram Ext. PW-14/A was recorded. FIR Ext. PW-30/A was registered. He collected blood stains from the room of Subhash Verma deceased with the help of cotton. Car was taken into possession. The post mortem of the dead body was got conducted. The photographs of the deceased were taken in the hospital. On 12.5.2011, he recorded the supplementary statement of Dhani Ram. He interrogated the accused. The accused Yog Raj made disclosure statement Ext. PW-3/C on the basis of which, baseball bat was recovered. He observed blood on the baseball bat. It was taken into possession. On 14.5.2011, accused Yog Raj made disclosure statement Ext. PW-3/E that he has concealed the keys of car and pants worn by him. These were got recovered by him. Accused Mandeep also made disclosure statement on 16.5.2011 that he could get recover the purse vide Ext. PW-6/A. The purse was got recovered at his instance. The case property was sent to RFSL, Gutkar, Mandi on 18.5.2011. He also got vehicle mechanically examined. During investigation, on 20.5.2011, an application was moved for test identification parade of Yog Raj alias Raju before JMIC, Court No. 3, Hamirpur. It was held on 25.5.2011 in Sub Jail, Hamirpur. In his cross-examination, he deposed that Dhani Ram was first person to reach on the spot. Sanjeev Kumar told him at 3:30 PM on 12.5.2011 that he was eye witness to the occurrence. He recorded the statement of Sanjeev Kumar on 12.5.2011 in his own hand writing. He also deposed that prior to conducting of test

identification parade on 25.5.2011, accused Yog Raj remained under muffled face. The identity of the accused was kept secret while taking him at various places.

36. PW-1 Sanjeev Kumar has identified accused Mandeep in the Court. According to him, one young boy came running to the spot from the side of under construction building towards the Santro Car. He identified him as Raju in test identification parade held in the Sub Jail, Hamirpur. According to him, when the accused saw him and heard Dhani Ram, they ran towards the path through the bushes. He and Dhani Ram immediately went inside the under construction building. He alongwith Dhani Ram mason saw Subhash Verma, Contractor lying in injured condition inside a room of the building. He was carrying a baseball bat in his hand. He identified baseball bat Ext. P-1. The test identification report is Ext. PA. It is duly signed by the Judicial Magistrate Ist Class, Court No. 3, Hamirpur. PW-2 Anil Kumar also deposed that at about 8:30 AM, accused Mandeep came on his bullet motorcycle. Mandeep told him that he was executing work of the building and then he also went with him on his motorcycle to the under construction house of a Govt. building at Village Gharyana. He was introduced to Contractor Subhash Verma and then he also started talking to Dhani Ram Mason. Mandeep and Contractor Subhash Verma were talking about the construction work of the building. They were saying that work of the window was not satisfactory. Thereafter, he and Mandeep came from there on the motorcycle of Mandeep. It, thus, conclusively proves the presence of accused Mandeep at 8:30 AM at the construction site. Though, he was declared hostile and cross-examined by the learned Public Prosecutor, but in his cross-examination, he admitted that when they came from the spot, they met a person on the road.

37. PW-3 Gurdev Jagota has proved disclosure statement Ext. PW-3/C made by accused Yog Raj alias Raju on 13.5.2011, on the basis of which baseball bat was recovered vide Ext. PW-3/D. He has also proved disclosure statement Ext. PW-3/E dated 14.5.2011 made by accused Yog Raj alias Raju, on the basis of which keys of vehicle and clothes were recovered. The memo of recovery Ext. PW-3/B was signed by PW-4 Tara Chand. He also identified the danda Ext. P-1, which was recovered from the spot and his signatures on danda Ext. P-1. PW-5 Ashwani Kumar has identified signatures on Ext. P-5 parcel. He identified the keys alongwith rings vide Ext. P-6, shirt Ext. P-7 and clothes Ext. P-8 and P-9, which were recovered from the house of the accused Yog Raj. The recovery of purse of deceased from the house of accused Mandeep has been proved on the basis of disclosure statement made by accused Mandeep, vide Ext. PW-6/A. PW-8 Swarup Chand has corroborated the statement of Dhani Ram that Dhani Ram was coming down from the tank road side shouting that they had to chase the killers of the Contractor.

38. PW-14 has supported the case of the prosecution, though declared hostile. He has made statement about the presence of accused Mandeep on the spot on 12.5.2011. He has identified him in the Court. He had seen the other person alighting from the Car of Subhash Verma. The person was wearing white shirt. He asked him to stop but he ran away. In his cross-examination by the learned Public Prosecutor, he deposed that he could not say that the person running downward was holding danda but volunteered that he was holding something in his hand.

39. According to the post mortem report proved on record by PW-16 Dr. Sanjeev Krishan Dhiman, the deceased died due to head injury (depressed fracture of skull) and injury to brain leading to neurogenic shock and death. According to him, injury could be caused with the baseball bat shown to him. It has come on record that the accused were in conversation before and after the incident but they had used telephones which were not in their names, as per the statement of PW-17 Bhagi Rath and PW-18 Kanta Devi. Neither PW-17 Bhagi Rath nor PW-18 Kanta Devi have filled in the subscription forms for telephone

numbers 91293 64695 and 98167 93665. The call details of mobile numbers 91293 64695 and 98167 93665 w.e.f. 1.5.2011 to 12.5.2011 have been duly proved by PW-21 Devender Verma, PW-22 Madan Lal Sharma and PW-23 Vishal Thakur.

40. The case property and viscera were sent for chemical examination at RFSL, Gutkar, Mandi. The report is Ext. PW-33/P. According to the report, human blood group "B" was found on the exhibit-1 (baseball bat), exhibit-2b (pant, Yog Raj), exhibit 3A (blood lifted from the spot), exhibit 3B (blood lifted from the spot), exhibit 4a (T shirt, Subhash Verma), exhibit 4b (vest, Subhash Verma), exhibit 4d (pant Subhash Verma) and exhibit 6 (blood sample, Subhash Verma). The report has been proved by PW-33 Insp. Anant Ram. The recovery of base ball bat and clothes of accused Yog Raj alias Raju have been proved in accordance with law by the prosecution. The blood group "B" was found on base ball bat and clothes of Yog Raj alias Raju. The blood was also found on the clothes of Subhash Verma deceased. The accused Yog Raj alias Raju has been identified by PW-1 Sanjeev Kumar in the Court as well as during the test identification parade and he has seen both the accused running from the Car. The test identification parade has been proved vide Ext. PA. The deceased died due to head injury received as per the final opinion given by PW-16 Dr. Sanjeev Krishan Dhiman. The presence of the accused has been proved on the spot by PW-1 Sanjeev Kumar, PW-2 Anil Kumar and PW-14 Dhani Ram. When Dhani Ram PW-14 was shouting and chasing the accused, he was seen doing so by PW-8 Swarup Chand. The presence of the accused on the spot coupled with the alleged recoveries made at their behest conclusively point towards their guilt. The prosecution has proved the entire chain of events, which conclusively proves the guilt of the accused persons.

41. The learned Advocates, appearing on behalf of the accused, have vehemently argued that the case is squarely based on circumstantial evidence and the prosecution has not attributed any motive. However, the fact of the matter is that accused Mandeep was engaged as sub-contractor by deceased Subhash Verma. He was not happy with the work executed by the sub contractor towards electrical fittings and paint. Deceased Subhas Verma had withheld his payment. Thus, the accused have hatched criminal conspiracy, which led to the murder of deceased Subhash Verma on 12.5.2011. The prosecution has proved the case against the accused persons beyond reasonable doubt.

42. Accordingly, there is no occasion for us to interfere with the well reasoned judgment of the learned trial Judge, who has correctly appreciated the evidence. Consequently, there is no merit in these appeals and the same are dismissed.

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

National Insurance Company Limited …Appellant.
Versus
Smt. Anu Devi & others …Respondents.

FAO No. 242 of 2008
Decided on: 22.05.2015

Motor Vehicle Act, 1988- Section 149- Insurance Company pleaded that it was wrongly saddled with liability and the owner had committed willful breach- insurer had not led any evidence to prove that owner/insurer and driver of the offending vehicle had committed any willful breach- a batch of claim petitions was filed in Utarakhand where insurer was saddled with liability- this award was questioned before the Apex Court by filing SLP which was

dismissed- therefore, the plea of the Insurance Company that it was wrongly saddled with liability cannot be accepted. (Para-3 to 5)

For the appellant: Ms. Devyani Sharma, Advocate.
For the respondents: Mr. Kulbhushan Khajuria, Advocate, for respondents No. 1 to 5.
Mr. G.D. Sharma, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Challenge in this appeal is to the award, dated 31.12.2007, made by the Motor Accident Claims Tribunal, Chamba Division, Chamba (H.P.) (for short "the Tribunal") in MAC Petition No. 56 of 2005, titled as Smt. Anu Devi and others versus Sh. Ganesh Singh Bargali, whereby compensation to the tune of Rs. 8,40,000/- with interest @ 9% per annum from the date of the petition till its realization came to be awarded in favour of the claimants-respondents No. 1 to 5 herein and against the appellant-insurer (for short "the impugned award").

2. The owner-insured and the claimants have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has questioned the impugned award on the grounds that the Tribunal has fallen in error in saddling it with liability as the owner-insured has committed a willful breach, thus, it was not liable to satisfy the award and the amount awarded is excessive.

4. Ms. Devyani Sharma, learned counsel for the appellant-insurer, frankly conceded that so many persons died in the same accident and a batch of claim petitions were filed in Uttrakhand and the insurer was saddled with liability, were questioned before the Apex Court by the medium of the SLPs by the insurer, came to be dismissed and the said findings recorded by the Tribunal in Uttrakhand have attained finality.

5. I deem it proper to record herein that the appellant-insurer has not led any evidence to prove that the owner-insured and the driver of the offending vehicle have committed any willful breach, which would have been a ground for the appellant-insurer to seek exoneration. Only on this count, the appeal merits to be dismissed. The Apex Court has also upheld the award whereby the insurer came to be saddled with liability, thus, the insurer has to satisfy the award in this case also.

6. The second ground of attack is the adequacy of compensation. It is worthwhile to record herein that compensation to the tune of Rs.8,40,000/- has been awarded in favour of the claimants, who are five in number, claimant No. 1 has lost her husband, which has affected her matrimonial home; claimants No. 2 & 3 are the minor sons, who have been deprived of the love and affection of their father and claimants No. 4 & 5 have lost their son, who was 35 years of age at the time of the accident. The parents have been deprived of their source of help in their old age. Thus, it cannot be said that the amount awarded is excessive in any way.

7. Viewed thus, the impugned award merits to be upheld and the appeal merits to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

8. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

9. The appeal is disposed of, as indicated hereinabove, alongwith all pending applications.

10. Send down the record after placing copy of the judgment on the Tribunal's file.

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

FAO No. 133 of 2008 a/w
a/w FAOs No. 379 of 2007
and 18, 19 & 20 of 2008
Reserved on: 15.05.2015
Decided on: 22.05.2015

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1. FAO No. 133 of 2008
National Insurance Company Ltd. …Appellant.
Versus
Smt. Kaushlaya & others …Respondents.

2. FAO No. 379 of 2007
National Insurance Company Ltd. …Appellant.
Versus
Smt. Lalita Devi & others …Respondents.

3. FAO No. 18 of 2008
National Insurance Company Ltd. …Appellant.
Versus
Sh. Madan Singh & others …Respondents.

4. FAO No. 19 of 2008
National Insurance Company Ltd. …Appellant.
Versus
Sh. Madan Singh & others …Respondents.

5. FAO No. 20 of 2008
National Insurance Company Ltd. …Appellant.
Versus
Smt. Kanta Devi & others …Respondents.

Motor Vehicle Act, 1988- Section 149- Insurance Company contended that driver did not have a valid driving licence and the owner had committed willful breach by employing a driver having a fake licence- held, that Insurance Company has to prove that owner knew that licence was fake- mere evidence that licence was fake is not sufficient to absolve the Insurance Company of its liability- Insurance Company had failed to lead the evidence to prove that owner knew that licence was fake and it was rightly held liable. (Para-11 to 16)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, 2013 AIR SCW 6505

Oriental Insurance Company Ltd. Vs. Pratibha Devi and others, ILR, 2014 (IX) HP 1, Page-705

FAO No. 133 of 2008

For the appellant:	Mr. Ashwani K. Sharma, Advocate.
For the respondents:	Mr. Ramesh Sharma, Advocate, for respondents No. 1 to 4. Nemo for respondents No. 5 to 7.

FAO No. 379 of 2007

For the appellant:	Mr. Ashwani K. Sharma, Advocate.
For the respondents:	Mr. V.S. Chauhan, Advocate, for respondents No. 1 to 3. Mr. Neeraj Gupta, Advocate, vice Ms. Jyotika Gupta, Advocate, for respondents No. 4 and 5. Nemo for respondent No. 6.

FAO No. 18 of 2008

For the appellant:	Mr. Ashwani K. Sharma, Advocate.
For the respondents:	Mr. V.S. Chauhan, Advocate, for respondent No. 1. Ms. Charu Gupta, Advocate, for respondent No. 3. Nemo for other respondents.

FAO No. 19 of 2008

For the appellant:	Mr. Ashwani K. Sharma, Advocate.
For the respondents:	Mr. V.S. Chauhan, Advocate, for respondent No. 1. Ms. Charu Gupta, Advocate, for respondent No. 3. Nemo for other respondents.

FAO No. 20 of 2008

For the appellant:	Mr. Ashwani K. Sharma, Advocate.
For the respondents:	Mr. V.S. Chauhan, Advocate, for respondents No. 1 to 4. Mr. Hoshiar Kaushal, Advocate, vice Mr. Karan Singh Kanwar, Advocate, for respondent No. 6. Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This judgment shall govern all the five appeals because these are outcome of one motor vehicular accident.

2. The claimants in all the five claim petitions, which are subject matters of these appeals, filed separate claim petitions, four claim petitions before the Motor Accident Claims Tribunal, Fast Track Court, Shimla (for short "the Tribunal-I) and one claim petition before Motor Accident Claims Tribunal (II), Shimla (for short "the Tribunal-II") on the grounds that they became the victims of the vehicular accident, which was allegedly caused by the driver, namely Shri Sushil Kumar, while driving the offending vehicle, i.e. passenger bus, bearing registration No. HP-07-5186, rashly and negligently on 30.10.2000, near Banol, P.S. Kotkhai, caused the accident, in which five persons sustained injuries and succumbed to the injuries.

3. All the five claim petitions were resisted by the legal representatives of the owner-insured and the insurer on the grounds taken in the respective memo of objections.

4. It is apt to record herein that the driver of the offending vehicle did not choose to contest the claim petitions and was set ex-parte in all the five claim petitions.

5. Issues came to be framed in all the five claim petitions. Claimants in all the claim petitions, the insurer and the legal representatives of the owner-insured examined witnesses, details of which are given in the impugned awards.

6. After scanning the evidence, oral as well as documentary, both the Tribunals determined the claim petitions, awarded compensation vide separate awards of different dates, held that the appellant-insurer is liable to satisfy the awards and saddled it with liability (for short "the impugned awards") .

7. The claimants and the owner-insured have not questioned the impugned awards on any count, thus, have attained finality so far it relate to them.

8. Appellant-insurer has questioned the impugned awards by the medium of these appeals on the following grounds:

> (i) that the driver of the offending vehicle was not having a valid and effective driving licence at the relevant point of time and was possessing a fake licence;
>
> (ii) that the owner-insured has committed willful breach by employing a driver, who was having a fake licence; and
>
> (iii) that the amount awarded is excessive.

9. The owner-insured died during the pendency of the claim petitions and his legal representatives have been brought on record, who have contested the claim petitions and led evidence in support of their case.

10. The legal representatives of the owner-insured have led evidence and have specifically stated that the owner-insured had taken all precautions at the time of employing the driver of the offending vehicle. He had also perused his driving licence. The evidence led by the legal representatives of the owner-insured has remained unrebutted.

11. It was for the appellant-insurer to prove that the owner-insured of the offending vehicle was in the know of the fact that the driving licence of the driver was fake one and he has committed a willful breach. The appellant-insurer has led evidence to the effect that the driving licence of the driver of the offending vehicle was fake one, but has not led any evidence to prove that the owner-insured has committed any willful breach. Thus, the appellant-insurer has failed to discharge the onus.

12. The Apex Court in a case titled as **National Insurance Co. Ltd. versus Swaran Singh & others, reported in AIR 2004 Supreme Court 1531,** held that the insurer has not only to prove that the driver of the offending vehicle was not having a valid driving licence, but has to prove that the owner-insured has committed a willful breach.

13. It is apt to reproduce relevant portion of para 105 of the judgment herein:

> *"105. ....*
> *(i) ....*
> *(ii) ....*
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for*

avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v)……………………

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

14. The Apex Court in another case titled as **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **2013 AIR SCW 6505,** held that the owner-insured is not supposed to go beyond verification to the effect that the driver was having a valid driving licence and the competence of the driver. It is profitable to reproduce para 10 of the judgment herein:

"9. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go

> *beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh's case (supra). If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the insurance company is not liable for the compensation."*

15. The same principle has been laid down by this Court in a series of cases including **FAO No. 427 of 2006,** titled as **Parveen & another versus Chetan Sood & others,** decided on 21.03.2014 and **FAO No. 166 of 2007,** titled as **Oriental Insurance Company Ltd. versus Smt. Pratibha Devi and others,** decided on 10.10.2014.

16. Applying the test to the instant case, I am of the considered view that the appellant-insurer has failed to discharge the onus and both the Tribunals have not fallen in an error in saddling it with liability.

17. It appears that the Tribunal-I has awarded interest @ 9% per annum from the date of the claim petitions till its realization in four claim petitions, i.e. M.A.C.s No. 72-S/2 of 2005/2001, 65-S/2 of 2005/2000, 61-S/2 of 2005/2000 and 9-S/2 of 2005/2000 (subject matters of FAOs No. 133, 18, 19 and 20 of 2008, respectively) and Tribunal -II has awarded interest @ 7.5% per annum from the date of the claim petition till its realization in M.A.C. Petition No. 13-S/2 of 2001 (subject matter of FAO No. 379 of 2007).

18. Keeping in view the facts of the case read with the mandate of Section 171 of the Motor Vehicles Act, 1988 (for short "the MV Act"), I deem it proper to modify the rate of interest awarded in the four claim petitions, which are subject matters of FAOs No. 133, 18, 19 & 20 of 2008, and hold that the claimants in all the five claim petitions are entitled to interest @ 7.5 per annum from the date of the respective claim petitions till its realization.

19. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned awards after proper identification. Excess amount, if any deposited by the appellant-insurer, be released in its favour through payee's account cheque.

20. Having said so, all the appeals are disposed of and the impugned awards in M.A.C.s No. 72-S/2 of 2005/2001, 65-S/2 of 2005/2000, 61-S/2 of 2005/2000 and 9-S/2 of 2005/2000 (subject matters of FAOs No. 133, 18, 19 and 20 of 2008, respectively) are modified, as indicated hereinabove.

21. Send down the record after placing copy of the judgment on each of the Tribunal's files.

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

Oriental Insurance Company Limited ...Appellant
Versus
Arvind Pal and others ...Respondents.

FAO No.275 of 2007.
Reserved on: 15.05.2015.
Pronounced on: 22.05.2015.

Motor Vehicle Act, 1988- Section 167- Labrourers/employees have a remedy to obtain compensation under Workmen Compensation Act, 1923- if a claim made under Workmen Compensation Act, the claimant will get compensation as per scheduled attached to the Act, however, claimants can seek higher compensation under Motor Vehicle Act- insurer pleaded that it is liable to pay compensation as per the policy- held, that insurance policy does not restrict the liability of the insurer- claimants are entitled to the compensation under law and the Insurance Company was rightly held liable to pay compensation to the claimants.

(Para-8 to 13)

For the Appellant: Mr.Ashwani K. Sharma, Advocate.
For the Respondents: Mr.Ramakant Sharma, Advocate, for respondents No.1 to 4.
Nemo for respondents No.5 and 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

The question involved in this appeal is – Whether the Motor Accident Claims Tribunal has rightly asked the insurer to satisfy the award.

2. In order to settle the issue (supra), a brief reference may be made to the facts of the case, the womb of which has given birth to the present appeal.

3. It is averred that the offending truck bearing No.PAT-6462, which was being driven by the deceased Surjit Singh, rolled down the road on 3.9.2003 near village Khangral, Police Station, Kargil, Jammu and Kashmir, as a result of which the said Surjit Singh died on the spot. The Claimants (respondents No.1 to 4 herein), being the dependants/legal representatives of the deceased Surjit Singh, have invoked the jurisdiction of the Motor Accident Claims Tribunal, Fast Track Court, Kangra at Dharmshala, (hereinafter referred to as the Tribunal), by the medium of Claim Petition No.100-N/II/05/04, titled Arvind Pal and others vs. Darshna Kumari and others, for grant of compensation to the tune of Rs.50.00 lacs, as per the break-ups given in the Claim Petition.

4. The owner/insured and the insurer resisted the Claim Petition by filing separate replies.

5. On the pleadings of the parties and the documents available on record, the following issues were framed by the Tribunal:

"1. Whether the deceased Surjeet Singh died during use of the vehicle and the petitioners being his dependants are entitled for compensation, if so, the amount thereof and from whom? OPP

2. Whether the petition is not maintainable in the present form, as alleged? OPR-2

3. Whether the vehicle was not insured with the respondent No.2 if so its effect? OPR.

4. Whether the State of J&K is responsible for the improper and bad shape of the roads and there was cause of accident, if so, its effect thereof? OPR

5. Whether the vehicle was being plied in violation of the terms of the insurance Policy at the time of accident, if so, its effect? OPR

6. Whether the deceased Surjeet Singh was not having valid and effective driving licence? OPR

7. Relief."

6. The Claimant Arvind Pal stepped into the wittiness box as PW-1, while the owner and the insurer have not led any evidence.

7. The Tribunal after scanning the evidence held the claimants entitled for compensation to the tune of Rs.6,10,000/- with interest at the rate of 9.5% per annum from the date of filing of the petition till final realization, vide award dated 30th April, 2007, subject matter of the present appeal, (hereinafter referred to as the impugned award).

8. The concept of granting compensation is the outcome of law of torts. Before the enactment of the provisions of the Motor Vehicles Act, (for short, "M.V. Act), for grant of compensation, the claimants/victims were seeking compensation by invoking jurisdiction of Civil Courts in terms of law of torts. In order to provide compensation to the victims and to reach them as early as possible, the M.V. Act was made, which provides remedy to the claimants to seek compensation in terms of Chapters X, XI and XII, contained in the M.V. Act. The aim and object of the said legislation is to provide compensation as early as possible so that the victims of a vehicular accident may not fall prey to social evils.

9. The Government has also provided remedy to the labourers/employees for obtaining compensation in terms of the mandate of Workmen's Compensation Act,1923, (for short, the Act).

10. Section 167 of the M.V. Act provides an option to the victims of a vehicular accident to seek compensation either by invoking the remedy in terms of the Act or in terms of the M.V. Act. The only difference is that if a claim is made in terms of the Act, the claimants will get the compensation as per the Schedule attached with it. However, in order to seek higher compensation, the claimants can exercise option under Section 167 of the M.V. Act.

11. This Court in **FAO No.183 of 2006, titled New India Assurance Company Limited vs. Chanchal Devi and others, decided on 14th March, 2014**, and **FAO No.530 of 2009, titled Oriental Insurance Company Ltd. vs. Smt.Kamlo & others, decided on 25th July, 2014**, has laid down the same principle.

12. The claimants in the instant case, perhaps after obtaining legal advice, have invoked the jurisdiction provided under the M. V. Act, and thus, have exercised the *doctrine of election* by resorting to the remedy available under Section 167 read with Section 166 of the M. V. Act. The Tribunal after examining the insurance policy and the mandate of the provisions, contained in Chapters X, XI and XII, of the M. V. Act, granted the compensation.

13. According to the learned counsel for the insurer, the compensation granted by the Tribunal is on the higher side and the insurer was liable to pay compensation only to the extent of its liability. The arguments, though attractive, are devoid of any force for the reason that the insurance policy nowhere restricts the liability of the insurer. The claimants, being the third parties, are the sufferers and have rightly invoked the jurisdiction

of the Tribunal for grant of compensation and despite the fact that a meager amount of compensation has been awarded, the claimants are not able to reap the fruits of the litigation and have virtually been deprived of the benefit of social legislation, which speaks volume as to how the Insurance Companies are dragging the poor victims from pillar to post and post to pillar.

14. Having said so, I am of the considered view that the Tribunal has not fallen in error in saddling the insurer with the liability.

15. In view of the above discussion, the appeal merits to be dismissed and the same is dismissed accordingly. Consequently, the impugned award is upheld.

16. The Registry is directed to release the award amount in favour of the claimants through payees' account cheque, strictly in terms of the impugned award.

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

Oriental Insurance Company Ltd. .....Appellant.
Versus
Sh.Krishan Dev and others ...Respondents

FAO (MVA) No. 476 of 2007.
Judgment reserved on 15th May,2015
Date of decision: 22nd May, 2015.

Motor Vehicle Act, 1988- Section 149- Insurance Company pleaded that driver did not have a valid driving licence as he possessed a learner licence- owner had committed willful breach of terms and conditions of the policy- held, that a person having a learner licence is competent to drive the motor vehicle for which he was given the licence - therefore, Insurance Company was rightly held liable. (Para- 11 to 17)

Cases referred:

Anuj Sirkek Vs. Neelma Devi and Ors., I L R 2014 Vol. XLIV (VI), HP 1 Page, 1242
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd. AIR 1999 SC 3181
Lal Chand versus Oriental Insurance Co. Ltd., 2006 AIR SCW 4832
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217
State of Haryana and another versus Jasbir Kaur and others, AIR 2003 Supreme Court 3696
The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another, AIR 2003 Supreme Court 4172
Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr., 2009 AIR SCW 3717
Nagappa v. Gurudayal Singh & Ors, (2003) 2 SCC 274
Devki Nandan Bangur and Ors. versus State of Haryana and Ors. 1995 ACJ 1288
Syed Basheer Ahmed & Ors. versus Mohd. Jameel & Anr., (2009) 2 SCC 225
National Insurance Co. Ltd. versus Laxmi Narain Dhut, (2007) 3 SCC 700
A.P. SRTC versus STAT and State of Haryana & Ors. versus Shakuntla Devi, 2008 (13) SCALE 621

Ningamma & another versus United India Insurance Co. Ltd., 2009 AIR SCW 4916
A.P.S.R.T.C. & another versus M. Ramadevi & others, 2008 AIR SCW 1213
Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service, 2013 AIR SCW 5800

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Mr. Tara Singh Chauhan, Advocate, for respondent No.1.
Mr. Vivek Singh Thakur, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Challenge in this appeal is to the judgment and award dated 18.7.2007, made by the Motor Accident Claims Tribunal, Bilaspur, H.P. in MAC No. 112 of 2004 titled *Krishan Dev versus Rattan Chand and others,* whereby compensation to the tune of Rs.9,23,861/- with 7.5% interest was awarded in favour of the claimant and insurer/appellant came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The claimant, owner and driver have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on three counts, i.e., (i) that the driver was having learner's license, thus was not having a valid and effective driving license to drive the offending vehicle, (ii) the owner has committed willful breach in terms of the mandate of the insurance contract read with Sections 146, 147 and 149 of the Motor Vehicles Act, for short "the Act, and (iii), the compensation awarded is excessive.

4. Thus, the questions to be determined in this appeal are whether the Tribunal has rightly saddled the insurer with the liability and whether the insurer can question the award on the ground of adequacy of compensation.

5. In order to determine these issues, the brief facts of the case, the womb of which has given birth to the present appeal, are to be noticed.

6. The claimant being the victim of a vehicular accident had filed claim petition before the Tribunal for the grant of compensation to the tune of Rs. 20 lacs as per the break-ups given in the claim petition on the ground that on 25.2.2004 he was on his way to his house on the scooter and that at about 8.15 a.m., when he reached near Kanchimor towards Kiratpur, the Jeep bearing registration No. HP-12-2970, which was being driven by Shri Sat Pal respondent No. 3 herein in a rash and negligent manner, who was overtaking another vehicle, came from front side and struck against his scooter due to which he suffered major injuries on his body, his both legs were crushed badly. He was firstly treated at Anandpur Sahib and thereafter referred to Chima Medical hospital, Mohali where he remained admitted from 26.2.2004 to 27.3.2004. It is further averred that when the accident took place, claimant was 43 years of age and his monthly income was Rs.20,000/- per month. He is stated to have spent Rs.3 lacs on his treatment and is still undergoing treatment.

7. The claim petition was resisted and contested by the respondents and following issues came to be framed by the Tribunal.

> *(i) Whether the accident has taken place due to the rash and negligent driving of Shri Sat Pal, driver of Jeep No. HP-12-2970, as alleged? OPP*
>
> *(ii) If issue No. 1 is supra is proved, to what amount of compensation the petitioner is entitled to and from which of the respondents? OPP.*
>
> *(iii) Whether the driver of Jeep No. HP-12-2970 did not have valid and effective driving license at the time of accident, if so, its effect? OPR-3.*
>
> *(iv) Whether the petition is bad for non-joinder of necessary party? OPR.*
>
> *(v) Relief.*

8. The claimant, including himself as PW1, examined as many as seven witnesses, namely Manoj Kumar (PW(2) Shashi Pal (PW3), Dr. Amarjeet Singh (PW4), Murari Dass (PW5), Jagat Ram, (PW6) and Manoj Kumar (PW7) and respondent examined only one witness, namely, Mohinder Singh.

9. The Tribunal, after scanning evidence, awarded the compensation to the tune of Rs.9,23,861/- in favour of the claimant and saddled the insurer with the liability, as stated supra.

10. Admittedly, the driver was having learner's license and was competent to drive the offending vehicle.

11. Section 2 (19) of the Act defines learner's license. It provides that a person who is holding a learner's license is authorized to drive a light motor vehicle or a motor vehicle of any specified class or description. It is apt to reproduce Section 2 (19) of the Act herein:

> *"2(19) "learner's licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive as a learner, a motor vehicle or a motor vehicle of any specified class or description;"*

12. While going through the said definition, one comes to an escapable conclusion that a person who is having a learner's license is competent to drive the motor vehicle or a motor vehicle of any specified class or description, for which he has been given the license.

13. A bare perusal of the driving license Ext. R3 does disclose that the license was valid and effective at the time of accident and the driver was competent to drive the Jeep, i.e., the offending vehicle. It is not the case, either of the claimant or of the insurer, that the driver was not having a learner's license. Reference in this regard is made to the judgment delivered by this Court in case titled ***Anuj Sirkek versus Neelma Devi and others (FAO No. 57 of 2014)*** decided on 19.12.2014.

14. It is profitable here to reproduce Section 10 of the Act, which reads as under:

> *"**10. Form and contents of licences to drive.** - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;
(b) motor cycle with gear;
(c) invalid carriage;
(d) light motor vehicle;
(e) transport vehicle;
(i) road-roller;
(j) motor vehicle of a specified description."

15. The mandate of Section 10 of the Act is that every learner is competent to drive the vehicle description of which is contained in the driving license Ext. R3 mention of which is made hereinabove.

16. Whether a person, who is holding a learner's license, is competent to drive light motor vehicle came up for consideration in case titled **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** and it was held that a person having learner's license is deemed to have been holding a valid and effective driving license. It apt to reproduce paras 88, 89 and 90 of the said judgment herein:

"88. Motor Vehicles Act, 1988 provides for grant of learner's licence. [See Section 4(3), Section 7(2), Section 10(3) and Section 14]. A learner's licence is, thus, also a licence within the meaning of the provisions of the said Act. It cannot, therefore, be said that a vehicle when being driven by a learner subject to the conditions mentioned in the licence, he would not be a person who is not duly licensed resulting in conferring a right on the insurer to avoid the claim of the third party. It cannot be said that a person holding a learner's licence is not entitled to drive the vehicle. Even if there exists a condition in the contract of insurance that the vehicle cannot be driven by a person holding a learner's licence, the same would run counter to the provision of Section 149(2) of the said Act.

89. The provisions contained in the said Act provide also for grant of driving licence which is otherwise a learner's licence. Sections 3(2) and 6 of the Act provide for the restriction in the matter of grant of driving licence, Section 7 deals with such restrictions on granting of learner's licence. Sections 8 and 9 provide for the manner and conditions for grant of driving licence. Section 15 provides for renewal of driving licence. Learner's licences are granted under the rules farmed by the Central Government or the State Governments in exercise of their rule making power. Conditions are attached to the learner's licences granted in terms of the statute. A person holding learner's licence would, thus, also come within the purview of "duly licensed" as such a licence is also granted in terms of the provisions of the Act and the rules farmed thereunder. It is now a well-settled principle of law that rules validly framed become part of the statute. Such rules are, therefore, required to be read as a part of main enactment. It is also well-settled principle of law that for the interpretation of

statute an attempt must be made to give effect to all provisions under the rule. No provision should be considered as surplusage.

90. Mandar Madhav Tambe's case (supra), whereupon the learned counsel placed reliance, has no application to the fact of the matter. There existed an exclusion clause in the insurance policy wherein it was made clear that the Insurance Company, in the event of an accident, would be liable only if the vehicle was being driven by a person holding a valid driving licence or a permanent driving licence "other than a learner's licence". The question as to whether such a clause would be valid or not did not arise for consideration before the Bench in the said case. The said decision was rendered in the peculiar fact situation obtaining therein. Therein it was stated that "a driving licence" as defined in the Act is different from a learner's licence issued under Rule 16 of the Vehicles Rules, 1939 having regard to the factual matrix involved therein.

17. Thus, the Tribunal has rightly held that the driver was having a valid and effective driving license.

18. The offending vehicle being Jeep, the gross weight of which does not exceed 7,500 kilograms, falls within the definition of “light motor vehicle” as contained in Section 2 (21) of the Act. It is apt to reproduce Section 2 (21) of the Act herein.

“21.“light motor vehicle” means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.”

19. This issue came up for consideration before the Supreme Court in case titled ***Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd.*** reported in ***AIR 1999 SC 3181***. It is apt to reproduce paras 10, 11 and 14 of the said judgment herein:

“10. Definition of "light motor vehicle" as given in clause (21) of Section 2 of the Act can apply only to a "light goods vehicle" or a "light transport vehicle". A "light motor vehicle" otherwise has to be covered by the definition of "motor vehicle" or "vehicle" as given in clause (28) of Section 2 of the Act. A light motor vehicle cannot always mean a light goods carriage. Light motor vehicle can be non-transport vehicle as well.

11. To reiterate, since a vehicle cannot be used as transport vehicle on a public road unless there is a permit issued by the Regional Transport Authority for that purpose, and since in the instant case there is neither a pleading to that effect by any party nor is there any permit on record, the vehicle in question, would remain a light motor vehicle. The respondent also does not say that any permit was granted to the appellant for plying the vehicle as a transport vehicle under Section 66 of the Act. Moreover, on the date of accident, the vehicle was not carrying any goods, and thought it could be said to have

been designed to be used as a transport vehicle or goods carrier, it cannot be so held on account of the statutory prohibition contained in Section 66 of the Act.

12-13 …. ….. …..

14. Now the vehicle in the present case weighed 5,920 kilograms and the driver had the driving licence to drive a light motor vehicle. It is not that, therefore, that insurance policy covered a transport vehicle which meant a goods carriage. The whole case of the insurer has been built on a wrong premise. It is itself the case of the insurer that in the case of a light motor vehicle which is a non-transport vehicle, there was no statutory requirement to have specific authorisation on the licence of the driver under Form 6 under the Rules. It had, therefore, to be held that Jadhav was holding effective valid licence on the date of accident to drive light motor vehicle bearing Registration No. KA-28-567."

20. This Court in **FAO No. 54 of 2012** titled ***Mahesh Kumar and another*** vs**. *Smt. Piaro Devi and others*** decided on 25th July, 2014, held that such type of vehicle is LMV. It is apt to reproduce paras 10,11,14,16,18 and 19 of the said judgment herein:

"10.I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle" as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the MV Act herein:

"2. ……………..

(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.

xxx xxx xxx

"(21)light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.

xxx xxx xxx

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.

xxx xxx xxx

(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."

11. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not

exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

12-13. …… …… …..

14. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

15.My this view is supported by Section 10 of the MV Act, which reads as under:

*"**10. Form and contents of licences to drive.** - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;

(b) motor cycle with gear;

(c) invalid carriage;

(d) light motor vehicle;

(e) transport vehicle;

(i) road-roller;

(j) motor vehicle of a specified description."

15- …. ….. …..

16. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, which was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stand deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

17. ….. ……. …….. …….

18. The purpose of mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as ***Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,*** *reported in* ***2013 AIR SCW 2791,*** *and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:*

"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. ....

21. ....

22. ....

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

*19. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:*

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. …………………

10. ………………

11. ………………

12. ……………..

13. ……………..

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. ……………………….

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

21. Applying the ratio, the vehicle in question falls within the definition of "Light Motor Vehicle" while keeping in view the "unladen weight", "gross weight" and type of vehicle, given in the Registration Certificate and other documents.

22. Same principles of law have been laid down by this Court in FAOs No. 385 of 2007 & 388 of 2007 decided on 14.11.2014, FAOs No. 33 & 55 of 2010, decided on 17.10.2014 and FAO No. 293 of 2006 decided on 4.4.2014.

23. In order to seek exoneration, it was for the insurer to plead and prove that the owner has committed willful breach, in terms of the mandate of Sections 147 and 149 of the Act read with the Insurance Policy, which the insurer has failed to do, thus, cannot seek exoneration. It is apt to reproduce relevant portion of para 105 of the judgment delivered in ***Swaran Singh's*** case referred to supra, herein:

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

24. In a case titled as **Lal Chand versus Oriental Insurance Co. Ltd.,** reported in **2006 AIR SCW 4832,** the owner had performed his job whatever he was required to do and satisfied himself that the driver was having valid driving licence. The Apex Court held the insurer liable. It is apt to reproduce paras 8, 9 and 11 of the judgment herein:

"8. We have perused the pleadings and the orders passed by the Tribunal and also of the High Court and the annexures filed along with the appeal. This Court in the case of United India Insurance Co. Ltd. v. Lehru & ors., reported in 2003 (3) SCC 338, in paragraph 20 has observed that where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). He will, therefore, have to check whether the driver has a driving licence and if the driver produces a driving licence, which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take test of the driver, and if he finds that the driver is competent to drive the vehicle, he will hire the driver.

9. In the instant case, the owner has not only seen and examined the driving licence produced by the driver but also took the test of the driving of the driver and found that the driver was competent to drive the vehicle and thereafter appointed him as driver of the vehicle in question. Thus, the owner has satisfied himself that the driver has a licence and is driving competently, there would be no breach of Section 149(2)(a)(ii) and the Insurance Company would not then be absolved of its liability.

10. ....

11. As observed in the above paragraph, the insurer, namely the Insurance Company, has to prove that the insured, namely the owner of the vehicle, was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant point of time."

25. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the

vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

26. Having said so, the Tribunal has rightly recorded the findings and saddled the insurer with the liability.

27. The word *"just compensation"* has been used in Section 168 of the Act. In order to award just compensation, the Tribunal has to weigh all the aspects, in order to come to the conclusion what is the just compensation.

28. In the case titled as **State of Haryana and another versus Jasbir Kaur and others,** reported in **AIR 2003 Supreme Court 3696,** the Apex Court has discussed the expression 'just'. It is apt to reproduce para 7 of the judgment herein:

"7. It has to be kept in view that the Tribunal constituted under the Act as provided in S. 168 is required to make an award determining the amount of compensation which is to be in the real sense "damages" which in turn appears to it to be 'just and reasonable'. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate the compensation must be "just" and it cannot be a bonanza; nor a source of profit; but the same should not be a pittance. The Courts and Tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a wide discretion is vested on the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot

be just. (See Helen C. Rebello v. Maharashtra State Road Transport Corporation (AIR 1998 SC 3191)."

29. The same view has been taken by the Apex Court in a case titled as **The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another,** reported in **AIR 2003 Supreme Court 4172**.

30. The Apex Court in the case titled as **Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr.,** reported in **2009 AIR SCW 3717,** laid down the same principle while discussing, in para 27 of the judgment, the ratio laid down in the judgments rendered in the cases titled as *Nagappa v. Gurudayal Singh & Ors, (2003) 2 SCC 274; Devki Nandan Bangur and Ors. versus State of Haryana and Ors. 1995 ACJ 1288; Syed Basheer Ahmed & Ors. versus Mohd. Jameel & Anr., (2009) 2 SCC 225; National Insurance Co. Ltd. versus Laxmi Narain Dhut, (2007) 3 SCC 700; Punjab State Electricity Board Ltd. versus Zora Singh and Others (2005) 6 SCC 776; A.P. SRTC versus STAT and State of Haryana & Ors. versus Shakuntla Devi, 2008 (13) SCALE 621.*

31. The Apex Court in another case titled as **Ningamma & another versus United India Insurance Co. Ltd.,** reported in **2009 AIR SCW 4916,** held that the Court is duty bound to award just compensation to which the claimants are entitled to. It is profitable to reproduce para 25 of the judgment herein:

> *"25. Undoubtedly, Section 166 of the MVA deals with "Just Compensation" and even if in the pleadings no specific claim was made under section 166 of the MVA, in our considered opinion a party should not be deprived from getting "Just Compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the Court is duty bound and entitled to award "Just Compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. However, whether or not the claimants would be governed with the terms and conditions of the insurance policy and whether or not the provisions of Section 147 of the MVA would be applicable in the present case and also whether or not there was rash and negligent driving on the part of the deceased, are essentially a matter of fact which was required to be considered and answered at least by the High Court."*

32. The Apex Court in the judgments delivered in the cases titled as **A.P.S.R.T.C. & another versus M. Ramadevi & others, reported in 2008 AIR SCW 1213** and **Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service,** reported in **2013 AIR SCW 5800,** discussed what is the just compensation**.** It is apt to reproduce para 9 of the judgment rendered in ***Sanobanu's*** case supra, herein:

> *"9. In view of the aforesaid decision of this Court, we are of the view that the legal representatives of the deceased are entitled to the compensation as mentioned under the various heads in the table as provided above in this judgment even though certain claims were not preferred by them as we are of the view that they are legally and legitimately entitled for the said claims. Accordingly we award the compensation, more than what was claimed by them as it is the statutory*

> *duty of the Tribunal and the appellate court to award just and reasonable compensation to the legal representatives of the deceased to mitigate their hardship and agony as held by this Court in a catena of cases. Therefore, this Court has awarded just and reasonable compensation in favour of the appellants as they filed application claiming compensation under Section 166 of the M.V. Act. Keeping in view the aforesaid relevant facts and legal evidence on record and in the absence of rebuttal evidence adduced by the respondent, we determine just and reasonable compensation by awarding a total sum of Rs. 16,96,000/- with interest @ 7.5% from the date of filing the claim petition till the date payment is made to the appellants."*

33. The same principles of law have been laid by this Court in case titled ***Jagdish versus Rahul Bus Service and others*** **(FAO No. 524 of 2007)** decided on 15.5.2015.

34. Applying the test in the present case, I am of the considered view that the Tribunal has rightly awarded the compensation to the tune of Rs.9,23,861 alongwith 7.5% interest in favour of the claimant, cannot be said to be excessive, in any way, rather the compensation awarded is meager.

35. As a corollary, the appeal merits dismissal and is accordingly dismissed and the impugned award is upheld. Send down the record, forthwith, after placing a copy of this judgment.

36. Registry is directed to release the amount in favour of the claimants strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

****

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

Pawan Kumar …Appellant
Versus
Sh. Prabahu Lal & others …Respondents

FAO No. 217 of 2008
Date of decision: 22.05.2015

Motor Vehicle Act, 1988- Section 157- Registered owner pleaded that he had sold the vehicle to 'S' prior to the accident- reliance was placed upon the affidavit and an application made by 'S' – held, that evidence on record did not prove that registered owner had sold the vehicle to 'S'- further, owner had not questioned the award, in which liability was fastened upon him- appeal dismissed. (Para-11 to 13)

For the appellant	:	Mr. B. C. Verma, Advocate.
For the respondents:		Mr. O.P. Negi, Advocate vice Mr. Narender Sharma, Advocate, for respondents No. 1 to 3.
		Mr. Dibender Ghosh, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

By the medium of this appeal, the appellant-owner has questioned the award, dated 1st March, 2008 passed by the Motor Accident Claims Tribunal, Kinnaur at Rampur (hereinafter referred to as "the Tribunal") in MAC Petition No. 36 of 2004, whereby compensation to the tune of Rs.3,05,000/- with interest at the rate of 9% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants-respondents No. 1 to 3 herein and against the owner, appellant herein, (for short, the "impugned award"), on the grounds taken in the memo of appeal.

2. The short controversy involved in this appeal is whether the Tribunal has rightly directed the owner-appellant to satisfy the impugned award.

Brief Facts:

3. The claimants, being victims of the motor vehicular accident, had filed the claim petition before the Tribunal for grant of compensation to the tune of Rs.15,00,000/-, as per the break-ups given in the claim petition, on the ground that driver, namely, Sunni Lal, had driven vehicle-Commander Jeep bearing registration No. HP-06-1643, rashly and negligently, on 02.12.2002, at about 9.30 a.m., near Bahli about 11 kilometer towards Teklach, caused the accident, in which one Birbal sustained injuries and succumbed to the injuries on the spot.

4. The claimants, driver and insurer have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

5. The only question to be determined in this appeal is-whether the Tribunal has rightly saddled the registered owner with liability.

6. The registered owner has questioned the impugned award that he has sold the vehicle to Shishila Devi, respondent No. 3 in the claim petition.

7. The claim petition was resisted by the respondents on the grounds taken in their memo of objections.

8. Following issues came to be framed by the Tribunal:

"1. Whether Sh. Birbal had died on account of rash and negligent driving of driver of vehicle No. HP-06-1643? ...OPP

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

3. Relief."

9. The parties led evidence. The Tribunal, after scanning the evidence, oral as well as documentary, came to the conclusion that registered owner Pawan Kumar has failed to prove that the offending vehicle was sold to Shishila Devi or the offending vehicle was registered in the name of said Shishila Devi.

11. The learned Counsel for the appellant was asked whether there was any agreement or power of attorney indicating that the offending vehicle was sold to Shishila Devi or it was registered in her name?

12. The learned Counsel for the appellant stated that as per affidavit Ext. RW-4/A, the offending vehicle was sold by Pawan Kumar to Shishila Devi and said Shishila Devi has made an application Ext. RW-2/A before the Deputy Commissioner for grant of aid.

13. The Tribunal has discussed the said issue in para-9 of the impugned award. I have gone through the impugned award and the entire record and am of the considered view that the registered owner has failed to discharge the onus. Accordingly, findings returned by the Tribunal on the said issue are upheld.

14. At this stage, learned Counsel for respondent No. 4, produced a copy of award dated 7th May, 2005 passed in MAC Case No. 68 of 2005, titled as **Akalzin & others versus Sh. Pawan Kumar & another,** which was outcome of the same accident, whereby compensation to the tune of Rs.2,55,000/- was awarded in favour of the claimants and owner Pawan Kumar was fastened with liability. The said award stands satisfied and has not been questioned, has attained finality.

15. Having said so, no case is made out for interference. Accordingly, the impugned award is upheld and the appeal is dismissed.

16. The Registry is directed to release the award amount in favour of claimants, strictly as per the terms and conditions, contained in the impugned award.

17. Send down the records after placing a copy of the judgment on the file of the claim petition.

****

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

Ramesh Kumar. …Petitioner.

Versus

Rajesh Kumar and others. …Respondents.

CWP No. 6506/2014
Reserved on: 12.5.2015
Decided on: 22.5.2015

H.P. Panchayati Raj Act, 1994- Section 113- Election of the petitioner was assailed on the ground that he had not obtained no objection certificate from the office of BDO- his election was set aside- petitioner claimed that the election petition was barred by limitation- this plea was rejected on the ground that same was taken only at the time of argument- provision of limitation is mandatory and there is no provision to condone the delay- Court cannot proceed with the matter if the same is barred by limitation- hardship and injustice are no grounds for extending the period of limitation, therefore, orders passed by the Court below set aside. (Para-6 to 18)

Cases referred:

Pyda Subbaramayya Chetty vs. The Premier Bank of India Limited, Branch Nellore and others, AIR 1959 Andhra Pradesh 96
Sheikh Makbul v. Union of India and another, AIR 1960 Orissa 146
Manindra Land and Building Corporation Limited vs Bhutnath Banerjee and others, AIR 1964 SC 1336

Syed Jalaluddin Hasan Quadri v. M/s. Tarapharmacy, AIR 1966 A.P. 136
Nagappa Gulappa Amminabhavi vs. Fakirappa Bhimappa Hanchinal and others, AIR 1970 Mysore 73
Ajab Enterprises vs. Jayant Vegoiles and Chemicals Pvt. Ltd., AIR 1991 Bombay 35
M/s Craft Centre and others vs. The Koncherry Coir Factories, Cherthala, AIR 1991 Kerala 83
Binod Bihari Singh vs. Union of India, (1993) 1 SCC 572
V.M. Salgaocar and Bros. vs. Board of trustees of Port of Mormugao, (2005) 4 SCC 613
Damodaran Pillai and others vs. South Indian Bank Limited, (2005) 7 SCC 300

For the Petitioner: Mr. Gaurav Gautam, Advocate.
For the Respondents: Mr. Sandeep Sharma, Advocate vice Mr. Ashwani Pathak, Advocate for Respondent No.1.
None for respondent No.2.
Mr. Shrawan Dogra, A.G. with Mr. Romesh Verma, Mr. Anup Rattan, Addl. A.Gs and Mr. J.K. Verma, Dy. A.G. for respondents No.3 to 5.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

Elections for the post of Pradhan, Gram Panchayat, Kawari were held on 30.12.2010. Petitioner was declared elected. The election of the petitioner was assailed by respondent No.1 by way of Election Petition under section 113 of the H.P. Panchayati Raj Act (hereinafter referred to as the "Act" for brevity sake) on the ground that the petitioner has not obtained "no objection certificate" from the office of Block Development Officer, Nagrota Bagwan at the time of contesting the election of Pradhan, Gram Panchayat, Kawari. The Election Petition was instituted on 7.2.2011. The reply was filed by the petitioner to the Election Petition vide Annexure P-2. According to the averments made in the reply, petition was not maintainable in the present form and respondent No.1 had no *locus standi* to file the petition.

2. The Sub Divisional Officer (Civil), Kangra allowed the Election Petition No. 2 of 2011 on 30.9.2013. Petitioner feeling aggrieved, assailed order dated 30.9.2013 before the Deputy Commissioner, Kangra at Dharamshala by way of case No. 7/2013. He dismissed the same on 11.4.2014. Hence, the present petition.

3. Mr. Gaurav Gautam, learned counsel for the petitioner, has vehemently argued that, Election Petition preferred by respondent No.1 assailing his client's election to the post of Pradhan, Gram Panchayat, Kawari was barred by limitation. He has also contended that the inquiry against his client has not been completed and thus the findings given by the Sub Divisional Officer (Civil), Kangra as well as the Deputy Commissioner, Kangra at Dharamshala are contrary to record.

4. Mr. Sandeep Sharma, learned vice counsel for respondent No.1, has supported the orders passed by the Sub Divisional Officer (Civil), Kangra and the Deputy Commissioner, Kangra at Dharamshala.

5. We have heard the learned counsel for the parties and have gone through the records carefully.

6. Elections for the post of Pradhan, Gram Panchayat, Kawari were held on 30.12.2010. Since no date of publication of result has been brought to the notice of the Court, we presume it from the date of declaration of result, i.e. 30.12.2010. We make it clear by way of abundant precaution that in case the date of publication of result was mentioned by either of the parties, the limitation would have run from that date. Section 165 of the Act lays down that if the election petition is not furnished in the prescribed manner, or the petition is not presented within the period specified in section 163 the authorized officer shall dismiss the petition. No provision has been brought to the notice of the Court whereby the delay could be condoned by the authorized officer. The language of section 165 of the Act is mandatory and imperative since the expression "***shall***" has been used therein. Petitioner has taken a specific ground that the election petition was barred by limitation. It was also argued before the Sub Divisional Officer (Civil), Kangra. Plea raised by the petitioner has been rejected merely on the pretext that the question regarding limitation was raised only at the time of arguments before the Sub Divisional Officer (Civil). The reason given by the Sub Divisional Officer (Civil) was perverse. He had to ensure that the election petition was filed within the period of limitation. Petitioner has taken the ground of limitation also in his appeal while assailing order dated 30.9.2013. The appellate authority has noticed that the election petition was filed beyond the period of limitation, but despite that has not gone into this question elaborately. The election petition was not maintainable as the same has been filed beyond the period of limitation. The result was declared on 30.12.2010. The election petition was filed on 7.2.2011 beyond the period of limitation. The election petition, according to order dated 30.9.2013, was filed on 7.2.2011, but according to the observation of the Sub Divisional Officer in his order, it was filed on 16.2.2011. There is no power vested with the Sub Divisional Officer (Civil) to condone the delay under the H.P. Panchayati Raj Act. The Deputy Commissioner was required to look into the provisions of Section 163 read in conjunction with Section 165 of the Act while hearing the appeal preferred against the order dated 30.9.2013. Petitioner had also moved an application for placing on record copy of letter of Ombudsman (MGNREGA) dated 18.6.2013 and copy of letter of Executive Engineer (RDD) dated 27.6.2013. According to these documents, the inquiry was pending and the re-assessment was being carried. Thus, the matter was under inquiry and despite that the election of the petitioner has been set aside. These documents have bearings on the case and should have been taken into consideration by the Deputy Commissioner while hearing the appeal. The appeal has been decided by the Deputy Commissioner in a very slipshod manner without taking into consideration the grounds of appeal. The Deputy Commissioner after the order dated 11.4.2014 has issued order dated 25.8.2014 Annexure P-11 and in sequel thereto, the Block Development Officer has issued order dated 27.10.2014 whereby the office of Pradhan was declared vacant.

7. The Sub Divisional Officer (Civil) Kangra and the Deputy Commissioner Kangra at Dharamshala were required to take into consideration whether the election petition was filed within limitation instead of rejecting the plea of the petitioner without due application of mind. We have already noticed that the petitioner has taken the plea in the election petition that it was not maintainable. Moreover, once the plea has been raised before the Sub Divisional Officer (Civil) Kangra, the Deputy Commissioner was also required to consider the same as per settled law. Both the authorities below have erred in law by hearing the election petition filed beyond the period of limitation only on the ground that arguable points were involved in the election petition. The Sub Divisional Officer (Civil) has no jurisdiction to condone the delay.

8. Division Bench of Andhra Pradesh High Court in ***Pyda Subbaramayya Chetty*** vs. ***The Premier Bank of India Limited, Branch Nellore and others***, AIR 1959

Andhra Pradesh 96, has held that although it is true that the court must dismiss a suit as barred by limitation if the facts disclose that it is even when the defendant has not raised such a plea, the court must make sure that it is so barred on the facts established on the evidence. Division Bench has held as under:

> “[7] We, therefore, propose to proceed upon the footing that the appellant was aware of the nature and terms of the contract between the creditor and the principal debtor which he understood to guarantee. We must ascertain first the nature of the contract between the 1st defendant and the plaintiff and then the situation in which the liability under the suit promissory note would arise.
>
> It is needless to point out that the promissory note though fully supported by consideration would remain unenforceable so long as the instalments payable by the 1st defendant in respect of the chit-fund were being regularly paid. It is only on default of payment of one or more of such instalments that the contract of guarantee of which Ex. A-l is the material embodiment, would at all become enforceable. Now, the relevant rule in Ex. B-1 which is a copy of the printed rules relating to the chit-fund, is in these terms:
>
> "If default in the due payment of subscription for any one installment be made by a subscriber who has received his prize, the Bank will, immediately on the happening of such default, become entitled to recover from him the arrears together with the full amount of subscriptions due for all future installments in one lump sum with, interest, on the aggregate sum at one per cent per mensem from the date of default without any claim for any deduction on account of discount."
>
> The argument has mainly therefore centred round this clause and canvassed at considerable length its legal effect. On behalf of the appellant it was contended that the case fell within the scope of Article 75 of the Limitation Act, and that unless the Bank could be said to have waived the benefit of the provision, the first default which was really on 10-5-1947, constituted the terminus a quo. It is pointed out that there was no proof, not even a plea of waiver in the present case.
>
> So it is argued that if time began to run against the plaintiff, as well as the sureties from 10-5-11947, the suit filed on 30-10-1950 was clearly barred. On this submission it becomes material to determine when the first default took place. If it took place on 10-5-1947, and the liability of the sureties too arose, eo instanti, the suit on the promissory note would be obviously out of time. If on the other band, the first default was on 10-12-1947 as the plaint stated it would be within time because the liability of the sureties could not spring into being before the principal debtor's own liability arose.
>
> But as we have already indicated the case in the plaint cannot be held to have been established. In the first place, there was not a sum of Rs. 1,400/-available in the savings Bank account of the 1st defendant, for being credited to the chit-fund account. Secondly it is not established that the adjustment was made with the consent of the 1st defendant because though P. W. 1 stated at one stage of his evidence, that he (the 1st defendant) authorised the adjustment, he later admitted that the Bank did not obtain any such authorisation. Now tile sum of Rs. 1,200/- available with the Bank

could only meet six instalments, and then the default would be on 10-11-1947.

It is true that in the latter case the suit would still be in time. But then, we would be proceeding on a basis different from that on which the plaint proceeded in order to claim exemption from the bar of limitation. It may however be noted that though the written statement raised a plea of limitation, there are no averments of fact in support! of such a plea. Therefore although it is true that we must dismiss a suit as barred by limitation --if the facts disclose that it is -- even when the defendant has not raised such a plea, we must make sure that it is so barred on the facts established on the evidence.

Now even if the plaint case of payment of seven instalments from 10-5-1947 to 10-11-1947 is not accepted and even if the first default should be held to have occurred on 10-5-1947, the question would still remain whether the promissory note became automatically enforceable against the promisors immediately on the date of the first default i.e., on 10-5-1947.

It is argued for the respondent that the promissory note became enforceable not on the date of the first or any other default made by the principal debtor hut when notice of such default was given to the sureties and they were intimated that their liability under the promissory note would be enforced."

9. Learned Single Judge of Orissa High Court in ***Sheikh Makbul*** v. ***Union of India and another***, AIR 1960 Orissa 146 has held that where issue such as jurisdiction and limitation, as question of pure law, are involved, the right to raise an issue cannot be treated as having been waived. Objections regarding limitation cannot be waived and even if they are waived they can be taken up again by the parties waiving them or by the courts themselves. Learned Single Judge has held as under:

"[7] Lastly, there is a point of limitation which the defendants raised in the written statement but did not press it as an issue before the learned Munsif. The learned Subordinate Judge in appeal however found that the suit was barred by limitation. Mr. H. Sen, learned counsel for the plaintiff, contended that the defendants not having pressed the issue as to limitation before the learned Munsif, it was not open to the lower appellate Court to have gone into the question and given his decision thereon. In support of his contention the learned counsel cited several decisions. In U. Kotayya v. N. Sreeramulu AIR 1928 Mad 900, it was held that a pleader's general powers in the conduct of an appeal include, in ordinary cases, the abandonment of an issue which in his discretion he thinks inadvisable to press and therefore an issue of fact abandoned by him in the lower appellate Court cannot be challenged in second appeal.

The context in which the Madras High Court gave the above finding was in connection with an issue of pure fact, namely, whether the plaintiff is entitled to the property. The Vakil had not argued before the lower appellate Court the question covered by the said issue stating that a finding in his favour on the other issue would be quite enough for his client. In Venkata Narsimha Naidu v. Bhasyakarlu Naidu ILR 25 Mad 367 (PC) on the facts that in a partition suit between brothers, relating to a zamindary at the hearing, after the other issues had been settled, the defendant asked to be allowed to raise an issue as to limitation on the ground that he had been in possession

adversely to the plaintiff for more than 12 years but the Judge refused to allow the issue to be raised, it was held that no question of limitation necessarily arose on the pleadings and it was not obligatory on the Judge to direct an issue on that point.

Furthermore in the context that one of the issues as to whether the zamindari was impartible or not, was abandoned by the Vakils for the defendant; it was held that the Vakil's powers in the conduct of a suit include the power to abandon an issue which, in his discretion, he thinks it inadvisable to press. All these cases cited above, related to questions of either pure fact or question of law dependent on finding of fact, which, -- on materials available before the court without further evidence, --could not be given for deciding the issue. Where however issues such as jurisdiction and limitation,--as questions of pure law, -- are involved, I do not think that the right to raise an issue can be treated to have been waived.

Objections regarding limitation cannot be waived and even if they are waived they can be taken up again by the parties waiving them or by the Courts themselves : Kunclo Mal v. Daulat Ram Vidya Parkash Firm, AIR 1940 Lah 75. The Patna High Court in Pallakdhari Thakur v. Bankey Thakur AIR 1925 Pat 549, where the question as to limitation was raised in the written statement and an issue was framed but it was not pressed in the trial court, held that the defendants respondents were entitled to press that point on appeal. It is thus open to the parties to raise it at subsequent stage. That apart, when such issue cuts at the very root of a litigation and if the court's attention is drawn to it, it must take cognizance of the same and give its decision thereon. Mr. H. Sen however contended that the issue of limitation in the present case being a mixed question of law and fact, the defendants should not be allowed to raise it at a late stage as alleged.

The learned counsel relied on a decision of the Calcutta High Court in Bejoy Kumar Bhattacharjee v. (Firm) Satish Chandra Nandi, AIR 1936 Cal 382, where it was held that no doubt the plea of limitation can be urged at any stage having regard to Section 3 of the Limitation Act but when a party does take the appropriate defence but does not put before the Court materials to sustain that defence, it is difficult for the Court sitting in appeal to give effect to the defence contention and the court is justified in rejecting it. In Secretary of State v. Ananda Mohan 34 Cal LT 205: (AIR 1921 Cal 661) which was also relied on by the plaintiff, it was held that the general rule is that points of limitation should not be allowed to be raised for the first time in appeal where they involve a decision upon a question of fact; points of limitation should not be decided against the parties unless attention has been drawn to the question of limitation and an opportunity given them to meet it on evidence; if limitation is urged as bar, the facts on which it is barred must be proved after an issue has been framed.

In both the two particular Calcutta cases cited above, limitation was a mixed question of law and fact where it was necessary for the party to produce evidence. But that is not the case here. In the present case, on the materials as available, this court is in a position to give a finding on limitation. It is not necessary for the party to produce fresh materials as in the Calcutta cases cited above. The present case is clearly governed by Article 30 or Article 31 of the Limitation Act. Article 30 provides a period of one year limitation from the time when the alleged loss or injury occurred.

Article 31 provides for the same period one year limitation from the time when the goods ought to be delivered. In the present case, the goods were delivered on July 19, 1953, alleged to be in rotten condition as aforesaid. The suit was filed not until September 29 1954. In either view whether it was under Article 30 or 31, the suit is clearly barred by limitation. Section 3 of the Limitation Act is imperative. It provides that every suit filed after the period of limitation shall be dismissed although limitation has not been set up as a defence. The point of limitation was taken as a ground as ground No. 9 before the lower appellate Court. The plaint itself shows that on the date of the institution of the suit the claim was barred by limitation. Paragraph 4 of the plaint states that potatoes were found damaged on opening of the baskets. Admittedly the delivery was taken on July 19, 1953 when the potatoes were found damaged. Therefore, one year period of limitation expired on July 19, 1954. Accordingly the suit having been filed on September 29, 1954 it was clearly out of time. Furthermore, the damage certificate Ext. C dated July 19, 1953 also supports the point of limitation raised on behalf of the defendants. The materials available to the Court are sufficient for giving a decision on the point of limitation. It is not necessary for the party to produce any further evidence on the point. I do not, therefore, accept the contention of the learned Counsel For the plaintiff on this point to be tenable in law. I uphold the finding of the lower appellate Court that the suit was barred by limitation."

10. Their Lordships of the Hon'ble Supreme Court in ***Manindra Land and Building Corporation Limited*** vs ***Bhutnath Banerjee and others***, AIR 1964 SC 1336 have held that under section 3 of the Limitation Act, it is the duty of the Court not to proceed with the application if it is made beyond the period of limitation prescribed. The court has no choice and if in construing the necessary provision of the Limitation Act or in determining which provision of the Limitation Act applies, the subordinate court comes to erroneous decision, it is open to the Court in revision to interfere with that conclusion as that conclusion led the court to assume or not to assume the jurisdiction to proceed with the determination of that matter. Their Lordships have held as under:

"[9] Section 3 of the Limitation Act enjoins a Court to dismiss any suit instituted, appeal preferred and application made, after the period of limitation prescribed therefor by Schedule I irrespective of the fact whether the opponent had set up the plea of limitation or not. It is the duty of the Court not to proceed with the application if it is made beyond the period of limitation prescribed. The Court had no choice and if in construing the necessary provision of the Limitation Act or in determining which provision of the Limitation Act applies, the subordinate Court comes to an erroneous decision, it is open to the Court in revision to interfere with that conclusion as that conclusion led the Court to assume or not to assume the jurisdiction to proceed with the determination of that matter.

[10] Section 5 of the Limitation Act, on the other hand, empowers the Court to admit an application, to which its provisions are made applicable, even when presented after the expiry of the specified period of limitation if it is satisfied that the applicant had sufficient cause for not presenting it within time. The Court therefore had jurisdiction to determine whether there was sufficient cause for the appellants not making the application for the setting aside of the abatement of the suit in time and, if so satisfied to admit it."

11. In the case in hand, once the election petition was barred by limitation, the Sub Divisional Officer (Civil) could not proceed with the matter.

12. Learned Single Judge of Andhra Pradesh High Court in ***Syed Jalaluddin Hasan Quadri*** v. ***M/s. Tarapharmacy***, AIR 1966 A.P. 136 has held that section 3 of the Limitation Act places a statutory obligation on the court to examine whether the suit is filed within limitation or not, and if it is filed beyond limitation it must be dismissed. Learned Single Judge has held as under:

> "[6] It was lastly contended by the learned counsel for the respondent that this Court should not interfere under Section 12 of the Act because there has been no injustice done in this case. Section 3 of the Limitation Act places a statutory obligation on the Courts to examine whether the suit Is filed within limitation or not, and if the suit is filed beyond limitation, what must follow is that it must be dismissed. When the suit is clearly time-barred and when it cannot be decreed in the teeth of Section 3 of the Limitation Act, I fail to see how the lower Court's judgment which is obviously wrong, can be sustained. The moment Article 85 becomes inapplicable to the facts of the case and the plaintiff is not in a position to show any other Article under which the suit if brought, ceases to be time-barred, what must follow is that the suit being time barred must be dismissed. This revision petition therefore, is allowed and the suit is dismissed as time-barred. In view of the circumstances of the case however I leave the parties to bear their own costs throughout."

13. Division Bench of Mysore High Court in ***Nagappa Gulappa Amminabhavi*** vs. ***Fakirappa Bhimappa Hanchinal and others***, AIR 1970 Mysore 73 has held that time barred election petition under section 13 must be dismissed under section 3 of the Limitation Act even if plea of limitation is not raised in defence. Their Lordships have held as under:

> "[9] Secondly, an application under Section 13 of the Panchayat Act to the Munsiff is not an application to examine the correctness or otherwise of the declaration of the results by the Returning Officer, but an application which questions the validity of the election itself. After hearing the parties and taking necessary evidence, the Munsiff is given the power either to confirm or amend the declared results of the election or to set aside the election itself.
>
> The various reasons on which the Munsiff can make an order in relation to the validity of the election set out in the subsequent portions of Section 13 also leave no room for doubt that what the Munsiff is called to examine is the validity of the election itself. Hence, we have no doubt in our mind that an application under Section 13 questioning the validity of an election cannot, in any sense, be regarded as an appeal against or an application to revise the declaration of the result made by the Returning Officer, nor can such a declaration be regarded as an order or a judgment for the purpose of Sub-section (2) of Section 12 of the Limitation Act, or for any other purpose.
>
> [11] There can be no doubt therefore that the Munsiff was bound under Section 3 of the Limitation Act, to dismiss the petition although the plea of limitation had not been set up as a defence by the petitioner (in this writ petition) or any other respondent before him in the election petition.

[13] We are not impressed by this argument for two reasons. The electoral right is a statutory right and the principle is that in dealing with an election statutory provisions must be strictly interpreted and applied. When Section 13 of the Panchayat Act expressly lays down a time limit of 15 days from the date of declaration of the result for entitling any person to question the validity of the election, it is not possible to extend that time except in accordance with law. We have already examined the legal position and held that there is no way of extending the time by the application of Section 12(2) of the Limitation Act as contended for on behalf of the respondent. The Munsiff, therefore, was bound to dismiss the petition under Section 3 of the Limitation Act. He having failed to exercise that jurisdiction, it is necessary that we should correct that error of jurisdiction which goes to the root o the matter.

[14] Secondly, the principle, as far as possible, is not to disturb the verdict of the electorate unless clear grounds justifying the same are made out. The verdict of the electorate in this case was in favour of the petitioner, and the Munsiffs verdict after recounting is a result based on a narrow difference. We do not think therefore that public interest will be served by dismissing this petition."

14. Learned Single Judge of Bombay High Court in ***Ajab Enterprises*** vs. ***Jayant Vegoiles and Chemicals Pvt. Ltd.***, AIR 1991 Bombay 35 has held that under section 3 it is the duty of the court to consider as to whether the suit is barred by limitation or not even if no such defence is taken by the defendant. Thus, there cannot be waiver against the provisions of limitation. Learned Single Judge has held as under:

"[7] The next question that arises for determination is about the waiver of limitation by the defendants and estoppel. As a matter of fact, the plaintiffs have to again fall back only on the consent terms. On behalf of the plaintiffs, Mr. Shah very strenuously tried to contend that the plaintiffs have averred in the Plaint that there is a waiver on the part of the defendants and as there is no written statement filed by the defendants, the said tact must be held to be established and it would not be permissible to hold that there is no waiver as such. The said contention also, really speaking, is not totally correct. The plaintiffs in para 13 of the Plaint have stated as under in this respect :-

"The plaintiffs therefore submit that the claim of the plaintiffs is within time. The plaintiffs further submit that all objections by the defendants to the claim of the plaintiffs on the ground of limitation have been given up or are deemed to be given up by the defendants at the time when the said consent terms where filed in the said Appeal and when the defendants submitted to the said consent order dated 10-10-1986 in the said Appeal No. 838 of 1986. The plaintiffs further say that the said consent order dated 10-10-1986 has been further acted upon by the defendants by depositing the sum of Rs. 20,000. 00 in this Hon'ble Court on 25-11-1986 within the time extended by the said Appeal order dated 10-10-1986. "the plaintiffs have also averred in the beginning of para 13 as under:-

"The plaintiffs submit that although the defendants urged the plea of limitation for the first time in the said Appeal No. 838 of 1986, the defendants have condoned and waived the said plea by admitting and acknowledging the liability to pay the aforesaid amount to the plaintiffs and by entering into consent terms and submitting to a consent order in the said

> Appeal whereby time to file the suit by the plaintiffs pursuant to the order dated 30-71986 was extended by a period of 10 weeks from 10-10-1986. " reading the said contention raised in para 13 of the Plaint, it is clear that the said plea of waiver is based on the consent terms dated 10-10-1986 on the basis of which the consent order confirming the Original Court's order came to be passed. I have already reproduced the consent terms earlier and by no stretch of imagination it could be considered to be a waiver of the ground of limitation. By consent terms only the order passed by the Lower Court was agreed to be confirmed. Similarly, the time which was granted earlier by the Trial Court for the depositing of the amount specified in the order and filing of the suit was extended. This also by no stretch of imagination can be said to be a waiver of ground of limitation on the basis of which the suit for recovery of the debts due to the plaintiffs could be said to have been barred by limitation. Apart from this, there is catena of decisions on the basis of which it could be said that there can be no waiver of ground of limitation even if it is assumed that in fact the said consent terms could be considered as waiver. Under Section 3 of the Limitation Act it is the duty of the Court to also consider as to whether the suit is barred by limitation or not even if no such defence is taken by the defendants in a suit. Therefore, there cannot be such waiver against the provisions of limitation. Reliance could be placed on the ruling reported in AIR 1920 PC 139 which has been followed in (1968) ILR 47 Pat. 262. In view of this, there also cannot be any estoppel which could be pleaded by the plaintiffs successfully. The defendants cannot be said to be estopped from pleading that the suit is barred by limitation when in fact the claim of the plaintiffs clearly appears to be barred by limitation taking into consideration Article 15 of the Limitation Act."

15. Learned Single Judge of Kerala High Court in ***M/s Craft Centre and others*** vs. ***The Koncherry Coir Factories, Cherthala***, AIR 1991 Kerala 83 has held that if the suit is barred by limitation on the face of it, court is duty bound to dismiss the same even at appellate stage though issue of limitation not raised. Learned Single Judge has held as under:

> "[4] What Section 3 of the Limitation Act says is that every suit instituted after the prescribed period shall be dismissed, although limitation has not been set up as a defence. It is the duty of the plaintiff to convince the Court that his suit is within time. If it is out of time and the plaintiff relies on any acknowledgment or acknowledgments in order to save limitation, he must plead them or prove, if denied. An acknowledgment not pleaded in the plaint, atleast by way of amendment, cannot be relied on. The plaint must appear on the face of it to be within time. If not, the court can reject it on the ground of limitation even without issuing summons to the defendant and waiting for his plea of limitation. In this case, the only acknowledgment pleaded is Ext.A1 dated 23-10-1978. If the Court finds that the acknowledgment was only on 23-10-1976, the suit filed beyond three years, on 20-3-1981, could be dismissed on that ground itself. The provision in Section 3 is absolute and mandatory. The Court can claim no choice except to obey it in full. It is the duty of the Court to dismiss a suit which on the face of it is barred by time even at the appellate stage despite the fact that the issue was not at all raised."

16. Their Lordships of the Hon'ble Supreme Court in ***Binod Bihari Singh*** vs. ***Union of India***, (1993) 1 SCC 572 have held that the Limitation Act is a statute of repose

and bar of a cause of action in a court of law, which is otherwise lawful and valid, because of undesirable lapse of time as contained in the Limitation Act, has been made on a well accepted principle of jurisprudence and public policy. Their Lordships have further held that if a claim is barred by limitation and such plea is raised specifically the court cannot straightaway dismiss the plea simply on the score that such plea is ignoble. Their Lordships have held as under:

> "[10] After giving our anxious consideration to the facts and circumstances of the case, we do not find any reason to interfere with the decision of the High Court. In our view, the High Court has rightly held that the application made by the appellant was an application for directing the arbitrator to file the award in Court so that such award is made a rule of Court. In this case, there was no express authority given by the arbitrator to the applicant to file the award to make it a rule of Court although a signed copy of the award was sent to the applicant. The forwarding letter clearly indicates that the award was sent for information. Accordingly, the decision of this Court made in Kumbha Mauji's case (AIR 1953 SC 313) (supra) is applicable. The High Court has given very cogent reasons which, we have indicated in some details, for not accepting the case of the appellant that he had received a signed copy of the award and the forwarding letter some time in May, 1965 and we do not find any reason to take a contrary view. The applicant has not produced the registered cover received by him which would have established the actual date of the receipt of the postal cover by the applicant convincingly. We are also not inclined to hold that the delay in presenting the application deserves to be condoned in the facts and circumstances of the case. The appellant has taken a very bold stand that he had received the signed copy of the award only in May, 1965 and only within three weeks of such receipt, he had filed the application. On the face of such statement, the plea of ignorance of the change in the Limitation Act need not be considered and accepted. As the case sought to be made out by the appellant that he had received the signed copy of the award only in May, 1965 has not been accepted, and we may add, very rightly by the Court, the question of condonation of delay could not and did not arise. In our view, it is not at all a fit case where in the anxiety to render justice to a party so that a just cause is not defeated, a pragmatic view should be taken by the Court in considering the sufficient cause for condonation of delay under S. 5 of the Limitation Act. Coming to the contention of Mr. Ranjit Kumar that to defeat a just claim of the appellant, the ignoble plea of bar of limitation sought to be raised by the respondent should not be taken into consideration, we may indicate that it may not be desirable for the Government or the public authority to take shelter under the plea of limitation to defeat a just claim of a citizen. But if a claim is barred by limitation and such plea is raised specifically the Court cannot straightway dismiss the plea simply on the score that such plea is ignoble. A bar of limitation may be considered even if such plea, has not been specifically raised. Limitation Act is a statute of repose and bar of a cause of action in a Court of law, which is otherwise awful and valid, because of undesirable lapse of time as contained in the Limitation Act, has been made on a well accepted principle of jurisprudence and public policy. That apart, the appellant, in this case, having taken a false stand on the question of receipt of the signed copy of the award to get rid of the bar of limitation, should not be encouraged to get any premium on the falsehood on his part by rejecting the plea of limitation raised by the

respondent. We may also indicate here that the High Court is justified in its finding that the objection petition has been filed within time by the respondent and the service of the copy of the application made by the appellant on the counsel of the respondent who had appeared in an earlier proceeding did not constitute a notice as contemplated under Art. 119(b) of the Limitation Act. In the aforesaid circumstances, the appeal must fail and is dismissed but we make no order as to costs."

17. Their Lordships of the Hon'ble Supreme Court in ***V.M. Salgaocar and Bros.*** vs. ***Board of trustees of Port of Mormugao***, (2005) 4 SCC 613 have held that even if defendant intentionally does not raise the plea of limitation, if the suit is ex facie barred by law of limitation, court has no choice but to dismiss the same. Their Lordships have held as under:

"[20] The mandate of Section 3 of Limitation act is that it is the duty of the court to dismiss any suit instituted after the prescribed period of limitation irrespective of the fact that limitation has not been set up as a defence. If a suit is ex-facie barred by the law of Limitation, a Court has no choice but to dismiss the same even if the defendant intentionally has not raised the plea of limitation."

18. Their Lordships of the Hon'ble Supreme Court in ***Damodaran Pillai and others*** vs. ***South Indian Bank Limited***, (2005) 7 SCC 300 has held that the hardship or injustice is not a ground for extending limitation period. Their Lordships have held as under:

"[21] Hardship or injustice may be a relevant consideration in applying the principles of interpretation of statute, but cannot be a ground for extending the period of limitation."

19. Accordingly, in view of the analysis and discussion made hereinabove, the writ petition is allowed. Annexures P-3 dated 30.9.2013, P-10 dated 11.4.2014, P-11 dated 25.8.2014 and P-12 dated 27.8.2014 are quashed and set aside. Pending application(s), if any, also stands disposed of. No costs.

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

Takki Mohd. …Appellant

Versus

State of Himachal Pradesh …Respondent

Criminal Appeal No. 7 of 2009
Judgment Reserved on : 2.5.2015
Date of Decision : May 22 , 2015

Indian Penal Code, 1860- Section 302- Accused conspired with co-accused to murder the deceased- deceased was taken to nearby jungle where he was murdered- the accused and deceased were last seen travelling on the motorcycle by independent witness- police official found a motorcycle parked at an isolated place- police went to jungle to find the owner –they heard the ring of mobile phone and noticed the dead body of the deceased- Medical Officer found multiple incised wounds on the vital parts of the body which could have been caused by means of a knife- PW-1 stated that accused went alone on his motorcycle towards the

main road, whereas deceased went on foot- prosecution failed to establish that after the accused left the house of the deceased, motorcycle remained in his possession or was being driven by him – police officials admitted that a Nepali had told them about hearing a telephonic ring but Nepali was not interrogated immediately- police had not seized the motorcycle- disclosure statement was not proved - clothes recovered by police were not connected to the accused- Medical Officer found injuries on the person of the accused- held, that in these circumstances, prosecution version was not proved and acquittal of the accused was justified. (Para-22 to 64)

Cases referred:

Shivaji Sahabrao Bobade and another Versus State of Maharashtra, (1973) 2 SCC 793
Lal Mandi v. State of W.B., (1995) 3 SCC 603
Bodhraj alias Bodha & others vs. State of Jammu and Kashmir, (2002) 8 SCC 45
Pudhu Raja and another Versus State Represented by Inspector of Police, (2012) 11 SCC 196
Madhu Versus State of Kerala, (2012) 2 SCC 399
Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622
Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172
Trimukh Maroti Kiran versus State of Maharashtra, (2006) 10 SCC 681
Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43
Ashok Kumar Chatterjee vs. State of M.P., 1989 Supp. (1) SCC 560
Balwinder Singh vs. State of Punjab, (1987) 1 SCC 1
State of U.P. vs. Sukhbasi, 1985 Supp. SCC 79
Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Earabhadrappa vs. State of Karnataka, (1983) 2 SCC 330
Hukam Singh vs. State of Rajasthan, (1977) 2 SCC 99
Eradu vs. State of Hyderabad, AIR 1956 SC 316]
Sujit Biswas vs. State of Assam, (2013) 12 SCC 406
Hanumant Govind Nargundkar v. State of Madhya Pradesh, AIR 1952 SC 343
Dharam Deo Yadav v. State of Uttar Pradesh, (2014) 5 SCC 509
Ravirala Laxmaiah vs. State of Andhra Pradesh, (2013) 9 SCC 283
Nika Ram vs. State of H.P., (1972) 2 SCC 80
Ganeshlal vs. State of Maharashtra, (1992) 3 SCC 106
Krishnan alias Ramasamy & others, vs. State of Tamil Nadu, AIR 2014 SC 2548
Harivadan Babubhai Patel vs. State of Gujarat, (2013) 7 SCC 45
Rohtash Kumar vs. State of Haryana, (2013) 14 SCC 434
M.G. Agarwal vs. State of Maharashtra, AIR 1963 Supreme Court 200
Balkar Singh vs. State of Haryana, (2015) 2 SCC 746
Brathi alias Sukhdev Singh v. State of Punjab, (1991) 1 SCC 519
Ramesh & others vs. State of Rajasthan, (2011) 3 SCC 685
Inspector of Police, Tamil Nadu vs. John David, (2011) 5 SCC 509
Rameshbhai Mohanbhai Koli vs. State of Gujarat, (2011) 11 SCC 111
State of Karnataka vs. Suvarnamma & another, (2015) 1 SCC 323

For the appellant : Mr. Anoop Chitkara, Advocate for the appellant.
For the respondent : Mr. Ashok Chaudhary and Mr. V. S. Chauhan, Addl. Advocate Generals and Mr. J. S. Guleria, Asstt. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

To a specific query put by the Court, a statement was made by learned Deputy Advocate General that neither any appeal stands filed, nor is one sought to be filed against the judgment of acquittal of co-accused Yusaf Ali.

2. Convict Takki Mohd., has assailed the judgment dated 22.12.2008, passed by learned Addl. Sessions Judge, Sirmaur, District at Nahan, Himachal Pradesh, in Sessions Trial No. 13-N/7 of 2007, titled as *State of Himachal Pradesh vs. Takki Mohd. & another,* whereby he stands convicted and sentenced to undergo rigorous imprisonment for life and pay fine of Rs.15,000/- in relation to an offence punishable under the provisions of Section 302 of the Indian Penal Code and in default thereof, to further undergo imprisonment for a period of one year. He has filed the present appeal under the provisions of Section 374 of the Code of Criminal Procedure, 1973. Both he and co-accused Yusaf Ali stand acquitted in relation to the charge under Section 120 of the Indian Penal Code.

3. It is the case of prosecution that co-accused Yusaf Ali, so acquitted by the trial Court, conspired with his brother-in-law Takki Mohd. (hereinafter referred to as the appellant) to commit murder of deceased Hussan Singh, husband of Sunita Devi (PW-1) and son of Gian Chand (PW-2). Since Gian Chand had sold land for a sum of rupees one crore, Yusaf Ali who was working as his driver, sought rise in salary and an advance of rupees one lakh, which was refused. This being the motive, as part of conspiracy, on 27.3.2007, appellant went to the house of the deceased and around noon, took him on his motorcycle to a nearby jungle, where after consuming liquor, murdered him. Independent witness Mohan Singh (PW.3) noticed both the appellant and the deceased travel on the motorcycle. Independently, same day, SI Subhash Chand and Constable Rajeev Kumar (PW-17), who were on patrol duty, noticed the motorcycle parked at an isolated place on the road near the jungle. Vinod Kumar (PW.10), a passerby, when queried by the police, expressed lack of knowledge about the ownership of the motorcycle. Hence police went into the jungle to search for the owner but could not find anyone. While they were returning, Vinod Kumar (PW.10), informed them that he heard ring of a mobile phone coming from a particular direction in the forest. Hence both the police officials went there and noticed a dead body. Ruka (Ext. PW-6/A) was immediately sent on the basis of which F.I.R. No. 57/2007 (Ext. PW-20/A), dated 27.3.2007, was registered by LHC Krishna Devi (PW-20), at police station Sadar, Nahan. Station House Officer Inspector Khazana Ram (PW-31) reached the spot and conducted necessary investigation. Photographs were taken on the spot by Hukam Chand (PW-13). Inquest reports (Ext.PW-9/B and PW-9/C) were prepared. While such proceedings were going on, co-accused Yusaf Ali called the deceased on the mobile phone, which was attended to by Inspector Khazana Ram. By a common link, Gian Chand and Sunita Devi were called on the spot who identified the body to be that of Hussan Singh. Personal belongings of the deceased were taken into possession by the police. Certain eatables found near the dead body were also recovered by the police. The dead body was sent for post mortem which was conducted by Dr. K.D. Bhatt (PW-9), who upon receipt of the report of the State Forensic Science Laboratory, Junga, issued Post Mortem Report (Ext. PW-9/D). The deceased died as a result of knife injury. On suspicion, appellant who was arrested on 28.3.2007 was got medically examined from Dr. A. Chaturvedi (PW-26) who opined the injuries found on the hand to be caused with a knife. On 30th March, 2007, appellant made a disclosure statement (Ext. PW-5/A) to the effect that both he and the deceased consumed liquor and that he could get the weapon of offence recovered. Pursuant thereto, on 31.3.2007, police recovered knife (Ext. P-2) in the presence of independent witness Inder

Singh (PW-5). On 4.4.2007, appellant again made a disclosure statement (Ext. PW-7/A) and got identified the place from where he had purchased the eatables and liquor; the place where it was consumed and the place where he concealed the bottle (pint) (Ext. P-3) and the glasses (Ext.P-4 and P-5); which he got recovered in the presence of independent witness Shiv Ram (PW-7). Police took into possession the same vide memo (Ext. PW-7/B). During interrogation, in the presence of Shiv Ram, accused also got recovered a motor cycle as also his blood stained clothes i.e. pants (Ext. P-6), half sleeve sweater (Ext. P-7) and shirt (Ext. P-8), so kept in the dickey. Report of the Director, Finger Prints Bureau, Phillaur (Ext. PB) revealed the finger prints, lifted from the bottle (pint) and the glasses with the help of the tape, to be that of the appellant. Call records of mobile numbers of the deceased, the appellant and co-accused Yusaf Ali, were obtained by the police. Investigation revealed complicity of both the accused in the alleged crime. Hence, challan was presented in the Court for trial.

4. Accused Takki Mohd. (appellant) was charged for having committed offences punishable under the provisions of Sections 120-B and 302 of the Indian Penal Code, whereas, co-accused Yusaf Ali was charged for having committed an offence punishable under the provisions of Section 120-B of the Indian Penal Code, to which they did not plead guilty and claimed trial.

5. In order to prove its case, in all, prosecution examined as many as thirty three witnesses and statements of the accused under Section 313 Cr. P.C. were also recorded, in which appellant took the following defence:

> "I am innocent and I have been falsely implicated in this case. I was arrested on suspicion because on the relevant date I had visited the house of deceased and thereafter the police planted recoveries against me and prepared other documents in order to fasten guilt on me. The cut injury on my palm was sustained in the marriage while I was working there. The abrasions were sustained on account of beating by the police on 27.3.2007 as I was brought by the police from the marriage on that day."

In defence he examined four witnesses.

6. Appreciating the material on record, including the testimonies of the witnesses, trial Court disbelieved the prosecution case in relation to an offence punishable under the provisions of Section 120-B IPC, but however convicted the present appellant for having committed an offence punishable under the provisions of Section 302 IPC and sentenced him as aforesaid. Hence, the present appeal.

7. We have heard Mr. Anoop Chitkara, learned counsel appearing for the convict as also Mr. V.S. Chauhan learned Addl. Advocate General ably assisted by Mr. Ashok Chaudhary, learned Addl. AG. and Mr. J. S. Guleria, Asstt. A.G. on behalf of the State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that the reasoning adopted by the trial Court is not only perverse but is also not based on correct and complete appreciation of testimonies of the witnesses. Judgment in question is not based on legal evidence and other material placed on record, causing serious prejudice to the accused, also resulting into miscarriage of justice.

8. Mr. Anoop Chitkara, learned counsel for the appellant, while making the following submissions has taken us through the record. (1) Genesis of the prosecution case of conspiracy and motive stands falsified and disbelieved by the trial Court. Hence accused merits acquittal; (2) In the absence of any motive, prosecution version of appellant

having committed the crime is also rendered to be extremely doubtful; (3) Prosecution version of disclosure statement(s) and recoveries of incriminating articles effected pursuant thereto, stand belied if not falsified from the record; (4) Prosecution has not been able to establish its case beyond reasonable doubt and (5) Defence taken by the appellant stands probablized through clear, cogent and convincing piece of evidence.

9. On the other hand, Mr. V.S. Chauhan, learned Addl. Advocate General while supporting the impugned judgment for the reasons set out therein has argued that (1) Prosecution has been able to establish its case beyond reasonable doubt; and (2) Defective investigation by the investigating agency cannot be a ground for acquitting the appellant.

10. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held that:

> "…….Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". …. ….
>
> (Emphasis supplied)

11. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

12. It is not in dispute that there is no eye witness to the occurrence of the incident. Prosecution relies upon the following circumstances for establishing the guilt of the accused:

1. Recovery of dead body of the deceased who died on account of shock and haemorrhage as a result of multiple injuries.
2. Appellant was last seen in the company of the deceased.
3. Motorcycle driven by the appellant was seen parked on the road near the spot of crime.
4. Disclosure statement(s) (Ext.PW-5/A & Ext.PW-7/A) made by the appellant, which also led to the identification of place of occurrence of crime; place from where he purchased eatables; place where both he and the deceased consumed the same; place where he committed the crime; place where he concealed the bottle (pint) of liquor, glasses, weapon of offence and the motor cycle.
5. Recovery of incriminating articles including blood stained clothes of the appellant from the dickey of his motorcycle.

13. Before we deal with the factual matrix, with profit, we discuss the law on the point.

Law on Circumstantial Evidence:

14. In *Bodhraj alias Bodha & others vs. State of Jammu and Kashmir,* (2002) 8 SCC 45, Hon'ble the Supreme Court of India held that:-

> "9. Before analysing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been

> committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans*, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed. ……………."
>
> 10. ………In *Bhagat Ram v. State of Punjab* [AIR 1954 SC 621], it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt." (Emphasis supplied)

15. Also it is a settled proposition of law that when there is no direct evidence of crime, guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with crime. All the links in the chain of circumstances, must be established beyond reasonable doubt, and the proved circumstances should be consistent only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence. [Also: *Pudhu Raja and another Versus State Represented by Inspector of Police,* (2012) 11 SCC 196; *Madhu Versus State of Kerala,* (2012) 2 SCC 399; *Dilip Singh Moti Singh versus State of Gujarat,* (2010) 15 SCC 622; *Ramreddy Rajesh Khanna Reddy v. State of A.P.*, (2006) 10 SCC 172; *Trimukh Maroti Kiran versus State of Maharashtra,* (2006) 10 SCC 681; *Mulakh Raj and others Versus Satish Kumar and others,* (1992) 3 SCC 43; *Ashok Kumar Chatterjee vs. State of M.P.,* 1989 Supp. (1) SCC 560; *Balwinder Singh vs. State of Punjab,* (1987) 1 SCC 1; *State of U.P. vs. Sukhbasi,* 1985 Supp. SCC 79; *Sharad Birdhichand Sarda Versus State of Maharashtra,* (1984) 4 SCC 116; *Earabhadrappa vs. State of Karnataka,* (1983) 2 SCC 330; *Hukam Singh vs. State of Rajasthan,* (1977) 2 SCC 99; and *Eradu vs. State of Hyderabad,* AIR 1956 SC 316]

16. In *Sujit Biswas vs. State of Assam,* (2013) 12 SCC 406, Hon'ble the Supreme Court of India held that:-

> "13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of

dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. [Vide: Hanumant Govind Nargundkar vs. State of M.P., AIR 1952 SC 343; State through CBI v. Mahender Singh Dahiya, (2011) 3 SCC 109: AIR 2011 SC 1017; and Ramesh Harijan vs. State of U.P., (2012) 5 SCC 777].

14. In Kali Ram vs. State of Himachal Pradesh, (1973) 2 SCC 808: AIR 1973 SC 2773, this Court observed as under:

> "25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence.""

17. Relying upon its earlier decision in *Hanumant Govind Nargundkar v. State of Madhya Pradesh*, AIR 1952 SC 343, Hon'ble the Supreme Court of India in *Dharam Deo Yadav v. State of Uttar Pradesh,* (2014) 5 SCC 509, again reiterated that:

> "15. .... Each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. Even when there is no eye-witness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any reasonable hypothesis save of guilt sought to be proved, the accused may be convicted on the basis of such circumstantial evidence."

18. In *Sharad Birdhichand Sarda Versus State of Maharashtra,* (1984) 4 SCC 116, Hon'ble the Supreme Court of India held that:-

> "Moreover the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court." ... ...
>
> ... ... "There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the court."

19. Keeping in view the aforesaid principles, we proceed to deal with each of the circumstances separately.

Circumstance No. 1

20. Recovery of dead body of the deceased from the jungle is not in dispute.

21. Dr. K. D. Bhatt (PW-9) who conducted the post mortem of the deceased and issued report (Ext. PW-9/D), found multiple incised wounds on the vital parts of the body of the deceased, which could have been caused with the weapon of offence i.e. Knife (Ext.P-2). According to the Doctor, multiple injuries resulting into shock and hemorrhage was the cause of death. Through the testimony of this witness, it is quite apparent that death, which was instantaneous, took place sometime during the day on 27.3.2007. The deceased had also consumed alcohol.

Circumstance No. 2

Law on Last Seen Theory:

22. Hon'ble the Supreme Court of India in *Ravirala Laxmaiah vs. State of Andhra Pradesh,* (2013) 9 SCC 283, after taking note of its earlier decisions rendered in *Nika Ram vs. State of H.P.,* (1972) 2 SCC 80; *Ganeshlal vs. State of Maharashtra,* (1992) 3 SCC 106 and *Trimukh Maroti Kirkan vs. State of Maharashtra,* (2006) 10 SCC 681 reiterated the principle that where accused is last seen with the victim, it becomes his duty to explain the circumstances under which the victim died. It is a strong circumstance indicative of the fact that he is responsible for the crime.

23. Hon'ble the Supreme Court of India in *Dharam Deo Yadav vs. State of Uttar Pradesh,* (2014) 5 SCC 509 has further held that:-

> "19. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that the possibility of any person other than the accused being the perpetrator of the crime becomes impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. Reference may be made to the judgment of this Court in *Sahadevan vs. State,* (2003) 1 SCC 534." (Emphasis supplied)

24. In *Krishnan alias Ramasamy & others, vs. State of Tamil Nadu,* AIR 2014 SC 2548; and *Harivadan Babubhai Patel vs. State of Gujarat,* (2013) 7 SCC 45, the principle stands reiterated.

25. Significantly, in *Rohtash Kumar vs. State of Haryana,* (2013) 14 SCC 434, Hon'ble the Supreme Court of India has held that:-

> "34. Thus, the doctrine of "last seen together" shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him."
>
> (Emphasis supplied)

26. Thus, last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased died or is found dead, is so small that possibility of any person, other than the accused, being the author of crime becomes impossible. The burden would immediately shift upon the accused.

27. Prosecution through the testimonies of Sunita Devi (PW-1) and Gian Chand (PW-2) wants the Court to believe that the appellant came to the house of the deceased and took him away on his motorcycle.

28. In court, initially Sunita Devi does state that on 27.3.2007 at 11.30 a.m. appellant came to her house in village Moginand, Tehsil Nahan, District Sirmaur, on a motorcycle bearing No. HP-17A-0086. He had wanted the deceased to arrange for a party. After some time, her husband left with the appellant on his motorcycle. Same day, at 4.30 p.m., she also informed her father-in-law of such fact. She does state that both the appellant and the deceased were not only known to each other from before but were also on visiting terms. But then, she qualifies her statement by deposing that the appellant went alone on his motorcycle towards the main road whereas the deceased went on foot, which version is so corroborated by Gian Chand. Significantly where did they go, remains unexplained by them. These witnesses do establish presence of the appellant in the house of the deceased, but as to whether deceased left with the appellant, on his motorcycle, to an undisclosed destination, cannot be said to have been established, with certainty, on record. It is not the case of the witnesses that the appellant coerced, threatened, intimidated or enticed the deceased to accompany him. Also what conversation took place between them is not so disclosed. Both left voluntarily to an undisclosed destination. So, in our considered view, the first link in the chain cannot be said to have been conclusively established.

29. Further, prosecution, through the testimony of Mohan Singh (PW-3), a close relative of the deceased, wants the court to believe that this witness, while travelling in a private truck, had also seen the deceased and the appellant travel on the very same motorcycle. This was around the same time when the appellant left the house of the deceased. Though in the earlier part of his testimony, witness clearly states such fact, but however later on contradicts himself rendering his earlier version to be not true. He admits himself to be a government servant, posted as a driver at Nahan, with the Civil Supplies Corporation. On the day of occurrence of the incident he admits to be on duty. His duty hours are between 10.00 a.m. to 5.00 p.m. It is not his case that either he was on leave or was required to travel for some official work. He does not disclose the purpose of his visit to Paonta Sahib, a place far off from Nahan. It is not that he had left Nahan on an official tour and that too in a private vehicle. We very much doubt the presence of this witness at the place where he allegedly noticed the appellant. He does not know the number of the truck or the name of the driver in which he travelled. Thus his presence on the spot, and having seen the appellant drive the motorcycle appears to be extremely doubtful. He does not remember the speed at which the motorcycle was being driven. All this may or may not be significant in rendering his testimony to be untrue. But what is relevant is his admission to the effect that "*The driver of the motor cycle was wearing helmet and so it was not possible to see his face to identify him"* and that "*It is correct that since the driver of the motor cycle was wearing helmet and so I had not identified him. It is correct that I have told today in the court that Taki Mohd. was driving the motor cycle at the instance of the police. I had not told to anybody that Hussan Singh was sitting on the motor cycle.*" It is nobodies case that the police got conducted a test identification parade for the purpose of identifying the rider of the motorcycle. Hence this admission, also breaks the link in the chain of the circumstance of the deceased seen last together in the company of the appellant.

30. We are not unmindful of the fact that both Sunita Devi as also this witness do disclose the number of the motorcycle, but then evidently motorcycle is not registered in the name of the appellant. It is in the name of his wife. Testimony of Rahish Ahmad (PW-30) and document (Ext. PW-30/A) is clear to this effect.

31. Also prosecution failed to establish that after the appellant left the house of the deceased, motorcycle remained in his possession or was being driven by him. Also police made no inquiries from the wife of the appellant. The circumstance cannot be said to have been proved.

Circumstance No.3

32. Through the testimonies of Vinod Kumar (PW-10), Constable Rajeev Kumar (PW-17) and SI Subhash Chand (PW-6), prosecution wants the court to believe that the motorcycle of the appellant was seen parked on the road at a secluded place in the forest. This was on the road from Paonta Sahib to Kala Amb.

33. Vinod Kumar, working as a helper in the Military Engineering Services, posted at the Pump House, Judoo, states that at about 2.15 – 2.30 p.m. he went to the forest for easing out. Two police officials inquired about the ownership of a motorcycle bearing No. HP-17A-0086 so parked on the road. He expressed his ignorance. Thereafter, these officials went towards the jungle, searching for the owner of the vehicle. Meanwhile he heard ring of a mobile phone, which fact he also informed them. Later on he came to know that body of the deceased was found at the place from where mobile was ringing.

34. Version of this witness, to us, is uninspiring in confidence. His presence appears to be doubtful. He had no reason to be near the place where motorcycle was parked, for it is at a distance of 2 k.m. from his place of work. Why would a person travel this far only for the purpose of easing out and that too in a jungle area, remains unexplained. His explanation of owning land close by remains uncorroborated by any evidence. Crucially witness admits to have been called by the police to the police station on 6.4.2007, where his statement was recorded. He specifically does not state that the very same police officials had called him. The question which arises is as to how did the police reach out to him. It is not that police was aware of his identity or that he had disclosed his identity to the police. He was just a passer by. Then how is it that police was able to call him after a gap of more than 10 days. The witness had not seen the motorcycle on an earlier occasion and under normal circumstances, was not expected to have remembered its number. The possibility of the witness being introduced cannot be ruled out. Further what discredits the witness is his admission to the effect that *"I had not told to the said persons that I had seen motor cycle No. HP-17A-0086 parked on the road side or that the police had met me or that I had heard any sound of ring of the mobile phone"*. As such his testimony is of not much use to the prosecution. But the matter does not end here.

35. Constable Rajeev Kumar does state that on 27.3.2007, he along with SI Subhash Chand were on patrol duty in connection with a Motor Car Rally. At 3.30 p.m. they reached Khajurna Pull, and noticed a motor cycle bearing No. HP-17A-0086 parked on the side of the road. He saw a "Nepali" (he specifically does not name Vinod Kumar) who on inquiry, expressed lack of knowledge about the ownership of the motorcycle. On suspicion, police party went into the forest to search for the owner. While they were returning, the said "Nepali" informed that he had heard ring of a mobile phone and when they went in that direction, they saw a dead body of a male person lying in the forest. Ruka was immediately sent to the police station for registration of the F.I.R.

36. Version of this witness stands corroborated by SI-Subhash Chand who further states that with the registration of the F.I.R., SHO Khazana Ram arrived on the spot and conducted necessary investigation.

37. Now when we read the cross examination part of the testimonies of these police officials, on the point in discussion, we find that this "Nepali" had only disclosed the place of his employment. It is not the case of the prosecution that these police officials went to the place where the very same "Nepali" was working and got him identified. Crucially these witnesses admit that despite the fact that dead body was recovered shortly (within five minutes) after the "Nepali" informed them of a phone call, they did not call him. Why so? remains unexplained. In our considered view, in fact this "Nepali" was a prime suspect, for he was the last one to have been seen in the jungle, near the place where dead body was recovered. This "Nepali" was also not interrogated for more than 10 days. Where all did the "Nepali" go for easing out? What all did he see there? For how much time he remained in the jungle? Where did he go from there? What all did he take with himself? Why did he not go towards the place from where the sound of the call was coming? All these questions, which remain unexplained, were required to be looked into by the investigating agency**.** After all, possibility of involvement of any other person had to be ruled out by the prosecution. Is it that the "Nepali" himself took away the motorcycle? Also who interrogated him? What all did he disclose to the police, remains unexplained on record. Significantly these witnesses do not state that when they went to the jungle, motorcycle was taken away by someone. Had it been so, they would have definitely got such fact recorded at the first instance. Unclaimed motorcycle, raising suspicion, prompting the police to search for its owner, would have only led the police to seizure of the vehicle. Which was not so done. This fact, as we shall see herein later, would acquire significance. Hence, we are of the considered view that even this circumstance, cannot be said to have been established by leading clear, cogent, consistent or reliable piece of evidence.

Circumstance No. 4

38. Prosecution through the testimonies of Inspector Khazana Ram (PW-31), SI – Chain Ram (PW-32), Inder Singh (PW-5) and Shiv Ram (PW-7) relies upon the circumstance of disclosure statements (Ext. PW-5/A and Ext. PW-7/A) made by the appellant, which further led to the recovery of incriminating articles and identification of spot of crime and other places.

39. Inspector Khazana Ram does state that he conducted the necessary investigation on the spot. He prepared inquest reports (Ext. PW-9/B and Ext. PW-9/C); got the dead body identified from Gian Chand and Sunita Devi; took into possession bathroom slipper (Ext. P-1) as also blood stained sample of soil and leaves and some eatables (grams and egg fry) found near the dead body. He further states that the appellant, who was arrested by him on 28.3.2007, made a disclosure statement (Ext. PW-5/A) on 30.3.2007 and also in the presence of Inder Singh (PW-5) led the police party and got identified the place (i) where both he and the deceased consumed liquor and (ii) concealed the knife (Ext. P-2). Also memos (Ext. PW-5/B and Ext.PW-5/D) were prepared.

40. Having perused the testimony of Inder Singh we express our doubt about the genuineness and legality of the disclosure statement and correctness of the version so disclosed by Khajana Ram. Inder Singh admits the disclosure statement and the memos to have been recorded in the police station and that too only on their return from the Khajurna jungle. It is not the case of the Investigating Officer that the disclosure statement was oral or that the appellant of his own led the police to the place of crime, as such his statement could not be recorded on the spot. Now if the police was already aware of the places so

identified by the appellant, then in law, disclosure statement loses its relevance and significance and cannot be relied upon by the prosecution. It is not a discovery of fact, pursuant to a disclosure statement. Crucially it has come in the testimony of Inder Singh that police did try to recover the weapon of offence on 30.3.2007 itself, but was prevented from doing so by the mob present on the spot. It appears that there was hue and cry with regard to false implication of the accused. Be that as it may, knife (Ext. P-2) kept on a shelf in the bathroom, was recovered on 31.3.2007 vide memo (Ext. PW-5/D), as is evident from the testimony of Inder Singh. We find that SI Chain Ram (PW-32) who took over the investigation of the case from Inspector Khazana Ram on 30.3.2007, was present at the time of recovery of weapon of offence. He is categorical that knife was not covered or kept in a concealed manner. Further it is an admitted case of the prosecution, as stands revealed through the ocular (PW-5 and PW-32) and documentary evidence, that knife so recovered was immediately sealed with seal impression-A. Undisputedly this parcel was neither opened nor tampered with. But when we examine the testimony of Gian Chand, father of the deceased, we find the circumstance of recovery of knife to have been totally contradicted and belied, also contradicting the testimonies of the witnesses, for according to him *"police had shown me a knife in the police station"*. Now if the parcel in which knife was kept was sealed, then how is it that it was shown to the father of the deceased. All this renders the prosecution case to be doubtful, if not false and the circumstance not to have been proved, much less beyond reasonable doubt.

41. Another disclosure statement (Ext. PW-7/A) so recorded in the presence of Shiv Ram (PW-7) as also Babu Ram (PW-11) was made by the appellant on 4.4.2007, through which, prosecution wants the Court to believe that the appellant got identified the spot (i) where he had concealed the bottle of liquor/glasses and (ii) the motorcycle. Independent witnesses who are close relatives/acquaintances of the deceased have deposed that the appellant first took the police party to the place from where he had purchased liquor and then got identified the spot where he had concealed the bottle and glasses. Memo (Ext. PW-7/B) was recorded. Appellant also took the police to the place where he concealed the motorcycle and got recovered his blood stained clothes from its dickey vide memo (Ext. PW-7/D).

42. We do not find testimonies of these witnesses or the prosecution case to be inspiring in confidence at all. Sanjay Kumar (PW-8) from whom the accused allegedly purchased eatables has not supported the prosecution. It has come in the testimony of Gian Chand and Inspector Khazana Ram that on 27.3.2007 itself, police had searched entire Khajurna jungle and nothing was found there. Hence subsequent recovery is rendered to be doubtful. Constable Rajeev Kumar (PW-17) states that having seen the spot on 27.3.2007, he could make out that someone had consumed alcohol. Then why did the police not interrogate the appellant on this aspect. It is not the case of the prosecution that despite interrogation, accused refused to co-operate or divulge information. The spot from where recovery was effected was not far off from the place of crime. On the issue, there is yet another mitigating circumstance in favour of the appellant, rendering the factum of disclosure statement (Ext. PW-7/A) and the recovery of glasses and bottle to be extremely doubtful. Shiv Ram (PW-7) an independent witness states that "<u>Takki Mohd. accused lifted the glasses and the pint of 8 PM. Again stated that the police had lifted the same and the accused had only shown the same.</u> The glasses and the pint were lying together. <u>The police had given the glasses and the pint in the hands of the accused Takki Mohd. so as to hold them</u>. The entire documents were reduced into writing on the National Highway and my signatures on all the documents were taken on the National Highway. The police had not reduced into writing any document before proceeding to the forest from the spot, where we had been waiting for arrival of the police at Khajurna. The wooden box in which the pint and

glasses were sealed was called from Nahan through some person. He was some police man. It is correct that the pint and the wooden box are exactly of the same size. The pint was not sent by the police to Nahan for preparing the wooden box of its size." (Emphasis supplied)

43. Evidently impression of finger prints of the appellant, on the glasses and the bottle were obtained by the police by asking him to hold the same. But the matter does not end here. Still there is contradiction. SI Chain Ram states that the impression of finger prints on the pint were taken with the help of a tape. But then where is this tape? It is not on record. Also report of the Director, Finger Print Bureau, Phillaur (Ext. PB) does not establish the prosecution case on this point. The manner in which finger prints were obtained and the bottle and glasses recovered, renders the prosecution case to be doubtful. How did the police know the exact dimensions of the bottle or the glasses? Is it that police was already aware of the same and thus got a box specifically prepared for keeping the articles in safe custody? There is no other evidence to link the appellant with the same. Thus even this circumstance cannot be said to have been proved.

Circumstance No. 5

44. The next circumstance pertains to recovery of motorcycle and blood stained clothes of the accused found in its dickey. This is pursuant to disclosure statement (Ext. PW-7/A) so made in the presence of Babu Ram and Shiv Lal. It has come in the testimony of the prosecution witnesses that the motorcycle was parked in an open courtyard. It was not kept in a covered/concealed manner. Between the time of arrest of the appellant on 28.3.2007 and recovery of the motorcycle on 4.4.2007, anyone could have seen the same. In view of our earlier discussion, the factum of recovery of motorcycle itself is rendered to be extremely doubtful, for it has not come on record that after committing murder it was only the accused who took away the motorcycle and concealed it in the house of his brother.

45. Shiv Lal categorically does not state that the clothes so recovered, belonged to the accused. Testimony of Babu Ram is also to similar effect. Now clothes i.e. Pants (Ext. P-6), Sweater (Ext. P-7), shirt (Ext. P-8) contained blood stains, which as per report of the Forensic Science Laboratory (Ext.PW-33/A), was of Group-A. It is not that of the appellant. No blood of the accused was found on these clothes.

46. It is the positive case of the prosecution that while committing murder, accused also sustained knife injuries on his hand. Had it been so, some blood would have fallen on his clothes. There is no other evidence linking the appellant to these clothes. He was not made to wear the same. Clothes are also not of his size. In fact, the best person who could have testified such fact was Sunita Devi who incidentally is silent on this aspect. After all, just four hours prior to the occurrence of the incident, she had seen the appellant in her house. Whether or not he was wearing the very same clothes, she could have testified to such fact. Even this circumstance cannot be said to have been proved.

47. Appellant who was arrested on 28.3.2007, had already made a disclosure statement on 30.3.2007. Possibility of being subjected to torture cannot be ruled out. After all it has come on record that local residents were enraged and had not allowed the police to enter his house. Significantly police did not take any action against the villagers who prevented them from discharging their duties.

48. On 28.3.2007 police got the appellant medically examined from Dr. A. Chaturvedi (PW-26) who found the following injuries on his body:

> "1. On left palmer surface of hand, just below little finger, there was clear cut, sutured wound/ situated size 2.7 C.M. regular colour dusky red, three sutured applied.

2. On left dorsum of hand multiple linear superficial abrasions present size 2 to 3 C.M. horizontally situated colour dusky red. No fresh bleeding present.

3. On right dorsum of hand multiple small superficial abrasion present colour dusky red/ situated no fresh bleeding size 1 to 1.5 C.M.

4. On nose three superficial abrasion, present size 1.25 C.M. colour dusky red/ situated no fresh bleeding.

5. On right temple/situated broad abrasion present size 3 cm. X 3 cm. colour dusky red."

49. Though no definite opinion could be given with regard to injury No. 1, but the Doctor did not rule out possibility of such injury, being caused by a knife in a scuffle. Significantly Doctor opined that injuries No. 2 to 5 could be caused as a result of beatings. It is not the case of prosecution that there was a scuffle between the accused or the deceased. This itself raises doubt about the prosecution story. Prosecution, through the testimony of Vijay Pal (PW-4) has tried to establish that appellant got his wound stitched. However, his testimony cannot be said to be inspiring in confidence. He was only working in the clinic of Dr. H. K. Panth, a medical practitioner, not examined in Court. Also record of employment is not proved. Register pertaining to the treatment so administered by him is also not placed or proved on record. It is not that he was medically trained, experienced or authorized to treat the patients. In what capacity he administered such treatment remains unexplained. Whether he was working in the clinic as a peon, an attendant, or a compounder remains undisclosed. He also did not issue any prescription slip to the accused.

50. On the other hand we find that with an endeavour of probabilising his defence, appellant examined Dr. Satpal Verma (DW-1), a registered medical practitioner, who proved the wound to have been stitched on 27.3.2007 at his clinic in Jagadhari. It has come on record through the testimony of Amit Kumar (DW-2) as also Iqbal (DW-3), which we see no reason to disbelieve, that the accused did attend the marriage ceremony of his cousin in village Amadalpur, Tehsil Jagadiri, District Yamunagar (Haryana) and while removing the tent, he sustained injury on his left hand. As per the prosecution, while inflicting injuries on the deceased, appellant also sustained injuries on his hand. Had it been so, and had the accused driven the motorcycle with a bleeding hand, then positively on the handle, blood stains would have been found. But none were there, for there is no such evidence proved on record by the prosecution. Such blood on the handle of the motorcycle could have linked the accused to the motorcycle. Absence thereof only goes in favour of the accused. Thus, defence so taken by the accused sands probabilised and not falsified.

51. Constitution Bench of Hon'ble the Supreme Court of India in *M.G. Agarwal vs. State of Maharashtra,* AIR 1963 Supreme Court 200, has held as under:

"18. There is another point of law which must be considered before dealing with the evidence in this case. The prosecution case against accused No. 1 rests on circumstantial evidence. The main charge of conspiracy under Section 120-B is sought to be established by the alleged conduct of the conspirators and so far as accused No. 1 is concerned, that rests on circumstantial evidence alone. It is a well established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused persons's conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is

> entitled to the benefit of doubt. There is no doubt or dispute about this position. But in applying this principle, it is necessary to distinguish between facts which may be called primary or basis on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of the proof of these basic or primary facts there is no scope for the application of the doctrine of benefit of doubt. The Court considers the evidence and decides whether that evidence proves a particular fact or not. When it is held that a certain fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not, and in dealing with this aspect of the problem, the doctrine of benefit of doubt would apply and an inference of guilt can be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt." … … [Emphasis supplied]

52. It is also a settled principle of law that absence of motive, in a case of circumstantial evidence itself would not be a ground to acquit the accused, but however such fact has to be kept in mind, while appreciating the prosecution evidence for determining his guilt beyond reasonable doubt. In the instant case co-accused stands acquitted so also appellant Takki Mohd. on the charge of conspiracy. Now if the link of conspiracy in the chain of circumstances stands snapped, prosecution version on a material fact is only rendered to be not true or proven on record.

53. In *Balkar Singh vs. State of Haryana,* (2015) 2 SCC 746, Hon'ble the Supreme Court of India held that one alleged conspirator cannot be convicted if all co-conspirators are acquitted. Under these circumstances, conspiracy would remain unestablished.

54. It is a settled principle of law that when allegedly several persons commit an offence in furtherance of common intention and all except one are acquitted, it is open to the appellate court to find out, on reappraisal of evidence whether some of the accused persons stood wrongly acquitted, although it would not interfere with such acquittal in the absence of any appeal by the State Government. The effect of such finding is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is relevant only in invoking against the convicted person his constructive criminality. (See: *Brathi alias Sukhdev Singh v. State of Punjab,* (1991) 1 SCC 519).

55. No doubt in his statement under Section 313 Cr.P.C. appellant admits to have visited the house of the deceased. He had wanted deceased to accompany him to the place of marriage. Since deceased refused, he left alone. His explanation is in the line of testimony of Sunita Devi and Gian Chand who have deposed that appellant alone left the house on a motorcycle and deceased only followed him on foot.

56. The Court below erred in ignoring the fact that police did not rule out the possibility of involvement of the "Nepali", for he was the last to have been seen near the place where dead body was recovered.

57. Also who took the motorcycle away from the spot, despite presence of the police, remains unexplained and not considered by the trial Court. It is not the case of prosecution that accused was seen around the place of crime by anyone else. Testimony of Mohan Singh, is not worthy of credence. Vinod Kumar, Rajeev Kumar and Subhash Chand are silent on this aspect. Also no explanation as to why police did not seize the motorcycle lying idle on the road under suspicious circumstance, is forthcoming.

58. The Court erred in not correctly appreciating the testimonies of defence witnesses. No doubt in the photographs so proved by Amit Kumar (DW-2), accused is not there but nonetheless, testimony of Iqbal (DW-3), rendering presence of the accused in the wedding cannot be said to be false or uninspiring in confidence.

59. On the question of link evidence, court erred in holding that knife (Ext. P-2) was properly sealed and not tampered with by the investigating agency.

60. No doubt Doctor (PW-26) has opined that injury on the hand of the accused could have been caused by the knife (Ext.P-2), but then this fact itself would not be sufficient enough to convict the accused, more so, in the light of improbabilities and weak or missing link in the chain, which, as we have already discussed, stands snapped. Knife was not kept in a concealed manner. It was lying on the shelf inside the bath room and was clearly visible. Family members of the accused could have easily destroyed such evidence on 30.3.2007 itself.

61 As already discussed, prosecution has failed to link the accused with the clothes so recovered from the dickey of the motorcycle.

62. On the point of recovery of bottle of alcohol (pint) and glasses, findings returned by the trial Court, as is evident from para-84 of the judgment, are contradictory.

63. The tape with which finger prints were lifted from the tumblers and the pint is not proved as a fact on record.

64. We now proceed to consider certain decisions referred to on behalf of the State.

65. In the given facts and circumstances, ratio of law laid down by the apex Court in *Ramesh & others vs. State of Rajasthan,* (2011) 3 SCC 685, is misconceived. In the instant case very recovery of the incriminating articles, pursuant to disclosure statements, so made by the accused, itself is rendered to be doubtful, notwithstanding the fact that it was so effected from the very same place from where the body was recovered.

66. The case in hand is not of defective investigation. Prosecution has to establish, the circumstances, forming complete chain of events, pointing towards the guilt of the accused, beyond reasonable doubt, without their being any possibility of any other hypothesis. Ratio of law laid down by the apex court in *Inspector of Police, Tamil Nadu vs. John David,* (2011) 5 SCC 509 in the given facts and circumstances is thus inapplicable. So is the decision rendered in *Rameshbhai Mohanbhai Koli vs. State of Gujarat,* (2011) 11 SCC 111.

67. Reliance on *Dharam Deo Yadav vs. State of Uttar Pradesh,* (2014) 5 SCC 509, so relied upon by the State is also distinguishable on facts. The Court was dealing with a case where dead body was recovered from the house of the accused who was lastly seen in his company.

68. The apex Court in *State of Karnataka vs. Suvarnamma & another,* (2015) 1 SCC 323 has only reiterated that mere lapse on the part of the investigating agency would not be a ground to discard the overwhelming evidence establishing the prosecution case on record. Also false plea taken by the accused would be an additional circumstance which can be used against him, which is not the fact in fact.

69. It cannot be said that each and every incriminating circumstance stands clearly established by leading reliable and clinching piece of evidence. It also cannot be said that the circumstances, so proved form a chain of events, leading to the only irresistible

conclusion drawing the guilt of the accused and no other hypothesis against such guilt is possible. The evidence collectively is incapable of explanation on any other reasonable hypothesis, save the guilt of the accused.

70. From the material placed on record, prosecution has failed to establish that the appellant is guilty of having committed the offence. The circumstances cannot be said to have been proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the appellant does not stand proved, beyond reasonable doubt, to the hilt. The chain of events do not stand conclusively established, leading only to one conclusion, i.e. guilt of the appellant. Circumstances when cumulatively considered do not fully establish completion of chain of events, indicating to the guilt of the appellant and no other hypothesis other than the same.

71. Thus, findings returned by the trial Court, convicting the appellant, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of his guilt. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as he stands wrongly convicted for the charged offence.

72. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence, dated 22.12.2008, passed by Addl. Sessions Judge, Sirmaur District at Nahan, H.P., in Sessions Trial No. 13-N/7 of 2007, titled as State of Himachal Pradesh vs. Takki Mohd. and another, is set aside and the appellant is acquitted of the charged offence. He be released from jail, if not required in any other case. Amount of fine, if deposited, be refunded to him. Release warrants be prepared accordingly. Appeal stands disposed of, so also pending application(s), if any.

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

Tapat Bahadur Shahi ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

Criminal Appeal No.322 of 2011
Reserved on : 4.5.2015
Date of Decision : May 22, 2015

N.D.P.S. Act, 1985- Section 20- An Alto car being driven by accused 'R' was stopped for checking- accused 'V' was sitting on the front seat - remaining accused 'T', 'N' and 'Z' were sitting on the rear seat- police found one bag containing 1.850 kgs of charas- independent witnesses did not depose that bag from which charas was recovered belonged to appellant 'T'- PW 'H' stated that when he made inquiries from the occupants of the vehicle, accused 'T' revealed that the bag belonged to him- this version was made for the first time in the Court- bag was concealed underneath the driver's seat and none had deposed that vehicle was hired by 'T' or that the passengers sitting on the rear seat were his relatives, friends, acquaintances or business associates- further, other persons were acquitted and it was not permissible to convict one conspirator, when others had been acquitted- held, that in these circumstances, prosecution version was not proved. (Para-8 to 24)

Cases referred:
Brathi alias Sukhdev Singh v. State of Punjab, (1991) 1 SCC 519
Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722
Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Girja Prasad v. State of M.P., (2007) 7 SCC 625
Aher Raja Khima v. State of Saurashtra, AIR 1956
Tahir v. State (Delhi), (1996) 3 SCC 338
Balkar Singh v. State of Haryana, (2015) 2 SCC 746

For the Appellant : Mr. Anoop Chitkara, Advocte.
For the Respondent : Mr. Ashok Chaudhary, Mr. V.S. Chauhan, Additional Advocates General and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Record reveals that no appeal stands filed by the State against the judgment of acquittal of four co-accused persons. In fact, under instructions from the State, learned Additional Advocate General made a specific statement that neither any appeal against the judgment of acquittal of these co-accused persons stands filed nor was it sought to be filed. Hence, we proceed to decide the appeal, so filed by the present appellant Tapat Bahadur, who alone stands convicted.

2. Appellant-convict Tapat Bahadur, hereinafter referred to as the appellant, has assailed the judgment dated 17.5.2011/20.5.2011, passed by Special Judge, Fast Track Court, Shimla, Himachal Pradesh, in Sessions Trial No.6-S/7 of 2010, titled as *State of Himachal Pradesh v. Rajiv alias Sanju & others*, whereby he stands convicted of the offence punishable under the provisions of Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) and sentenced to undergo rigorous imprisonment for a period of ten years and pay fine of Rs.1,00,000/- and in default of payment thereof, to further undergo rigorous imprisonment for a period of one year.

3. It is the case of prosecution that in the night intervening 24.11.2009 & 25.11.2009, ASI Harjit Singh (PW-8) alongwith HHC Ram Lal (PW-7), was on a patrol duty and had set up a naka near Beas Dhaba, 16 Meel, District Shimla. At about 4.10 a.m., an Alto Car bearing number HP-01A-6515, driven by co-accused Rajiv Kumar alias Sanju, was stopped for checking. In the vehicle, co-accused Vinod Kumar was sitting on the front seat and the remaining accused persons namely Tapat Bahadur (appellant), Nain Bahadur and Zamil were sitting on the rear seat. Upon checking the vehicle, police recovered one bag, concealed under the driver's seat, which contained charas like substance in the shape of Damru. Upon weighment, it was found to be 1.850 kgs. The same was sealed with seal impression 'T' and seized vide Memo (Ex. PW-1/B). Search and seizure operations were carried out in the presence of independent witnesses Dharam Parkash (PW-1), Sanjeev Sood (PW-2) and Virender (not examined). HHC Ram Lal took the ruka (Ex. PW-7/A), on the basis of which FIR No.229 dated 25.11.2009 (Ex. PW-9/A), under the provisions of Section 20 of the Act, was registered at Police Station, Shimla West, District Shimla. File was taken back to the spot and necessary formalities completed, including filling up of NCB form (Ex. PW-8/B). All the accused persons (occupants of the vehicle) were arrested and informed about

the ground of arrest. Case property as also the accused were produced before Inspector Gurdeep Singh (PW-9), who resealed the parcel with his seal impression 'B'. Thereafter, it was deposited with the MHC Nand Lal (PW-6), who kept the same in the Malkhana. Special Report (Ex. PW-5/A), so prepared by Harjit Singh, was presented before Madan Lal (PW-10), working in the Officer of ASP, Shimla. Contraband substance was sent to the Forensic Science Laboratory, Junga, for analysis, through Constable Kishori Lal (PW-3). Report of the Laboratory (Ex.PY) revealed the contraband substance to be Charas. On completion of investigation, which prima facie revealed complicity of the appellant and his co-accused in the alleged crime, challan was presented in the Court for trial.

4. All the accused persons, were charged for having committed an offence punishable under the provisions of Section 20 of the Act, to which they did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 12 witnesses and statements of the accused persons, under the provisions of Section 313 of the Code of Criminal Procedure, were also recorded. All the accused, though admitted their presence on the spot, pleaded false implication.

6. Based on the testimonies of the witnesses and the material on record, trial Court only convicted and sentenced appellant Tapat Bahadur. Remaining co-accused persons (Rajiv alias Sanju, Vinod, Nain Bahadur and Zamil) stand acquitted.

7. We have heard learned counsel for the parties as also perused the record.

8. It is a settled principle of law that when allegedly several persons commit an offence in furtherance of common intention and all except one are acquitted, it is open to the appellate court to find out, on reappraisal of evidence whether some of the accused persons stood wrongly acquitted, although it would not interfere with such acquittal in the absence of any appeal by the State Government. The effect of such finding is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is relevant only in invoking against the convicted person his constructive criminality. (See: *Brathi alias Sukhdev Singh v. State of Punjab,* (1991) 1 SCC 519).

9. Dharam Parkash (PW-1) categorically states that the vehicle in question was being driven by Sanju, whose friend Vinod was sitting on the front seat and the remaining accused were sitting on the back seat of the car, which was stopped by the police for checking. Witness clarifies that the vehicle was hired by the occupants, as was so disclosed by them to the police. But then which one of the occupants, he does not state. He also states that the occupants of the vehicle had not informed the police that the bag belonged to the driver or his friend. He categorically states that the bag was found concealed under the driver's seat. In his testimony, there is nothing specific qua the present appellant.

10. Sanjeev Sood has not supported the prosecution and was extensively cross-examined by the Public Prosecutor. However, with regard to complicity of the present appellant Tapat Bahadur, he has not disclosed anything, save and except, recording presence on the spot, which fact, in any case, is not in dispute.

11. Thus from the testimony of independent witnesses, it cannot be proved that the bag, from which charas was recovered, belonged to appellant Tapat Bahadur.

12. Now, this brings us to the testimony of the police officials present on the spot.

13. It is a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

14. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

15. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction.

> [See: *Govindaraju alias Govinda v. State by Srirampuram Police Station and another,* (2012) 4 SCC 722; *Tika Ram v. State of Madhya Pradesh,* (2007) 15 SCC 760; *Girja Prasad v. State of M.P.,* (2007) 7 SCC 625); and *Aher Raja Khima v. State of Saurashtra,* AIR 1956].

16. Apex Court in *Tahir v. State (Delhi)*, (1996) 3 SCC 338, dealing with a similar question, held as under:-

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

17. Harjit Singh categorically states that the vehicle in question was stopped for checking. At that time, all the accused persons were sitting in the vehicle. Rajiv alias Sanju

was on the wheels, whereas Vinod Kumar was sitting on the front seat and the remaining three accused persons were sitting on the rear seat. He specifically does not state who was sitting in the centre or on the sides. He further states that upon checking the vehicle, a bag, kept under the driver's seat, was recovered, which contained Charas, in the shape of Damru. This was in the presence of witnesses Sanjiv Sood and Dharam Parkash. On weighment, Charas was found to be 1.850 kgs, which was seized and sealed with seal impression 'T'. NCB form (Ex. PW-8/B) was filled up on the spot. Also, Ruka (Ex. PW-7/A) was sent to the Police Station. All the accused persons were arrested on the spot and informed of their rights. Witness states that during interrogation, it so revealed that Charas was brought by Tapat Bahadur and he had negotiated with Nain Bahadur and Zamil, who further had conversation with Rajiv. Now, this version of his is mere exaggeration and improvement. We find testimony of the witness not to be inspiring in confidence at all. Where did Tapat Bahadur bring the charas from, has not been disclosed. Why was the investigation not taken to the source? All this remains unexplained, rendering such version to be further doubtful, if not false. There are improvements, exaggerations and embellishments. The witness admits absence of any reference to the weighing scales in his previous statement. Also, there is no reference of either Zamil or Tapat Bahadur indulging in the trade of contraband substance. Crucially, witness admits that when the vehicle was checked, all the passengers were standing outside. The only incriminating evidence, in his version, against Tapat Bahadur is that "when I asked the occupants of the vehicle about the bag, Tapat Bahadur told that it belonged to him", but then this version has come out, for the first time, in Court, as the witness admits it not to be there in his previous statement, so recorded under the provisions of Section 161 of the Code of Criminal Procedure and corroborated by any evidence. Significantly, Ruka (Ex. PW-7/A), FIR (Ex. PW-9/A) and Special Report (Ex.PW-5/A) do not record such fact. What is recorded is only that Tapat Bahadur was sitting immediately behind the driver's seat. Now, it is not the case of the prosecution that the co-passengers, during investigation, had revealed that the bag either belonged to or was concealed by Tapat Bahadur. It is also not the case of prosecution that Tapat Bahadur was holding the bag. In fact, it is the positive case of the prosecution that the bag was concealed underneath the driver's seat. It is also not the case of prosecution that the passengers sitting on the rear seat could have seen the same. If at all, anyone was accusable, it was the driver, who incidentally was also the owner of the vehicle. Thus, this version is absolutely uninspiring in confidence.

18. HHC Ram Lal also categorically does not state that the bag, from which Charas was recovered, belonged to Tapat Bahadur or was so concealed by him. In fact, he is categorical that "the passengers sitting on the back seat, did not say that the bag did not belong to them and it belonged to the driver".

19. Though it stands established that at the time when the vehicle was checked, all the accused persons were travelling together, but however, none has come forward to establish that the vehicle was either hired by Tapat Bahadur alone or that the passengers sitting on the rear seat were his relatives, friends, acquaintances or business associates. Prosecution also has not been able to establish that the bag in question was concealed by Tapat Bahadur or that it belonged to him. Then how can it be presumed that recovery was effected from the conscious possession of the appellant. There is no past history of appellant Tapat Bahadur being involved in any crime. He was also not under any suspicion. Police party was not suspecting any trafficking of the contraband substance at the relevant point in time. Also the area in question is not prone to trafficking of such substance.

20. It is in this backdrop the Court below erred in relying upon Ruka (Ex. PW-7/A), wherein it is recorded that Tapat Bahadur was sitting immediately behind the driver's

seat, hence, he was in the control and supervision of the bag (Ex. P-2). Trial Court erred in invoking the statutory presumption of having recovered the contraband substance from his conscious possession. Trial Court also erred in relying upon the provisions of Sections 7 & 8 of the Indian Evidence Act, while coming to the conclusion that admission so made by Tapat Bahadur before the Police officer, not being a concession, was admissible in evidence. Admission of ownership of bag, before the Police Officer, was absolutely inculpatory, and hit by statutory provisions, which, in any case, we do not find to be inspiring in confidence. Action, if any, had to be taken against the owner/driver and no appeal of acquittal stands filed against him.

21. Charge against the accused is not under the provisions of Section 29 of the Act. In any event, in *Balkar Singh v. State of Haryana,* (2015) 2 SCC 746, Hon'ble the Supreme Court of India held that one alleged conspirator cannot be convicted if all co-conspirators are acquitted. Under these circumstances, conspiracy would remain unestablished.

22. In view of the aforesaid discussion, thus, it cannot be said that the prosecution, by leading clear, cogent, convincing and reliable piece of evidence, has been able to establish, beyond reasonable doubt, recovery of the contraband substance from conscious possession of the appellant.

23. Thus, findings of conviction and sentence, returned by the Court below, cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of appellant Tapat Bahadur.

24. Hence, for all the aforesaid reasons, the appeal is allowed and the judgment of conviction and sentence, dated 17.5.2011/20.5.2011, passed by Special Judge, Fast Track Court, Shimla, Himachal Pradesh, in Sessions Trial No.6-S/7 of 2010, titled as *State of Himachal Pradesh v. Rajiv alias Sanju & others,* is set aside and appellant Tapat Bahadur is acquitted of the charged offence. He be released from jail, if not required in any other case. Amount of fine, if deposited by the appellant, be refunded to him accordingly. Release warrants be immediately prepared. Appeal stands disposed of, so also pending application(s), if any.

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

Sunehru Devi (Now deceased) through LRs and others ... Appellants.
Versus
Pohlo Ram and another ... Respondents.

RSA No. 509 of 2002.
Reserved on: 16.5.2015.
Date of decision: 25.5.2015.

Specific Relief Act, 1963- Section 38- Plaintiff sought a relief of permanent prohibitory injunction claiming that he had constructed a work shed (Reniali) for the work of Iron smith- defendant No. 1 dismantled the wall of the work shed and threw the material from the land- held, that when the plaintiff had admitted that he was dispossessed from the suit land by dismantling his work shed and his material was thrown out, he was out of possession, he could not have sought the relief of injunction as necessary requirement for granting the relief of injunction is possession which is not established. (Para-7)

Limitation Act, 1963- Article 65- Plaintiff claimed to be a non-occupancy tenant –he also claimed to have become owner by way of adverse possession- held, that pleas taken by the plaintiff were contradictory - plaintiff had not specified the date of commencement of his possession with necessary animus – hence his plea of becoming owner by operation of law was not acceptable. (Para- 8 to 11)

For the appellant: Mr. Raman Sethi, Advocate.
For the respondent No.1: Mr. Anand Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

The instant appeal is directed against the judgment and decree, rendered on 4.6.2002, in Civil Appeal No. 125 of 1995 by the learned District Judge, Bilaspur, H.P., whereby, the learned First Appellate Court had partly allowed the appeal filed by the appellant/plaintiff whereby the suit for permanent injunction seeking to restrain the defendants from interfering in the suit land till such time he is evicted in due course was decreed. However, the plaintiff's suit for the alternative relief of possession and for declaration was dismissed.

2. The facts giving rise to the present case are that the plaintiff had filed a suit for permanent prohibitory injunction and also in the alternative for possession with the averments that the plaintiff is in possession of the land measuring 2 biswas comprised in Khasra No. 118 min, Khewat Khatoni No. 5/8 situated in village Bhatoli, Pargana Ajmerpur, Tehsil Ghumarwin, District Bilaspur, H.P. as Gair Morusee (non occupancy tenant). The plaintiff has constructed the work shed 'Reniali' for the work of Iron smith over the suit land. On 19.6.1989 the defendant No.1 forcibly came into the suit land and dismantled the walls of the workshop and also thrown the material which was kept over the suit land.

3. Written statement-cum-counter claim filed on behalf of the defendants. The preliminary objection of maintainability, misjoinder and non joinder of necessary parties, locus standi, estoppel and cause of action were taken. On merits, it is stated that the defendants are in possession of the suit land and they are recorded owners of the suit land. The entries showing the plaintiff as Gair Maurusee (Bila Lagan Babaja Khidmat Pessa) over the suit land are wrong, illegal and contrary to the spot. By way of counter claim, it is contended that the defendants are owners in possession of the suit land and the revenue entries showing the plaintiff as non occupancy tenant over the suit land are totally wrong. It is alleged that the plaintiff has got these wrong entries incorporated in his name in the revenue record in connivance with the revenue staff.

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

1. Whether the plaintiff is in possession of the suit land as non occupancy tenants? OPP.
2. Whether the defendants are interfering in the possession of the plaintiff over the suit land? OPP.
3. Whether the plaintiff is entitled to the possession of the suit land if dispossessed from the suit land during the pendency of the suit by dismantling the construction? OPP.

4. Whether the plaintiff has no locus standi to file the present suit, as alleged, OPD.
5. Whether the plaintiff is estopped to file the present suit by his own acts, conducts, omissions and commissions? OPD.
6. Whether the suit is not properly valued? OPD.
7. Whether the plaintiff has no cause of action? OPD.
8. Whether the defendants are in possession of the suit land, as alleged? OPD.
9. A. Whether the plaintiff has become owner of the suit land by way of adverse possession? OPP.

   B. Whether the defendants are owners in possession of the suit land, as alleged? OPD.
10. Whether the defendants are entitled to a decree of declaration? OPD.
11. Relief.

5. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court had dismissed the suit of the plaintiff and the learned District Judge, Bilaspur, had partly allowed the appeal.

6. Now the defendants/appellants have instituted the instant Regular Second Appeal before this Court, assailing the findings recorded by the learned first Appellate Court, in, its impugned judgment and decree. When the appeal came up for admission on 29.11.2002, this Court, admitted the appeal on, the hereinafter extracted substantial questions of law:-

1. Whether a party can be permitted to take two diametrically opposite and inconsistent stands and claim to be tenant on one hand and also be allowed to plead that the said part has become owner by way of adverse possession?
2. Whether a suit for permanent injunction can be filed by a party against the true owner when it is not in possession of the land?

<u>Substantial questions of law No. 1 and 2</u>.

7. The plaintiff had constructed a work shed (Raniali) on the suit land for carrying therein the avocation of an iron smith. The aforesaid 'Reniali' raised by the plaintiff over the suit land stood dismantled by defendant No.1 on 19.6.1989. The plaintiff has claimed a decree for permanent injunction restraining the defendant from interfering over/ upon the suit land, in any manner. Besides a decree is claimed against the defendants qua theirs being directed to restore the possession of the suit land to him in the event of his during the pendency of the suit being dispossessed by the defendants. The core relief claimed or asserted by the plaintiff against the defendants was hence primarily of a decree of permanent prohibitory injunction restraining the defendants from interfering in the suit land, besides in the alternative a decree for possession of the suit land in case during the pendency of the suit the plaintiff stands dispossessed by the defendants. Therefore, the graveman of the controversy is anvilled upon the apposite pleadings and apt evidentiary facts unearthing the factum whether the plaintiff has been able to establish the factum of his being in possession of the suit land, for his then being entitled to a decree for injunction

besides his having proved the factum of his having been dispossessed from the suit land during the pendency of the suit by an act of the defendants so as to claim the relief or a decree of possession of the suit land. Obviously, for a decree of injunction being rendered in favour of the plaintiff, the indispensable tenet to be satiated by evidence, is of the plaintiff being in settled possession of the suit land. Besides, for an alternative decree of possession being renderable in favour of the plaintiff, the plaintiff was enjoined to establish that viz.a.viz the defendants he has a superior and better title to the suit land hence even if he stands dispossessed from the suit land, he has a right to reclaim or recover its possession. The factum of the plaintiff being not in possession of the suit land is borne out by an admission of the plaintiff comprised in his examination in chief wherein he has deposed that the defendants dismantled his 'Raniali' besides there is another admission in his cross-examination, of the Reniali/workshop, wherein he performed his avocation as an iron smith, no longer existing at the site, rather it having been dismantled five years prior to the recording of his deposition, on oath. In aftermath, the admissions aforesaid forcefully convey the fact of no 'Reniali' or workshop wherein the plaintiff performed his avocation as an iron smith existing at the site. Besides, there is a revelation in Ext.PA, which is an order imposing fine upon the defendant Sunehru Devi by the Gram Panchayat concerned on its receiving a complaint from the plaintiff attributing therein an inculpatory act to the defendant-Sunehru Devi comprised in hers dismantling the 'Reniali' of the plaintiff existing on the suit property, of hence the defendant Sunehru Devi having been fined for hers having committed an offence under Section 427 of the IPC. However, there is no portrayal therein of the defendant Sunehru Devi having been ordered to restore the possession of the suit land to the plaintiff. Nor there is any evidence adduced by the plaintiff that his possession of the suit land comprised in the existence of an iron shed thereon, which stands dismantled, having been reclaimed by him by his reoccupying the suit land hence warranting this Court to render a decree of injunction, as prayed for. Consequently, when there is abysmal want of evidence, rather when the aforesaid evidence is communicative of the plaintiff by his omitting to reclaim it or his having not reclaimed it, hence his having abandoned possession over the suit land, the refusal by the learned trial Court of a decree of injunction in favour of the plaintiff was legally apt as well as tenable. The first Appellate Court while reversing the decree of the learned trial Court whereby the latter Court dismissed the suit of the plaintiff appears to have formed a conclusion qua the fact of the plaintiff being in possession of the suit land merely on conjectures and surmises, besides on the mere existence of a stray suggestion having been put to PW-2 during his cross-examination by the defendants connoting the factum of acquiescence of the defendants to the permissive possession of the plaintiff over the suit land. The conclusions aforesaid arrived at, by the learned First Appellate Court on mere conjectures and surmises qua the possession of the plaintiff stand to be discountenanced more especially when the said conclusion warrants its being dislodged/displaced, by the existence of potent admissions in the deposition of the plaintiff besides other material as referred to hereinabove, portraying the fact of the plaintiff being extantly not in possession of the suit land, hence when the factum of proven possession over/upon the suit land of the plaintiff would alone entitle him to a decree of permanent prohibitory injunction, its want, necessitated its refusal as tenably done by the learned trial Court and which decree has been untenably accorded by the learned First Appellate Court.

8. The claim of the plaintiff to recover possession of the suit land necessitated adduction of apposite potent evidence and its also carrying probative sinew besides its manifesting the fact that even if he stood dispossessed from the suit land, he had a right to reclaim its possession from the defendants, as he had acquired title to it by adverse possession, as averred in the plaint. Besides a decree for possession was renderable in his favour, in the event of the factum recorded in the apposite jamabandies displaying him to be

a gair marusee tenant qua the suit land, enjoying sanctity, as such, empowering him to assert acquisition of title thereon by operation of law. However, the learned trial Court had dispelled the factum of the plaintiff having lent or adduced strong and potent proof qua his having become owner of the suit land by adverse possession. The pre dominant reason which prevailed upon the learned trial Court for dispelling the factum of the plaintiff having proven the predominant factum of his having become owner of the suit land by adverse possession was harbored upon omission of a communication in his deposition with precision qua the commencement of his possession over the suit land with an animus possidendi, comprised in his act of his having constructed a work shop thereupon. Omission of a communication with precision qua the exact time of his having commenced possession of the suit land with the requisite animus possidendi gives latitude to the inference that his deposition is nebulous, shaky and infirm for fostering thereupon an apt conclusion qua the precise time when he entered possession upon the suit land with an animus possidendi so as to, as a corollary reckon therefrom the elapse of the statutorily ordained period of time for rendering him capacitated to be construable to be owner thereof by prescription.

9. The learned trial Court had struck an issue qua the factum of the validity of entries in the revenue record depicting the plaintiff as a gair marusee tenant. The findings returned on the said issue by the learned trial Court were against the plaintiff. The plaintiff had asserted acquisition of title to the suit land by way of adverse possession, as also with his being, in the apposite revenue entries qua the suit land comprised in Ext.P-1, P-2, P-4, P-6 and Ext.P-7 displayed therein to be a non occupancy tenant qua the suit land, rendered him empowered to foist a claim qua his having become owner of the suit land by operation of law.

10. Significantly, the tenacity of the revenue entries of the aforesaid apart, his plea of his having become owner of the suit land on the strength of the revenue entries personifying him and depicting him to be a gair marusee tenant under the defendants/landowners rendering him legally fit to claim vestment of title by operation of law and the alternative plea of his having become owner of the suit land by way of adverse possession, are mutually antithetical besides inconsistent pleas. Both erode and whittle down the effect of the other. Predominantly, the factum of occurrence of an entry in the relevant revenue record displaying the plaintiff to be a gair marusee tenant qua the suit land under the land owners, whereupon he anvilled a claim of his having become its owner by operation of law, is necessarily built upon a bilateral contract inter se the landlords and the tenant or the entries aforesaid pre suppose the germination of or coming into existence of a valid relationship of landlord and tenant interse the contesting parties. While canvassing the said plea there is an apparent acquiescence by the plaintiff, of the defendants landlords being the owners of the suit land and his possession under them being in his capacity as a tenant. However, he in derogation to his admitted and accepted status as a tenant under the defendants landlords qua the suit land has proceeded to assert his having acquired title over/upon the suit land by way of prescription arising from efflux of time. Obviously, then he erodes the effect of besides benumbs the effect of the entries in the revenue record portraying him to be a gair marusee tenant qua the suit property under the defendants/landlords.

11. Also concomitantly he while canvassing an assertion of his having acquired title to the suit land by way of adverse possession afflicts it with the malady of its starkly contradicting his primarily plea of his while being recorded as a gair marusee tenant qua the suit land under the defendants/landlords, its ownership stands by operation of law vested in his favour. Both pleas being mutually destructive erode and whittle down the effect of the other. They render the plaintiff incapacitated and disempowered to sustain and establish

each of the alternative yet mutually destructive and erosive pleas. Apart therefrom, dehors the plaintiff having canvassed mutually destructive pleas which mutually emasculate each other, the factum of existence of entries in the jamabandis apposite to the suit land connoting the plaintiff to be a gair marusee tenant over the suit land under the defendants land owners, too would gain succor and would attract truth only in the event of it having been established by cogent evidence that the entries in Ext.P-1, P-2, P-4, P-6 and Ext.P-7 aforesaid in succession to the reflection in Ext.P-5 wherein the predecessor-in-interest of the defendants is recorded owner in possession of the suit land stood incorporated in substitution to the preceding entries comprised in Ext.P-5, only in pursuance to orders rendered by the competent revenue authorities.

12. However, in the face of no evidence having been adduced qua orders having been rendered by the competent revenue authority for effectuating substitution of entries in Ext.P-5 by entries in Ext.P-1, P-2, P-4, P-6 and Ext.P-7, renders the entries in the Jamabandies prepared subsequent to Ext.P-5 to be hence recorded or incorporated without the authority of law and as such construable to be nonest. Consequently, the presumption of truth hence attracted or enjoyed by revenue entries comprised in Ext.P-1, P-2, P-4, P-6 and Ext.P-7 displaying the plaintiff to be gair marusee tenant over the suit land stands whittled down. In sequel, there is no right in the plaintiff to canvass that his being recorded as a gair marusee tenant therein he has a right in law to claim or assert vestment of title in the suit land in him by operation of law. Moreover, there is no evidence portraying the factum of the entries comprised in Ext.P-1, P-2, P-4, P-6 and Ext.P-7 having been preceded by rendition of an order for attesting mutation in favour of the plaintiff as a gair marusee tenant qua the suit land. Absence of the above evidence not only dispels the factum portrayed therein of the plaintiff being a gair marusee tenant qua the suit land under the defendants/land owners, besides efficaciously rebuts the truth, if any, carried by them.

13. In sequel, the entries in Ext.P-1, P-2, P-4, P-6 and Ext.P-7 then hold no force, also Ext.P-3 which is a Roznamcha Bakiati prepared by the halqa Patwari, which is also not demonstrated to be founded upon an order of the revenue authority nor has been demonstrated to be preceded by a detailed inquiry in which the defendants also participated hence rendering its recitals while being unilaterally incorporated therein in infraction of the principles of natural justice, to be hence nonest and void. In aftermath, even when the plaintiff has been unable to establish the factum of the revenue entries depicting him to be a gair marusee tenant qua the suit land under the defendants to be acquiring any truth of veracity, rather the presumption attracted/attached thereto for the reasons aforesaid facing rebuttal, as such, he is incapacitated to either claim the factum of his being a gair marusee tenant under the defendants qua the suit land, besides he is disempowered to claim vestment of title in him qua the suit land by statutory operation. Naturally then when he has been unable to establish title to the suit land as also when he stands dispossessed from the suit land, he cannot claim a decree for possession qua the suit land. The learned First Appellate Court while, overcoming the effect of the admission in the testimony of the plaintiff personifying the factum of his being no longer in possession of the suit land and thereupon having reversed the judgement and decree of the learned trial Court, comprised in it having relied upon a mere stray suggestion having been put to PW-2 conveying the factum of acquiescence of the defendants to the permissive possession of the plaintiff over the suit land has committed a grave illegality. Obviously then it has proceeded to untenably render a decree of injunction in favour of the plaintiff by imputing unnecessary leverage to the aforesaid factum whereas for reasons assigned hereinabove its effect does stand wholly benumbed and smothered. Besides, the aforesaid discussion unfolds the factum of not only the plaintiff being not entitled to the decree of injunction in the face of his being unable to establish the factum of his being in possession of the suit land the preeminent sine qua non

for rendition of a decree of injunction in his favour. Moreover, in the face of his having not established the factum of his having no lawful title to the suit land for entitling him to claim recovery or restoration of the possession of the suit land, rather with it having been forcefully established that the entry in Ext.P-5 while having been substituted by unwarranted entries in the subsequent jamabandies holds the field, wholly dis-empowers him to also claim possession as well as ownership of the suit land. Now with Ext.P-5 reflecting the predecessor in interest of the defendants as owner they hence stand entitled to the suit land. The judgement and decree of the learned trial Court is maintained and affirmed and the judgement of the learned First Appellate Court is set-aside. Consequently, the suit of the plaintiff is dismissed and the substantial questions of law are answered in favour of the defendants/appellants. Records be sent back forthwith. No costs.

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

Devta Balu Nag Ji …Appellant.

Versus

Devta Shring Rishi Ji & others …Respondents.

LPA No. 422 of 2012
Decided on: 26.05.2015

Constitution of India, 1950- Article 226- Appellant was not a party before the Writ Court and had not filed any application seeking leave to appeal- held, that leave can be granted to 3rd party provided it carves out a case to the effect that the judgment is prejudicial to its rights and interests- since no such case was made out therefore, writ Petition dismissed as not maintainable. (Para-1 to 3)

For the appellant:	Mr. Sanjeev Kuthiala, Advocate.
For the respondents:	Mr. O.P. Sharma, Senior Advocate, with Mr. Naveen K. Dass, Advocate, for respondents No. 1 to 3 and 5. Name of respondent No. 4 stands deleted. Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. Kush Sharma, Deputy Advocate General, for respondents No. 6 and 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The appeal, on the face of it, is not maintainable for the simple reason that the appellant was not a party in the lis before the Writ Court in CWP No. 3757 of 2011-D, titled as Devta Shring Rishi Ji and other versus State of Himachal Pradesh and others and has not applied for grant of leave to file appeal, not to speak of carving out a case for grant of leave.

2. It is a beaten law of land that leave can be granted to a third party provided it carves out a case to the effect that the impugned judgment is prejudicial to its rights and interests.

3. The Writ Court in para 2 and the last para of the impugned judgment held that it has not determined the rights of the parties by the medium of the impugned judgment. However, the Writ Court has observed that the Deputy Commissioner's communication, dated 01.10.2008 is taking care of the grievances of the writ petitioners. It is apt to reproduce para 2 and the last para of the impugned judgment herein:

> *"2. In this writ petition, I do not intend to adjudicate upon the rights of each and every deity or individual but only the participation of the petitioner deity in the Kullu Dussehra festival which is of International fame.*
>
> *......................*
>
> *In these circumstances, this Court sees no reason as to why this practice should not be followed in letter and spirit, which should take care of all the grievances of the petitioners. It is directed accordingly. This order does not determine or circumscribe the right of any other participant in the festival."*

4. In the given circumstances, appeal merits to be dismissed. However, the appellant is at liberty to challenge the communication, dated 01.10.2008 (Annexure P-1 to the writ petition), if aggrieved and advised.

5. The appeal is dismissed as such alongwith all pending applications.

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

Sudesh Kumar ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

Criminal Appeal No.21 of 2012
Reserved on : 5.5.2015
Date of Decision : May 26, 2015

Indian Penal Code, 1860- Sections 341, 506 and 376- Prosecutrix was going to her home- accused met her on the road and raped her- incident was narrated by her to her parents who reported the matter to Pardhan- Pardhan called accused and his parents- his father and brother came and expressed their regrets- even if it is assumed that accused and prosecutrix knew each other and were in love with each other that would not give a licence to the accused to sexually assault the victim- testimony of prosecutrix is sufficient to convict the accused if it inspires confidence- matter was reported to the police promptly- mere fact that victim did not resist due to fear cannot lead to the conclusion of consent. (Para-9 to 26)

Cases referred:

Vinod Kumar v. State of Kerala, (2014) 5 SCC 678
Amar Bahadur Singh v. State of U.P., (2011) 14 SCC 671
Narayan alias Naran v. State of Rajasthan, (2007) 6 SCC 465
Deelip Singh alias Dilip Kumar v. State of Bihar, (2005) 1 SCC 88
Balasaheb v. The State of Maharashtra, 1994 CLJ 3044

Rajesh Patel Versus State of Jharkhand, (2013) 3 SCC 791
State of Rajasthan Versus Babu Meena, (2013) 4 SCC 206
Narender Kumar Versus State (NCT of Delhi), (2012) 7 SCC 171

For the Appellant : Mr. S.D. Gill, Advocate.
For the Respondent : Mr. Ashok Chaudhary, Mr. V.S. Chauhan, Additional Advocates General, and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Sudesh Kumar, hereinafter referred to as the accused, has assailed the judgment dated 31.12.2011, passed by Additional Sessions Judge-I, Kangra at Dharamshala, Himachal Pradesh, in Sessions Trial No.62-D/2010, titled as *State of Himachal Pradesh v. Sudesh Kumar*, whereby he stands convicted of the offences, punishable under the provisions of Sections 341, 506 and 376 of the Indian Penal Code and sentenced as under:

Section	Sentence
341 IPC	Rigorous imprisonment for a period of one month and fine of Rs.500/- and in default of payment thereof to further undergo simple imprisonment for a period of one month.
506 IPC	Rigorous imprisonment for a period of one year and fine of Rs.2,000/- and in default of payment thereof to further undergo simple imprisonment for a period of three months.
376 IPC	Rigorous imprisonment for a period of ten years and fine of Rs.20,000/- and in default of payment thereof to further undergo simple imprisonment for a period of six months.

All the sentences have been ordered to run concurrently. Out of the fine amount, so imposed by the trial Court, an amount of Rs.15,000/-, on realization, has been ordered to be paid, as compensation, to the prosecutrix.

2. It is the case of prosecution that prosecutrix (PW-14), resident of Jhikar, was running a tailoring and beauty parlour in village Gharoh. On 21.8.2010, after closing her parlour, while she was returning home, at about 6.15 p.m., accused met her at Murad Gohar and disclosed his liking for her. Also, he prevented her from going home and on the spot forcibly subjected her to sexual intercourse. Finding the prosecutrix not to have returned home, since it was raining heavily, her mother Reeta Devi (PW-2) and father Prem Chand came to search for her. On way, they met the prosecutrix, who disclosed the entire incident to them. The matter was immediately brought to the notice of Pradhan Urmila (PW-1), who called the accused and his parents. Though accused did not come, but his father and brother came and expressed their regrets. The matter was immediately brought to the notice of the police. On the basis of complaint (Ex. PW-14/A), police registered FIR No.208,

dated 22.8.2010 (Ex. PW-15/A), under the provisions of Section 376/341/506 of the Indian Penal Code, at Police Station Dharamshala. Prosecutrix was got medically examined at the Government Hospital, Dharamshala. Dr. Shalini Gautam (PW-7), who conducted the medical examination, issued MLC (Ex. PW-7/B). Investigating Officer, Narain Singh (PW-15), conducted investigation on the spot. He took into possession clothes of the prosecutrix as also other incriminating articles. Report of the Forensic Science Laboratory, with respect to the vaginal swab and the clothes was obtained by the police. With the completion of investigation, which, prima facie, revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed offences, punishable under the provisions of Sections 341, 506 and 376 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 15 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he pleaded innocence and took the following defence:

> "PW 1 Urmila Katoch Pradhan and parent of the prosecutrix have prepared a false case. Because the parents of Prosecutrix are working in the house of Pradhan. Therefore they alongwith police have prepared false case."

5. Based on the testimonies of the witnesses and the material on record, trial Court convicted the accused of the charged offences and sentenced him, as aforesaid.

6. Learned counsel for the appellant has assailed the judgment on the following counts, (i) accused and the prosecutrix were known from before and the act is consensual in nature, (ii) prosecution has concealed relevant material from the Court, as call logs of the mobile number of the prosecutrix would have revealed proximity between the two, and (iii) testimony of the prosecutrix is absolutely uninspiring in confidence. In fact, she has falsely deposed before the Court and as such accused only merits acquittal. He has referred to the following decisions:

1. *Vinod Kumar v. State of Kerala,* (2014) 5 SCC 678;
2. *Amar Bahadur Singh v. State of U.P.,* (2011) 14 SCC 671;
3. *Narayan alias Naran v. State of Rajasthan,* (2007) 6 SCC 465;
4. *Deelip Singh alias Dilip Kumar v. State of Bihar,* (2005) 1 SCC 88; and
5. *Balasaheb v. The State of Maharashtra,* 1994 CLJ 3044.

7. Learned Additional Advocate General has supported the findings of fact and judgment, so rendered by the trial Court.

8. Having heard learned counsel for the parties, we are of the considered view that no case for interference is made out.

9. We find the testimony of the prosecutrix to be absolutely inspiring in confidence. In this backdrop, we do not find any merit in the submission of learned counsel that the investigating agencies had concealed relevant material from the Court. In any case, plea is based on suspicion and not fact, much less proven. Call logs would have only revealed proximity between the accused and the prosecutrix. Assuming hypothetically that they knew each other from before, or for that matter were even in love with each other, that fact would not be construed to be a licence to sexually assault the victim. Prosecution, through reliable and creditable piece of evidence is duty bound to establish the incident of sexual assault. If testimony of the prosecutrix is found to be inspiring in confidence,

evidence of call logs would pale into insignificance. In any event, accused has not led any evidence in his defence to establish such fact. On the contrary, accused has tried to impeach the character of the prosecutrix, as is evident from the cross-examination of the prosecution witnesses.

10. In Court, prosecutrix states that on 21.8.2010, while she was returning from village Murad Gohar to Jhikar, accused met her near the Pulli (culvert) at Murad Gohar. He enquired and she replied that she was going home. He asked her to stop. Accused, who was drunk, said that he liked her and wanted to marry her, to which she responded that she would talk lateron and asked him to let her go. However, for about 15-20 minutes, accused prevented her from going home. She got frightened and took out her mobile phone from her bag, which was also thrown away by the accused. When she raised hue and cry, accused caught her from the throat and also started intimidating her. He threatened to kill her. Accused took her to the bushes and raped her. Thereafter, he threatened her not to disclose the incident to anyone. Since she had got late, her parents came searching for her, whom she met on the way and disclosed the entire incident. Thereafter, they went to the house of the Pradhan, who called the accused and his father. Though accused did not come, but his father and brother came and felt sorry. On her asking complaint (Ex.PW-14/A) was lodged with the police. This is all that she states in her examination-in-chief.

11. It is a settled principle of law that testimony of prosecutrix is sufficient enough to convict the accused if it inspires confidence. (See: *Rajesh Patel Versus State of Jharkhand,* (2013) 3 SCC 791 and *State of Rajasthan Versus Babu Meena,* (2013) 4 SCC 206).

12. The Court is duty bound to appreciate the evidence in the totality of the background of the entire case. It is also settled proposition of law that in case evidence read in its totality and the story projected by the prosecutrix is found to be improbable, her version is liable to be rejected. The apex Court in *Narender Kumar Versus State (NCT of Delhi),* (2012) 7 SCC 171, has held as under:-

> "20. It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.
>
> 21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide: *Vimal Suresh Kamble v. Chaluverapinake Apal S.P. & Anr.*, (2003) 3 SCC 175; and *Vishnu v. State of Maharashtra,* (2006) 1 SCC 283.
>
> 22. Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version

may be otherwise, no reliance can be placed upon her evidence. (Vide: *Suresh N. Bhusare & Ors. v. State of Maharashtra*, (1999) 1 SCC 220.

23. In *Jai Krishna Mandal & Anr. v. State of Jharkhand*, (2010) 14 SCC 534, this Court while dealing with the issue held:

> "4….the only evidence of rape was the statement of the prosecutrix herself and when this evidence was read in its totality, the story projected by the prosecutrix was so improbable that it could not be believed."

24. In *Rajoo & Ors. v. State of Madhya Pradesh*, (2008) 15 SCC 133, this Court held: (SCC p. 141, para 10)

> "10….that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on par with that of an injured witness and if the evidence is reliable, no corroboration is necessary."

The court however, further observed:

> "11…….It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication….. there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

25. In *Tameezuddin @ Tammu v. State (NCT of Delhi)*, (2009) 15 SCC 566, this Court held has under:

> "9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter."

26. Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference of the victim being a woman of "easy virtues" or a women of "loose moral character" can be drawn. Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. Merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated. (Vide: *State of Maharashtra & Anr. v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57; *State of Punjab v. Gurmit Singh & Ors.,* (1996) 2 SCC 384; and *State of U.P. v. Pappu @ Yunus & Anr.*, (2005) 3 SCC 594.

27. In view of the provisions of Sections 53 and 54 of the Evidence Act, 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration at all.

28. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant

discrepancies in the evidence of witnesses which are not of a substantial character.

29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide: *Tukaram & Anr. v. The State of Maharashtra,* (2979) 2 SCC 143; and *Uday v. State of Karnataka*, (2003) 4 SCC 46.

30. The prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.

31. The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtue/unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of."

13. Now, when we examine the cross-examination part of her testimony, we find her credit not to be impeached. Her testimony is clear, cogent and consistent. We find her version to be absolutely inspiring in confidence. It has come on record, which fact she also does not deny that her father had lodged a report with the police that she had been found missing from her home, but then, this was in the year 2006 and not 2010. The fact that she had opened a parlour in village Murad Gohar is not disputed by the accused, which fact is, in any way, evident from her testimony. She explains that she was dragged by the accused in a standing position. She clarifies that "*the accused had slightly pressed my throat and threatened me. It is incorrect that accused had pressed my throat so I could not speak".* This explains the reason of absence of any injury marks on her face or throat or any other part of her back. We find that she did resist the acts of the accused, but eventually under threat of life, gave it up.

14. Painstakingly, Mr. S.D. Gill has taken us through the following part of her testimony to throw light that it is a case of consent:

"……….*It is incorrect that I had been asked to state the above things for the first time today in the court. It is correct that after I was laid down on the ground the accused opened the string of my salwar and came near to me. I had not bitten the accused with my teeth or scratched him with my finger, as I*

was frightened. I cannot tell as to how much time taken by the accused in removing my salwar. The accused had also removed the undergarment. I had not struggled or scratched the accused when he removed my undergarment. Volunteered that I was weeping at that time. It is correct that when the accused tried to rape me, I closed my legs together so that accused may not rape. Thereafter, the accused forcefully opened the thighs with his hands. I cannot tell as to how much time accused took in forcefully opening the thighs. Thereafter I did not close my legs. It is correct that I had not given the above facts in detail in my complaint to the police. I cannot tell as to how much time the accused took in committing the rape."

15. We are in total disagreement with the learned counsel on this count. She has explained the reason of not continuing with her resistance. She was weeping and the accused, without her consent, for satisfying his lust and desire, subjected her to sexual intercourse.

16. We find her version to have been corroborated by her mother Reeta Devi (PW-2) as also Pradhan Urmila Katoch (PW-1).

17. Yes, these are main contradictions. We find in the testimony of Reeta Devi, there is denial of lodging of missing report in the year 2006. But then, this fact alone would not shatter the prosecution case or for that matter render the testimony of the prosecutrix, or her mother, to be doubtful. Parties hail from rural background and it is not that the mother had lodged the report. Benefit of loss of memory, on account of passage of time, has to be accorded to her. Also Pradhan Urmila states that the place where the prosecutrix was dragged, bushes were broken, which fact the Investigating Officer has not been able to highlight. But then, this fact would not render the prosecution case to be doubtful, for on material aspect, prosecution case stands totally established on record and beyond reasonable doubt.

18. We find that there is no delay in lodging the FIR. The very same day, the incident was reported to the Pradhan and then to the police. It is not a case of due deliberations or false implication. It is also not the case of the accused that the prosecutrix subjected him to blackmail.

19. Dr. Shalini Gautam (PW-7), who examined the prosecutrix, on local examination observed as under and found the following injuries on her body:

"1. Abrasions red in colour multiple in number over wrist forearm right arm right foot,

2. Multiple abrasion seen on the middle part of right side back,

3. One abrasion over upper part of left breast.

<u>Local Examination:</u>

1. Red coloured around 5 c.m. long abrasion present over the left groin. No other injury mark seen over thighs and private parts.

2. Pubic hairs present, pubic hair not matted and pubic hair clipping taken sealed and packed. Dried grass pieces seen over the perineal.

3. P/S (Per speculum) examination showed ton taggs of hymen. (carunculae hymenalis) Brownish coloured secretions seen in the vagina. Cervix healthy. Swab taken from the vagtina, posterior fornix and cervical canal. Two slides prepared from the vagina and posterior fornix.

4. Per veginal examination: two fingers easily admitted. No local tenderness uterus anteverted normal size and bilateral fornices clear.

Nature of Injuries:

2. Injuries 1 to 3 were simple in nature, caused approximately more than six hours. Referred for age verification. ……………

Opinion

In my opinion it cannot be ruled out that sexual intercourse has not taken place based on physical findings, final opinion to be given after report from FSL."

20. Age of the prosecutrix is between 17 and 19 years, whereas accused was aged 24 years as on the date of commission of crime. On account of intimidation and threat to her life, she was not able to resist the overt acts of the accused. Also her body structure is frail, whereas accused is an able bodied man.

21. Absence of injury marks on the back side of the prosecutrix would also not render her testimony to be uninspiring in confidence. How a person would respond to the threats would depend from case to case. It is neither the requirement of law nor that of medical jurisprudence that in every case of sexual assault, so committed in a jungle/open place, victim must, under all circumstances, sustain injuries. Reaction of a victim is dependent upon various attending circumstances, including the nature of threat to her life. Initially, in the instant case, victim did raise noise, but then none could have come forward to help her, for it is not the case of the accused that there were houses/habitation nearby. It is also not the case of the accused that the path where the alleged offence took place was common and frequently used by passersby.

22. For the benefit of the accused, it be only observed that the scientific evidence does not establish complicity of the accused, but then it is not the law that the accused is to be co acquitted solely on this ground. Laboratory could not conclusively establish presence of semen on the vaginal swab, as it was insufficient for examination.

23. We find testimony of the prosecutrix to be absolutely inspiring in confidence. There is no prior animosity between the complainant and the accused or a reason sufficient enough for the prosecutrix to have falsely implicated the accused.

24. Alleged immoral character, so imputed from the circumstance of the prosecutrix of having left the house of her parents, way back in the year 2006, by no stretch of imagination, would render the prosecution case to be false or testimony of the prosecutrix to be impeachable.

25. In *Vinod Kumar (supra)*, the Court was dealing with the case where the parties had expressed their desire of getting married and only thereafter they indulged in sexual activity. In *Amar Bahadur Singh (supra),* the Court was dealing with the case where the prosecutrix was caught, having sexual act, in her own house, in the presence of her children. In *Narayan (supra)*, the Court was dealing with a case where testimony of the prosecutrix was not found to be inspiring in confidence. In *Deelip Singh (supra)*, the Court itself has clarified that consent given, under fear or injury, is not consent at all. In fact there is consent between "consent" and "submission". The Court clarified that consent or absence of it could be gathered from attending circumstances. Previous, contemporaneous or subsequent act would be relevant.

26. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The

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

27. In our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

28. For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

****

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

Smt. Sunita Kumari …Appellant
Versus
Bhumi Chand …Respondent

FAO (HMA) No. 41 of 2014
Reserved on 21.5.2015
Date of decision: 26.5.2015

Hindu Marriage Act, 1955- Section 13(1) (ia) (ib)- Wife started residing in the house of her parents- a compromise was effected- husband went to bring her back but she did not return- husband was serving in the army - he suffered a stroke of paralysis but wife did not visit home to care for him- wife claimed that she and her child were forced to reside in her parental home- wife had gone to Hamirpur to get her son educated and had agreed to return to her matrimonial home after the conclusion of examination- she instead went to her parental home - she had not complied with the decision of the Panchayat – she claimed maintenance from the Army Authority- she had not visited her husband even when he had suffered paralytic stroke- all this showed that intention of the wife was to harass her husband- held, that in these circumstances, husband was rightly held entitled for divorce.
(Para-17 to 24)

Case referred:

K. Shrinivas Rao Vs. D.A. Deepa, (2013) 5 SCC 226

For the Appellant: Mr. S.D. Gill, Advocate.

For the Respondent: Mr.K.D. Sood, Senior Advocate with Mr.Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The appellant is aggrieved by the order passed by learned District Judge, Hamirpur, on 24.12.2013, whereby the marriage between the parties was ordered to be dissolved under Section 13(1) (ia) (ib) of the Hindu Marriage Act.

2. The brief facts of the case as per the respondent (who was the petitioner before the Court below) are that the marriage between the parties was solemnized on 28.7.2002 in accordance with Hindu rites and customs. One son, namely, Suraj was born out of the wedlock. The appellant began to reside in the house of her parents and thereafter a compromise was affected between the parties at the instance of Pradhans of the respective Gram Panchayats. As per the compromise effected on 11.3.2010, parents and relatives of the respondent along with Pradhan Urmila Devi and other villagers went to the parental house of the appellant to bring her back to her matrimonial house, but she did not join her matrimonial home.

3. The respondent was serving in the Army and suffered a stroke of paralysis, due to which he was admitted in the Army hospital, but the appellant did not even care to see, much less look after him. He was discharged from the hospital on 19.1.2011 and thereafter on 24.10.2011 came to his home after availing leave and sent a message to the appellant through his father. But, even then the appellant refused to come to the house of the respondent. It was alleged that no cohabitation has taken place between the parties since March, 2010 and the appellant has not only deserted the respondent, but also treated him with cruelty.

4. The appellant opposed the petition by filing reply, wherein preliminary objections regarding maintainability and estoppel were raised. On merits, the appellant denied the allegations that she had treated the respondent with cruelty or had deserted him as alleged. Her specific stand was that the respondent and his family members had forced the appellant and her minor child to live in her parental house, through she was ready to join the company of respondent at anytime and anywhere and it was the respondent who was not interested to keep her with him and therefore, had neglected to maintain her. It was for this reason that the maintenance of Rs.5670/- per month was being paid to her by the Military Authorities. It was further alleged that prior to the year 2010 the appellant resided at Hamirpur with the consent of the respondent because their son was studying at DAV School, Salasi, but later on all the house hold luggage was removed by the respondent and his family members from the rented accommodation, in which the appellant was residing. The appellant in such circumstances has no other option, but to live in her parental house. Such luggage was finally removed by mother-in-law of the appellant forcibly on 12.3.2010.

5. The appellant further denied the so called compromise and it was alleged that some persons from the side of respondent had come and discussed the matter, but they simply disclosed that the respondent would consume poison and end his life in case the appellant comes to her matrimonial house. It was thereafter pleaded that the appellant was ready to return to her matrimonial house and fulfill all the obligations, if she is allowed to live in the matrimonial home with proper dignity. It was further alleged that the respondent never disclosed to the appellant that he had suffered from paralytic attack and had remained admitted in Army Hospital, due to which the appellant was not in a position to have any access at the place of posting of the respondent.

6. The learned Court below on 28.12.2012 framed the following issues:-

"1. Whether the respondent has subjected the petitioner with cruelty as alleged? OPP

2. Whether the respondent has deserted the petitioner as alleged? OPP

3. Whether the petitioner is estopped from filing the present petition by his act and conduct? OPR

4. Relief."

7. After recording the evidence and evaluating the same, the learned Court below allowed the petition and ordered the dissolution of the marriage by passing a decree for divorce on the ground of cruelty as also desertion. It is against this order that the present appeal has been filed.

8. Sh. S.D. Gill, learned counsel for the appellant has vehemently argued that the learned Court below has failed to take into consideration that the appellant was ready to live with her husband and therefore, in such circumstances it would not have been held that the appellant had deserted the respondent. He further contended that the Court below had wrongly relied upon the compromise, whereas no compromise was ever affected between the parties. He also contended that the decree was silent with respect to alimony and maintenance of minor child.

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

9. A perusal of the record would show that the respondent in support of his case had examined in all four witnesses. He appeared as PW-1 and re-iterated the facts as stated in the petition. In his cross-examination he admitted that the appellant had earlier remained at Hamirpur with their son in a rented accommodation. He also admitted that he had removed the luggage from the rented accommodation, but then qualified his statement by saying that the same was removed only after the decision of the Panchayat. He also admitted that the rented accommodation was taken at Hamirpur for the schooling of their child. He denied the suggestion that no compromise had taken place between the parties. However, he did not dispute that Pradhan of his Panchayat was his aunt.

10. PW-2 Urmila Devi is the Pradhan of Gram Panchayat, Sapahal, who deposed regarding the dispute between the parties. She stated that the respondent had filed a complaint in the Panchayat and on the basis of said complaint, the Panchayat had got effected a compromise Ex.PW-2/A between the parties. She stated that the compromise was signed by her and she identified her signatures. She further stated that at the time of compromise the mother of the appellant, Daljit and Gopi etc. and one Up-Pradhan from the side of the appellant was also present. In cross-examination, she admitted that the complaint is not available in the Panchayat record. She also stated that at the time of compromise, the parties were present at the spot, but their signatures were not obtained on the compromise deed. The compromise was written in the house of respondent. She also admitted that the respondent was her nephew.

11. PW-3 Munshi Ram, father of the respondent has corroborated the version of respondent. He further stated that he along with 5-6 other respectable persons of the village had gone to bring back the appellant to her matrimonial house, but she refused to come and was residing separately from the respondent since 2010. In his cross-examination he has stated that one Khiali Ram, his two brothers and some other villagers accompanied him when they had gone to bring the appellant. He also stated that he had not gone to the place

of posting of his son, when he had suffered a paralytic attack. He also stated that he had informed the appellant about the paralytic attack of his son.

12. PW-4 Khiali Ram acknowledged the compromise and also identified his signatures thereupon. He also deposed regarding his having accompanied the father of the respondent to the parental house of the appellant. He stated that the compromise Ex. PW-2/A was written in his presence and bears his signatures. He further stated that when he had accompanied the father of respondent, so as to bring the appellant back to her matrimonial house, the appellant had refused to come. In his cross-examination he stated that compromise Ex. PW-2/A was written in the house of the respondent in the presence of the parties.

13. On the other hand respondent examined three witnesses. She appeared as her own witness as RW-1 and deposed that she along with her minor child was residing in her parental house for the last three years. The reason for the same was that her son was studying at Hamirpur. She further deposed that earlier she had been residing in a rented accommodation at Hamirpur, but her mother-in-law gradually removed the entire luggage from the accommodation and finally on 12.3.2010 after removing the luggage her mother-in-law threatened her with dire consequences in case she returned to her matrimonial house. She further stated that her husband was not paying any maintenance to her, which constrained her to file an application before the Army Authorities and thereafter maintenance to the tune of Rs.5500/- was awarded to her. She further stated that her husband proclaimed that in case she returns to the matrimonial home, then he will commit suicide. She then goes to state that she did not know about the paralytic attack of her husband, as she was not informed by anyone. Her uncle and some other villagers had gone to persuade the respondent, then on the first date he agreed to behave properly, but the next date he began quarrel. He even refused to have intercourse with her. She then stated that she was still ready to reside in the matrimonial house. Her husband has not issued any notice to bring her back to her matrimonial house. She admitted that her son was studying in school in her parental village.

14. In cross-examination the appellant stated that when she remained at Hamirpur, her mother-in-law used to provide maintenance to her. She also admitted that her husband used to provide maintenance to her through his mother. She admitted that on 12.3.2010 a compromise has taken place between the parties. She also admitted that in the compromise, she had admitted that after the examination of her son, she would come back to her matrimonial house, but after the examination, she did not come there and went to her parental house. She also admitted that after the compromise her father-in-law and 3-4 other persons had came to take her back to matrimonial house. She further admitted that after the year 2010, there was no relation of husband and wife between the parties. She also admitted that she had never filed any case against the respondent.

15. RW-2 Rajinder Singh, who is the Up-Pradhan of Gram Panchayat, Panoh, states that at the instance of mother of the appellant he had come to the house of in-laws of the appellant. There they had made both the parties understand because the complaint of the appellant was that whenever she goes to her matrimonial house from Hamirpur, her husband used to leave the house. After persuasion by them, the respondent had agreed that he will not do so in future. He further stated that no written compromise was affected between the parties to this effect. In his cross-examination, however, admitted that the appellant had agreed that now she will live in the matrimonial house. He also stated that after that no complaint from the appellant was received by them.

16. RW-3 Dalgir Chand, who is the uncle of the appellant has deposed on the same lines as RW-2 Rajidner Singh. In his cross-examination he admitted that when they reached the house of in-laws of the appellant, at that time the persons of the Panchayat and other persons from the village were present. He also admitted that both the parties had admitted their guilt.

This is the entire evidence led by the parties.

17. Learned counsel for the appellant has strenuously argued that the mere fact that the parties were living separately would not mean that the appellant had deserted the respondent. He further contended that the reasons for living separately was the education of minor child of the parties and therefore, by no stretch of imagination could it be held that she had either deserted the respondent or had treated him with cruelty. Strong reliance has been placed by him on the judgment rendered by Hon'ble Supreme Court in ***K. Shrinivas Rao Vs. D.A. Deepa,*** *(2013) 5 SCC 226*, more particularly, the following observations:-

> *"**16**. Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh Vs. Jaya Ghosh, (2007) 4 SCC 511, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse.*
>
> ***27***. *We need to now see the effect of the above events. In our opinion, the first instance of mental cruelty is seen in the scurrilous, vulgar and defamatory statement made by the respondent wife in her complaint dated 4-10-1999 addressed to the Superintendent of Police, Women Protection Cell. The statement that the mother of the appellant husband asked her to sleep with his father is bound to anger him. It is his case that this humiliation of his parents caused great anguish to him. He and his family were traumatized by the false and indecent statement made in the complaint. His grievance appears to us to be justified. This complaint is a part of the record. It is a part of the pleadings. That this statement is false is evident from the evidence of the mother of the respondent-wife, which we have already quoted. This statement cannot be explained away by stating that it was made because the respondent-wife was anxious to go back to the appellant-husband. This is not the way to win the husband back. It is well settled that such statements cause mental cruelty. By sending this complaint the respondent-wife has caused mental cruelty to the appellant husband.*
>
> ***28***. *Pursuant to this complaint, the police registered a case under Section 498-A of the IPC. The appellant-husband and his parents had to apply for anticipatory bail, which was granted to them. Later, the respondent-wife withdrew the complaint. Pursuant to the withdrawal, the police filed a closure report. Thereafter, the respondent-wife filed a protest petition. The trial court took cognizance of the case against the appellant-husband and his parents (CC No. 62/2002). What is pertinent to note is that the respondent wife filed criminal appeal in the High Court challenging the acquittal of the appellant husband and his parents of the offences under the Dowry Prohibition Act and also the acquittal of his parents of the offence*

punishable under Section 498-A of the IPC. She filed criminal revision seeking enhancement of the punishment awarded to the appellant husband for the offence under Section 498-A of the IPC in the High Court which is still pending. When the criminal appeal filed by the appellant-husband challenging his conviction for the offence under Section 498-A of the IPC was allowed and he was acquitted, the respondent wife filed criminal appeal in the High Court challenging the said acquittal. During this period respondent-wife and members of her family have also filed complaints in the High Court complaining about the appellant husband so that he would be removed from the job. The conduct of the respondent-wife in filing a complaint making unfounded, indecent and defamatory allegation against her mother-in-law, in filing revision seeking enhancement of the sentence awarded to the appellant-husband, in filing appeal questioning the acquittal of the appellant husband and acquittal of his parents indicates that she made all attempts to ensure that he and his parents are put in jail and he is removed from his job. We have no manner of doubt that this conduct has caused mental cruelty to the appellant husband.

29. *In our opinion, the High Court wrongly held that because the appellant-husband and the respondent wife did not stay together there is no question of the parties causing cruelty to each other. Staying together under the same roof is not a pre-condition for mental cruelty. Spouse can cause mental cruelty by his or her conduct even while he or she is not staying under the same roof. In a given case, while staying away, a spouse can cause mental cruelty to the other spouse by sending vulgar and defamatory letters or notices or filing complaints containing indecent allegations or by initiating number of judicial proceedings making the other spouses life miserable. This is what has happened in this case."*

18. Indisputably, the appellant had initially with the consent of the respondent and his family members gone to Hamirpur to educate their minor child, but later on in terms of compromise Ex. PW-2/A, which was duly been proved on record, the appellant was to join her matrimonial house after the examination of the child were over, but the appellant instead went back to her parental home, never to return.

19. Desertion is a matter of inference and has to be gathered from the surrounding circumstances. It is a condition of mind. It is to be inferred from the course of conduct. In so far as the appellant's act and conduct in failing to return to her husband's house is concerned, obviously the same is entitled to more weight as against her evidence of true intention, and her assurances made in the compromise deed to return to her matrimonial home, which ultimately proved to be false. When the appellant refused to return to the conjugal fold, it would be legitimate to presume that she was no longer ready to keep the marriage intact.

20. The essence of desertion is the backup of the matrimonial home caused by the withdrawal of one spouse. It is the cessation of cohabitation brought about by the failure or act of the deserting spouse. Was there a sincere intention and a bonafide offer on the part of the appellant to join the company of her husband, the records also do not support such version.

21. The appellant instead of joining her matrimonial home returned to her parental house, never to return. She did not comply with the decision of the Panchayat, in terms whereof she had agreed to return to her matrimonial house. She directly claimed the

maintenance from the Army Authorities and despite the respondent having suffered a paralytic attack and being admitted at Command Hospital Calcutta, she did not come to even see him there or even at the village when he had come on leave, that too, despite the fact that she had been informed.

22. The appellant has further made no efforts to resume cohabitation and she has admitted that there is no relationship of husband and wife between the parties since the year 2010. This clearly proves the intention-animus deserendi on the part of the appellant. There is no probable reason why the appellant did not join her matrimonial home, particularly when there is no evidence led by the appellant to the fact that she had ever been treated with cruelty.

23. Now in so far as the contention of the appellant that no compromise had been affected between the parties, suffice it to say that the appellant herself in her cross-examination has admitted that on 12.3.2010 a compromise had been arrived between the parties. She further admitted that in terms of the said compromise she after the examination of her son was to come back to the matrimonial house. Even if, the statement of the appellant is brushed aside, even then, the compromise has been duly proved, not only by respondent, but even by PW-2, Pradhan Gram Panchayat, Sapahal, PW-3 Munshi Ram and PW-4, Khiali Ram, who is the signatory to the compromise.

24. Lastly, in so far as there being no provision for alimony for maintenance of minor child is concerned, admittedly the minor child is not party to the proceedings and even otherwise the law has provided adequate safeguards for protecting the interest of the minor and resort to the same can always be taken by the minor.

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

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

Surender Singh …Appellant
Versus
State of Himachal Pradesh …Respondent

Criminal Appeal No. 59 of 2011
Judgment Reserved on : 29.4.2015
Date of Decision : May 26, 2015

Indian Penal Code, 1860- Sections 302, 323, 324, 201, 452 and 506 (II)- Accused gave beatings to his sister who took refuge in the house of his neighbour – accused went to the house of the neighbour and again gave beating to her when another neighbour 'S' tried to intervene - she was also beaten by the accused- accused gave beatings to 'R' and 'K'- accused poured kerosene upon them and set them on fire- testimonies of the witnesses were corroborated by medical officer who stated that deceased had died due to shock caused as a result of 100% burn injuries- held that the accused was rightly convicted. (Para-10 to 13)

Indian Penal Code, 1860- Section 84- Accused claimed that he had no malice against the deceased- accused was a chronic patient of epilepsy and last attack had occurred one day prior to the date of incident- accused was not in a proper state of mind at the time of incident- held, that absence of motive is no ground to discard the prosecution story and

witnesses- mere lack of motive is also not sufficient to establish the unsoundness of mind- medical evidence does not establish the insanity of the accused- version of accused that he suffered from mental disorder was not believable – Doctor admitted that accused had normal behaviour and he was cooperative at the time of examination- hence, his plea of insanity was not established. (Para-14 to 43)

Cases referred:
Sheralli Wali Mohammed vs. The State of Maharashtra, (1973) 4 SCC 79
State of Madhya Pradesh v. Shmadulla, AIR 1961 SC 998
Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, AIR 1964 SC 1563
Elavarasan v. State, represented by Inspector of Police, (2011) 7 SCC 110
Sidhapal Kamala Yadav v. State of Maharashtra, (2009) 1 SCC 124
Hari Singh Gond v. State of M.P., (2008) 16 SCC 109
Bablu alias Mubarik Hussain v. State of Rajasthan, (2006) 13 SCC 116
Shrikant Anandrao Bhosale v. State of Maharashtra, (2002) 7 SCC 748
T.N. Lakshmaiah v. State of Karnataka, (2002) 1 SCC 219
State of H.P. v. Gian Chand, (2001) 6 SCC 71; (1974) 3 SCC 299
Sheralli Wali Mohammed v. The Statte of Maharashtra, (1973) 4 SCC 79
Oyami Ayatu v. The State of Madhya Pradesh
Bhikari v. The state of Uttar Pradesh, AIR 1966 SC 1
Amrit Bhushan Gupta v. Union of India and others, (1977) 1 SCC 180
Paras Ram and others v. State of Punjab, (1981) 2 SCC 508
Vijayee Singh and others v. State of H.P., (1990) 3 SCC 190
Bapu alias Gujraj Singh v. State of Rajasthan, (2007) 8 SCC 66
Sudhakaran v. State of Kerala, (2010) 10 SCC 582
Surender Mishra v. State of Jharkhand, (2011) 11 SCC 495

For the appellant : Mr. Vishal Bindra, Advocate for the appellant.
For the respondent : Mr. Ashok Chaudhary, Addl. Advocate General with Mr. V. S. Chauhan, Addl. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Convict Surender Singh (appellant herein), has assailed the judgment dated 31.12.2010/7.1.2011, passed by Sessions Judge, Sirmaur, District at Nahan, Himachal Pradesh, in Sessions Trial No. 02-ST/7 of 2010, titled as *State of Himachal Pradesh vs. Surender Singh,* whereby he stands convicted for having committed offences punishable under the provisions of Sections 302, 323, 324, 201, 452 and 506 (II) of the Indian Penal Code and sentenced as under:-

Sections	Sentence
302 IPC	Rigorous imprisonment for life and pay fine of Rs.20,000/- and in default thereof to further undergo imprisonment for a period of one year.
323 IPC	Rigorous imprisonment for a period of one year and to pay fine of Rs.1,000/- and in default thereof to further

	undergo imprisonment for a period of three months.
324 IPC	Rigorous imprisonment for a period of two years and to pay fine of Rs.10,000/- and in default thereof to further undergo imprisonment for a period of six months.
201 IPC	Rigorous imprisonment for a period of five years and to pay fine of Rs.10,000/- and in default thereof to further undergo imprisonment for a period of six months.
452 IPC	Rigorous imprisonment for a period of five years and to pay fine of Rs.10,000/- and in default thereof to further undergo imprisonment for a period of six months.
506 (II) IPC	Rigorous imprisonment for a period of three years and to pay fine of Rs.5,000/- and in default thereof to further undergo imprisonment for a period of three months.

he has filed the present appeal under the provisions of Section 374 of the Code of Criminal Procedure, 1973.

2. It is the case of prosecution that accused Surender Singh resident of village Dadahu was working as a Chowkidar at Panchayat Vishram Griha (Kisan Rest House), Dadahu. On 13th October, 2009, he gave beatings to his sister Kunta Devi who took refuge in the house of her neighbour Sh. Jagdish Chand (PW-1). In the middle of night, armed with a scissor, darat and danda, accused came and knocked the door of Jagdish Chand asking Kunta Devi to come out. When she came out accused again gave her beatings. Hearing her cries, neighbour Shashi Bala (PW-5) also came who also was beaten up by the accused. However, she was saved by her son Deepak Kumar (PW-8). Accused then went to the house of Rangi Lal and started giving him beatings. He also gave beatings to Kartar Singh who also was present there. However when both of them ran towards the road, accused drenched them with kerosene oil and set them on fire. Resultantly both Rangi Lal and Kartar Singh died on the spot. Jagdish Chand reported the matter to the police and F.I.R. No. 54/2009 (Ext. PW-1/A), dated 14.10.2009, was registered against the accused at Police Station Renukaji, Distt. Sirmaur, under the provisions of Section 302 of the Indian Penal Code. SI-Narayan Singh (PW-11), posted as Station House Officer, Renukaji, proceeded to the spot and conducted the necessary investigation. After taking photographs on the spot, he prepared inquest reports (Ext.PW-1/B and PW-1/D) and sent the dead bodies for post mortem, which was conducted by Dr. Vinay Kumar (PW-10) and reports (Ext. PW-10/C and PW-10/D) obtained. From the spot, police took into possession plastic canny (Ext.P-3), match-box (Ext. P-4), scissor (Ext.P-5), knife (Ext. P-6) and other incriminating articles. Accused was arrested and was also medically examined by Dr. Vinay Kumar on 15.10.2009. Upon receipt of the report of the State Forensic Science Laboratory, Junga, the Doctor opined the deceased to have died due to shock caused as a result of 100% burn injuries and that death took place within 15 minutes of receiving such burn injuries. Investigation revealed complicity of the accused in the alleged crime. Hence, challan was presented in the Court for trial.

3. Accused was charged for having committed offences punishable under the provisions of Sections 452, 324, 323, 302, 506(II) and 201 of the Indian Penal Code to which he did not plead guilty and claimed trial.

4. In order to prove its case, in all, prosecution examined as many as eleven witnesses and statement of the accused under Section 313 Cr. P.C. was also recorded.

5. Quite apparently accused took plea of insanity, not knowing as to what and how the incident happened. In defence he examined three witnesses.

6. Appreciating the material on record, including the testimonies of the witnesses, trial Court convicted the accused of all the charged offences and sentenced as aforesaid. Hence, the present appeal.

7. We have extensively heard learned counsel appearing on both the sides and perused the record.

8. Challenge to the judgment, by Mr. Vishal Bindra, learned counsel for the appellant-accused, is on a limited ground. The actual occurrence of the incident is not in dispute. However it is argued that the accused, in a state of mental disorder and unsoundness of mind, without realizing the consequences of his acts, committed the charged offences. Also accused had no malice or bias against any one of the victims. Thus, in law, their being no knowledge and intent of commission of crime, appeal needs to be allowed. More specifically, it is argued that accused was a chronic patient of epilepsy and last such attack took place only one day prior to the incident i.e. on 12th October, 2009, for which he had undertaken treatment from a competent medical practitioner. It is further argued that in the night intervening $13^{th}/14^{th}$ October, 2009, the time of occurrence of the incident and commission of crime, accused who was undertaking medical treatment for his medical illness was not in a proper sate of mind. His conduct exhibits such fact. Hence, he needs to be acquitted.

9. On the other hand, Mr. Ashok Chaudhary, learned Addl. Advocate General ably assisted by Mr. V. S. Chauhan, learned Addl. A.G. has supported the impugned judgment for the reasons set out therein.

10. From the conjoint reading of the testimonies of the prosecution witnesses namely Jagdish Chand (PW-1), Shashi Bala (PW-5) and Deepak Kumar (PW-8) it is evidently clear that prosecution has been able to establish, beyond reasonable doubt, the fact that accused committed criminal trespass; voluntarily caused injuries with sharp edged weapon to Shashi Bala; criminally assaulted Rangi Lal and Kartar Singh; threatened to kill Shashi Bala and Jagdish Chand and their family members and also caused the evidence to disappear with an intention of screening himself. Also it stands established that accused first gave beatings to deceased Rangi Lal and, thereafter, by pouring kerosene oil, set them on fire. We notice that the occurrence of the incident is also not disputed by Kunta Devi (DW-3) who stepped into the witness box on the asking of her brother, the present accused. They are spot witnesses and saw the occurrence of the incident. There is no infirmity in their testimonies, which are fully inspiring in confidence with regard to the incident(s) in question. Each one of them have categorically deposed that in the night intervening 13th and 14th of October, 2009 at about 12.30 a.m., accused came to the house of Jagdish Chand and shouted for his sister Kunta Devi. When she came out he started giving her beatings. Shashi Bala who also reached the spot was also beaten by the accused though she was saved by her son Deepak Kumar. Testimony of Jagdish Chand, to the effect that accused set the deceased on fire, is fully inspiring in confidence.

11. From the testimony of Dr. Vinay Kumar (PW-10), who conducted the post mortem on the deceased, it is evidently clear that both the deceased died as a result of shock, so received on account of 100% burn injuries. Post mortem report of deceased Rangi Lal is Ext. PW-10/C and that of deceased Kartar Singh is Ext. PW-10/D. They stand proven on record.

12. The incriminating articles recovered from the spot, with which accused set the deceased on fire stands proved on record by the police officials and witnesses to the recovery memos. We need not elaborately deal with this aspect of the matter, in view of limited submission so made before us.

13. However only to satisfy our conscience, we went through the testimonies of the prosecution witnesses and find, as briefly discussed herein above, the accused to have committed the acts for which he stands charged for.

14. The question which needs to be considered is as to whether such crime was committed by the accused out of malice/bias and in a state of unsound mind. In effect, plea of insanity, as one of the defences, so provided under the provisions of Section 84 IPC is taken by the accused.

15. It is a settled position of law that absence of motive itself cannot be a ground to discredit the prosecution story and its witnesses. Accused cannot be acquitted solely on this ground. Coming to the defence of insanity, so taken by the accused, before we deal with the evidence on record, we shall first deal with the law on the issue.

16. Section 84 of the Indian Penal Code provides that nothing is an offence which is done by a person who, at the time of its commission, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that what he is doing is either wrong or contrary to law. However, the burden to prove such defence, in view of the provisions of Sections 101 and 105 of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act), would be on the accused. The plea of insanity has to be established by leading credible evidence. It is also a settled principle of law that law presumes every person to be sane, unless contrary is proved.

17. The apex Court in *Sheralli Wali Mohammed vs. The State of Maharashtra,* (1973) 4 SCC 79 has held that it would be most dangerous to admit the defence of insanity upon the arguments derived merely from the character of the crime. The mere fact that no motive was proved, as to why the accused committed the crime of murder nor the fact that he made any attempt to run away from the spot, would not be indicative of his plea of insanity or lack of necessary *mens rea* for the commission of the crime.

18. Apex Court in *State of Madhya Pradesh v. Shmadulla,* AIR 1961 SC 998, has clearly held that burden to establish mental condition of the accused, at the crucial point of time, lies upon the accused, who claims such benefit of unsoundness of mind.

19. While taking note of provisions of Section 101 as also Section 105 of the Evidence Act, the apex Court in *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat,* AIR 1964 SC 1563 held that when a plea of legal insanity is set up, Court has to consider whether at the time of commission of the offence, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. *The crucial point of time for ascertaining the state of mind of the accused is the time of commission of offence.* Whether accused was in such a state of mind as to be entitled to the benefit of S. 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed by the crime. [Also see:

Elavarasan v. State, represented by Inspector of Police, (2011) 7 SCC 110; *Sidhapal Kamala Yadav v. State of Maharashtra,* (2009) 1 SCC 124; *Hari Singh Gond v. State of M.P.,* (2008) 16 SCC 109; *Bablu alias Mubarik Hussain v. State of Rajasthan,* (2006) 13 SCC 116; *Shrikant Anandrao Bhosale v. State of Maharashtra,* (2002) 7 SCC 748; *T.N. Lakshmaiah v. State of Karnataka,* (2002) 1 SCC 219; *State of H.P. v. Gian Chand,* (2001) 6 SCC 71; (1974) 3 SCC 299, *Sheralli Wali Mohammed v. The Statte of Maharashtra,* (1973) 4 SCC 79; *Oyami Ayatu v. The State of Madhya Pradesh;* and *Bhikari v. The state of Uttar Pradesh,* AIR 1966 SC 1.]

20. In *Amrit Bhushan Gupta v. Union of India and others,* (1977) 1 SCC 180, the apex Court had the occasion to deal with a case where, based on medical opinion of the convict suffering from schizophrenia, while appreciating the law as laid down in England, rejected the plea of the accused not to undergo sentence, so imposed by the criminal Court.

21. Further, in *Paras Ram and others v. State of Punjab,* (1981) 2 SCC 508, the apex Court held that:

> "2. Just one more observation relevant to the punishment. The poignantly pathological grip of macabre superstitions on some crude Indian minds in the shape of desire to do human and animal sacrifice, in defiance of the scientific ethos of our cultural heritage and the scientific impact of our technological century, shows up in crimes of primitive horror such as the one we are dealing with now, where a blood-curdling butchery of one's own beloved son was perpetrated, aided by other 'pious' criminals, to propitiate some bloodthirsty deity. Secular India, speaking through the court, must administer shock therapy to such anti-social 'piety', when the manifestation is in terms of inhuman and criminal violence. When the disease is social, deterrence through court sentence must, perforce, operate through the individual culprit coming up before court. Social justice has many facets and judges have a sensitive, secular and civilising role in suppressing grievous injustice to humanist values by inflicting condign punishment on dangerous deviants. In discharge of this high duty, we refuse special leave in these applications against the correct convictions and sentences of the courts below."

22. In *Vijayee Singh and others v. State of H.P.,* (1990) 3 SCC 190, the apex Court, observed that:

> "23. At his stage it becomes necessary to consider the meaning of the words "the court shall presume the absence of such circumstances" occurring in Section 105 of the Evidence Act. Section 4 of the Act explains the meaning of the term "shall presume" as to mean that the Court shall regard the fact as proved unless and until it is disproved. From a combined reading of these two Sections it may be inferred that where the existence of circumstances bringing the case within the exception is pleaded or is raised the Court shall presume the absence of such circumstances as proved unless and until it is disproved. In Section 3 of the Act meaning of the terms "proved", "disproved" and "not proved" are given. As per this provision, a fact is said to be "proved" when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. A fact is said to be "disproved" when, after considering the matters before it the Court either believes that it does not exist, or considers its non existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the

supposition that it does not exist. A fact is said to be "not proved" when it is neither "proved" nor "disproved".

24. The first part of Section 105 as noted above lays down that when a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any of the exceptions or proviso is on him and the latter part of it lays down that the Court shall presume the absence of such circumstances. In a given case the accused may discharge the burden by expressly proving the existence of such circumstances, thereby he is able to disprove the absence of circumstances also. But where he is unable to discharge the burden by expressly proving the existence of such circumstances or he is unable to disprove the absence of such circumstances, then the case would fall in the category of "not proved" and the Court may presume the absence of such circumstances. In this background we have to examine the meaning of the words "the Court shall presume the absence of such circumstances" bearing in mind the general principle of criminal jurisprudence that the prosecution has to prove its case beyond all reasonable doubt and the benefit of every reasonable doubt should go to the accused.

23. The apex Court in *Bapu alias Gujraj Singh v. State of Rajasthan,* (2007) 8 SCC 66, held as under:

"9. There are four kinds of persons who may be said to be *non compos mentis* (not of sound mind), i.e., (1) an idiot; (2) one made *non compos* by illness (3) a lunatic or a mad man and (4) one who is drunk. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals; and those are said to be idiots who cannot count twenty, or tell the days of the week, or who do not know their fathers or mothers, or the like, (See *Archbold's Criminal Pleadings, Evidence and Practice, 35th Edn. pp.31-32; Russell on Crimes and Misdemeanors, 12th Edn. Vol., p.105; 1 Hale's Pleas of the Grown 34*). A person made non compos mentis by illness is excused in criminal cases from such acts as are-committed while under the influence of his disorder, (See 1 Hale PC 30). A lunatic is one who is afflicted by mental disorder only at certain periods and vicissitudes, having intervals of reason, (See Russell, 12 Edn. Vol. 1, p. 103; Hale PC 31). Madness is permanent. Lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.

10. Section 84 embodies the fundamental maxim of criminal law, i.e., *actus non reum facit nisi mens sit rea* (an act does not constitute guilt unless done with a guilty intention). In order to constitute an offence, the intent and act must concur; but in the case of insane persons, no culpability is fastened on them as they have no free will (*furios is nulla voluntas est*).

11. The section itself provides that the benefit is available only after it is proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that even if he did not know it, it was either wrong or contrary to law then this section must be applied. The crucial point of time for deciding whether the benefit of this section should be given or not, is the material time when the offence takes place. In coming to that conclusion, the relevant circumstances are to be taken into consideration, it would be dangerous to admit the: defence of insanity upon

arguments derived merely from the character of the crime. It is only unsoundness of mind which naturally impairs the cognitive faculties of the mind that can form a ground of: exemption from criminal responsibility. Stephen in *'History of the Criminal Law of England*, Vo. II, p. 166 has observed that if a persons cut off the head of a sleeping man because it would be great fun to see him looking for it when he woke up, would obviously be a case where the perpetrator of the act would be incapable of knowing the physical effects of his act. The law recognizes nothing but incapacity to realise the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently dim to apprehend what he is doing, he must always be presumed to intend the consequence of the action he takes. Mere absence of motive for a crime, howsoever atrocious it may be, cannot in the absence of plea and proof of legal insanity, bring the case within this section This Court in *Sheralli Walli Mohammed v. State of Maharashtra*, (1973) 4 SCC 79 held that (SCC p.79):

> "The mere fact that no motive has been proved why the accused murdered his wife and child or the fact that he made no attempt to run away when the door was broken open would not indicate that he was insane or that he did not have the necessary mens rea for the offence."

12. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under Section 84 as the law contained in that section is still squarely based on the outdated *M'Naughton* rules of 19th Century England. The provisions of Section 84 are in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords, in *M Naughton's case. (1843) 4 St. Tr. NS 847(HM).* Behaviour, antecedent, attendant and subsequent to the event, may be relevant in finding the mental condition of the accused at the time of the event, but not that remote in time. It is difficult to prove the precise state of the offender's mind at the time of the commission of the offence, but some indication thereof is often furnished by the conduct of the offender while committing it or immediately after the commission of the offence. A lucid interval of an insane person is not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficiently to enable the person soundly to judge the act; but the expression does not necessarily mean complete or prefect restoration of the mental faculties to their original condition. So, if there is such a restoration, the person concerned can do the act with such reason, memory and judgment as to make it a legal act; but merely a cessation of the violent symptoms of the disorder is not sufficient.

13. The standard to be applied is whether according to the ordinary standard, adopted by reasonable men, the act was right or wrong. The mere fact that an accused is conceited, odd irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts, in the past or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this section."   (Emphasis supplied)

24. The apex Court in *Sudhakaran v. State of Kerala,* (2010) 10 SCC 582, further observed as under:

> “30. A bare perusal of the aforesaid section would show that in order to succeed, the appellant would have to prove that by reason of unsoundness of mind, he was incapable of knowing the nature of the act committed by him. In the alternate case, he would have to prove that he was incapable of knowing that he was doing what is either wrong or contrary to law.
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> 31. The aforesaid section clearly gives statutory recognition to the defence of insanity as developed by the Common Law of England in a decision of the House of Lords rendered in the case of R. Vs. Daniel Mc Naughten2. In that case, the House of Lords formulated the famous Mc Naughten Rules on the basis of the five questions, which had been referred to them with regard to the defence of insanity. The reference came to be made in a case where Mc Naughten was charged with the murder by shooting of Edward Drummond, who was the Pvt. Secretary of the then Prime Minister of England Sir Robert Peel. The accused Mc Naughten produced medical evidence to prove that, he was not, at the time of committing the act, in a sound state of mind. He claimed that he was suffering from an 2 [1843 RR 59: 8ER 718(HL)] insane delusion that the Prime Minister was the only reason for all his problems. He had also claimed that as a result of the insane delusion, he mistook Drummond for the Prime Minister and committed his murder by shooting him.
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> 32. The plea of insanity was accepted and Mc Naughten was found not guilty, on the ground of insanity. The aforesaid verdict became the subject of debate in the House of Lords. Therefore, it was determined to take the opinion of all the judges on the law governing such cases. Five questions were subsequently put to the Law Lords. The questions as well as the answers delivered by Lord Chief Justice Tindal were as under:-
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> > "Q.1 What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing a revenging some supposed grievance or injury, or of producing some public benefit?
> >
> > Answer
> >
> > "Assuming that your lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land.
> >
> > Q.2. What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or

more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

Q.3. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

Answers - to the second and third questions

That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put as to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong: and this course, we think, is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

Q.4. If a person under an insane delusion as to the existing facts commits and offence in consequence thereof, is he thereby excused?

Answer

The answer must, of course, depend on the nature of the delusion, but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self- defence, he would be exempted from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

> Q.5. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?
>
> Answer
>
> We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."
>
> A comparison of answers to question no. 2 and 3 and the provision contained in Section 84 of the IPC would clearly indicate that the Section is modeled on the aforesaid answers."

25. In *Surender Mishra v. State of Jharkhand,* (2011) 11 SCC 495, the apex Court held as under:

> "11. In our opinion, an accused who seeks exoneration from liability of an act under Section 84 of the Indian Penal Code is to prove legal insanity and not medical insanity. Expression "unsoundness of mind" has not been defined in the Indian Penal Code and it has mainly been treated as equivalent to insanity. But the term insanity carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering from mental disease is not ipso facto exempted from criminal liability. The mere fact that the accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behaviour or the behaviour is queer are not sufficient to attract the application of Section 84 of the Indian Penal Code. (Emphasis supplied)

26. Plea of insanity or defence set up by the accused has to be examined in the light of aforesaid decisions and settled principles of law.

27. To prove the factum of insanity, our specific attention is invited to the testimonies of Jagdish Chand (PW-1), Shashi Bala (PW-5), Deepak Kumar (PW-8), Dr. Vinay Kumar (PW-10) and SI-Narayan Singh (PW-11), prosecution witnesses and Dr. Suresh Kumar Bansal (DW-1), Dr. Peter Desouza (DW-2) and Kunta Devi (DW-3), defence witnesses.

28. We shall first deal with the testimony of the prosecution witnesses.

29. From the testimony of Jagdish Chand it is evident that accused had suffered some kind of "fit" on 12th October, 2009. Resultantly he was shown to Dr. Peter Desouza at

Nahan and on his advise some test was got conducted on 13th October at Chandigarh. Witness also states that even on 2nd October, 2009, accused was taken for treatment to Dr. Peter Desouza who had issued prescription slip (Ext. DW-2/A). This witness further states that when police had tried to nab the accused he had started spitting at the police officials and laughing loudly saying that "I have killed two piegons see them".

30. Shashi Bala is silent with regard to the ill health or mental state of unsoundness of mind of the accused.

31. Deepak Kumar states that he rescued his mother Shashi Bala from the clutches of the accused who was beating her. At that time accused was "very violent and was assaulting every one whoever was seen by him". Even he was beaten up. Also even after his arrest in the police station accused continued to remain violent and abused everyone. It was only after a great deal of effort that the accused was brought under control.

32. The Investigating Officer SI-Narayan Singh states that when the accused was arrested, he was struggling and saying that "why I am being arrested, when I have done nothing". Also accused was abusing. An application for hand cuffing was filed for the reason that the accused was using force against the police.

33. Dr. Vinay Kumar examined the accused on 15th October, 2009. The injuries on his body, as was so observed by the Doctor, stands explained through the unrebutted testimony of Deepak Kumar who states that at the time he saved his mother (Shashi Bala), he gave beatings to the accused. Much emphasis has been led on the testimony of the Doctor to highlight that at the time of commission of offence, accused was not in his senses. However, we do not find such fact to have been established. In cross examination, Doctor states that:

> "There is no prescribed medical test to judge insanity. To judge the insanity, the personal behaviourial history is considered. For medical legal aspects, Medical jurisprudence by Dr. Modi and Text Book of Forensic Science by Dr. Ready are considered as guidelines in routine practice. It is correct that to commit murder without any motive, to attack near and dears, the absence of secrecy in committing crime, committing crime without preparation and without accomplice and not absconding from the scene after committing crime are the signs of insanity. The period of fit of insanity depends from person to person and from disease to disease and can be as short as few minutes or can last for hours or days. It is correct that episode of fit of insanity can occur after a day or it is also possible that the same occurs after a period of year. It is also correct that the normal interval between the two episodes of insanity is called lucide interval and during the lucide interval, the behaviour of the person is absolutely normal. It is also correct that a person who has suffered a fit of insanity, 14-10-2009 can be absolutely normal on 15-10-2009. There can be a delusion that a person suffering from mental disease can see a human being as an animal or bird. The medicine written on Mark A is tab. Phenobarbiton. This medicine is prescribed for mental disorder and more particular for epilepsy. The test of EEG can be normal even if a person is suffering from mental disease."

His opinion conclusively does not establish mental state of unsoundness of mind of the accused.

34. Significantly it has come on record through the unrebutted testimony of Shashi Bala that accused, aged 30 years, was initially working in a *Halwai* shop and for the last four – five years has been working as a Chowkidar, in the Rest House, Dadahu. Even she does not state that accused was suffering from any mental illness or had suffered a "fit" on the day of occurrence of the incident. In fact, no such suggestion has been put to her.

35. Significantly Jagdish Chand does not state that in the night of 13th October, 2009, when Kunta Devi came to his house, she informed him that the accused was suffering from any kind of mental disorder or had suffered a "fit" (epilepsy) as a result of which accused had given her beatings. All that he states is that since Kunta was frightened, she sought refuge in his house for the reason that she was beaten by her brother and thus was scared.

36. Significantly this witness clarifies that Dr. Peter Desouza did not disclose the reason of "fit" so suffered by the accused, nor did he disclose his diagnosis. He is not aware as to whether any medication was prescribed by the Doctor or in fact taken by the accused. Crucially the witness does not disclose that on 13th October, 2009, the day of incident, he was informed by Kunta Devi of the accused having suffered any fit. She was beaten up by the accused and had sought refuge in the house of this witness, as she was scared. Hence this witness does not even prima facie establish, much less conclusively, the plea of insanity.

37. The question which arises for consideration is as to whether the following circumstances which have come on record, conclusively exhibit the conduct of the accused to be that of an insane person:

(i) Absence of motive,

(ii) Possessing multiple weapons at the time of attack,

(iii) Attack without provocation,

(iv) Cordial relationship with all the victims including the deceased,

(v) Absence of secrecy,

(vi) Laughing and not fleeing away from the spot after commission of crime,

(vii) Calling deceased to be pigeons and

(viii) Exhibiting violent behaviour against the police who filed application for handcuffing the accused before the appropriate court.

38. Now we proceed to discuss the testimonies of the defence witnesses. Kunta Devi (DW-3) states that on 12th October, 2009 accused who suffered a "fit" became unconscious and froth was coming from his mouth. On 13th October, he was taken to Chandigarh for medical examination and they returned at about 6.00 – 7.00 p.m. Now significantly this witness does not state anything with regard to the treatment so administered by Dr. Peter Desouza. She further states that same day at about 10.00 p.m., accused suddenly slapped her and tried to slash her throat. However, she sought refuge in the house of her uncle Jagdish Chand where she slept. In the middle of night, accused came to the house of Jagdish Chand armed with weapons. She came out of the house and the accused again stated beating her with kick blows. He then ran away and starting assaulting Shashi Bala. When police tried to catch the accused he was saying "why you are catching me when I have just killed pigeons". Witness further states that even in the year 2007, accused had exhibited similar conduct when a *Pandit* had told that he was under the influence of evil powers. The said *Pandit* treated him and thereafter he was normal. Now

significantly witness admits her parents to be alive who have not been examined in Court. Her version that on 12th October, 2009 accused having suffered an epileptic attack does not inspire confidence at all. She was not alone at home. Her parents are alive. Yet they have not been examined. Except for prescription (Ext. DW-2/A) dated 2.10.2009, there is no medical evidence on record proving the illness of the accused. From her testimony it is evident that when accused returned from Nahan and Chandigarh, he was normal. He also had dinner that day. Crucially she admits that on the day of occurrence of the incident there was no attack of any kind even in the evening, though she clarifies by stating that the accused was behaving like a mad man.

39. Now Dr. Peter Desouza (DW-2) who issued prescription slip (Ext. DW-2/A) states that "It is correct that in case of an epileptic cizure grandmal epileptic cizure, patient falls unconscious. It is correct that when patient Surender was brought to me he was having normal behaviour and cooperative".

40. Dr. Suresh Bansal (DW-1) who conducted the EEG (Ext. DW-1/A) admits that the test revealed the brain cells to be functioning normally. Also the patient was cooperative and behaving in a normal manner.

41. In view of this evidence on record, by applying the ratio of law laid down by the Hon'ble Supreme Court of India and more specifically in *Surender Mishra* (supra), *Bapu alias Gujraj Singh* (supra), *Dahyabhai Chhaganbhai Thakkar* (supra) and *Sheralli Wali Mohammed* (supra), it cannot be said that the accused has been able to discharge his statutory burden so stipulated under the provisions of the Indian Evidence Act. It cannot be said that on account of his unsoundness of mind, accused was incapable of knowing the nature of offence he was committing.

42. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour, which can also be violent, cannot be said to be a symptom of unsoundness of mind. Crucially the accused was employed as a Chowkidar, where he had been working over a long period of time, without any behaviour of abnormality. Violent behaviour can be as a result of anger against anyone and everyone for undisclosed reasons. Parents were the best persons to have thrown light on the upbringing of the child. There is no prior history of unsoundness of mind.

43. Quite apparently, accused has not been able to examine any witness, or produce any credible evidence, establishing the plea of insanity. Thus, the essential ingredients, as is so required, under the provisions of the Indian Penal Code and the Indian Evidence Act, not having been established on record, defence of the accused cannot be said to have been probablized, much less proved.

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

said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

45. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that accused committed the charged offences.

46. For all the aforesaid reasons, there is no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Findings of conviction cannot be said to be erroneous or perverse. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any. Records of the Court below be immediately sent back.

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

Deepi Devi wife of Sh. Rupia Ram ....Petitioner
Versus
State of H.P. & others ....Respondents

CWP No. 1257 of 2013
Order Reserved on 15th May 2015
Date of Order 27th May, 2015

Constitution of India, 1950- Article 226- Petitioner was engaged on daily wages basis on muster roll as Beldar - services of 1087 workmen including petitioner were retrenched by respondent No. 3- 43 workmen raised industrial dispute and their services were reinstated – petitioner raised an industrial dispute after this order but his case was rejected and was not referred to Industrial Tribunal on the ground of delay- held, that relief cannot be denied to workmen on the ground of delay- petitioner is a labourer and should not have been denied the relief simply on the ground of delay. (Para-5 and 6)

Cases referred:

Collector Land Acquisition Anantnag and another vs. Mst. Katji and others, AIR 1987 SC 1353
Jasmer Singh vs. State of Haryana and others, (2015)4 SCC 458
Raghuvir vs. G.M. Haryana Roadways Hissar, (2014)10 SCC 301

For the Petitioner: Mr. Rahul Mahajan, Advocate.
For the Respondents: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

It is pleaded that in the month of December 1998 petitioner was engaged by co-respondent No.3 on daily wages basis on muster roll as Beldar. It is pleaded that thereafter on dated 8.7.2005 the services of 1087 workmen were retrenched by co-respondent No.3 including the services of petitioner. It is pleaded that on dated 30.3.2009

the retrenchment order dated 8.7.2005 of 43 workmen was set aside and quashed by learned H.P. Industrial Tribunal-cum-Labour Court Dharamshala. It is further pleaded that on dated 16.9.2009 services of 43 workmen were reinstated by co-respondent No. 3 but petitioner was not given opportunity of reemployment being senior workman. It is also pleaded that on dated 9.11.2009 one Smt. Bhichi Devi raised demand notice under Section 2-A of Industrial Disputes Act 1947 against her illegal termination w.e.f. June 2004 after elapse of more than five years and five months. It is pleaded that on dated 12.11.2009 petitioner raised industrial dispute under Section 2-A of Industrial Disputes Act 1947 against co-respondent No. 3 to set aside the retrenchment order dated 8.7.2005 after about four years. It is pleaded that on dated 27.1.2010 one Shri Nand Lal had also raised industrial dispute under section 2-A of Industrial Disputes Act 1947 against co-respondent No. 3 to set aside the retrenchment order dated 8.7.2005 after more than five years. It is pleaded that on dated 6.8.2010 case of Inder Singh was referred by co-respondent No. 3 to learned H.P. Industrial Tribunal-cum-Labour Court Dharamshala and said Shri Inder Singh has raised the industrial dispute after lapse of more than seven years. It is also pleaded that on dated 30.11.2011 case of Nand Lal was referred by co-respondent No. 2 to Hon'ble H.P. Industrial Tribunal-cum-Labour Court Dharamshala for adjudication after lapse of more than five years. It is also pleaded that on dated 31.3.2012 the case of Bhichi Devi was referred by co-respondent No. 2 to Hon'ble H.P. Industrial Tribunal-cum-Labour Court Dharamshala for adjudication after lapse of more than five years and five months. It is also pleaded that on dated 30.5.2012 case of petitioner was rejected by co-respondent No. 2 and was not referred to Hon'ble Industrial H.P. Tribunal-cum-Labour Court Dharamshala for adjudication. It is pleaded that order dated 30.5.2012 passed by Labour Commissioner H.P. whereby Labour Commissioner has refused to refer the dispute of petitioner to H.P. Industrial Tribunal-cum-Labour Court Dharamshala be set aside and co-respondent Nos. 1 and 2 be directed to refer the dispute of petitioner for adjudication to Hon'ble H.P. Industrial Tribunal-cum-Labour Court Dharamshala. Prayer for acceptance of petition sought.

2. Per contra reply filed on behalf of co-respondent Nos. 1 and 2 pleaded therein that petitioner served demand notice on dated 12.11.2009 on co-respondent No.3 and same was submitted to Labour Officer-cum-Conciliation Officer Mandi. It is pleaded that Labour Officer-cum-Conciliation Officer tried to settle the dispute amicably but dispute could not be settled by way of conciliation. It is pleaded that thereafter Labour Officer-cum-Conciliation Officer Mandi sent the report under Sub-section 4 of Section 12 of Industrial Disputes Act 1947 to the Labour Commissioner. It is pleaded that co-respondent No. 2 exercising the powers of appropriate government examined the report sent by Labour Officer-cum-Conciliation Officer Mandi and also perused the reply filed by respondent No.1 and found that petitioner had raised dispute vide demand notice dated 12.11.2009 after a lapse of more than four years without giving any detailed reasons relating to delay. It is pleaded that dispute was not kept alive by petitioner for long period and learned Labour Commissioner came to the conclusion that dispute had faded away after a lapse of long time and demand notice raised by petitioner was found to be vexatious and devoid of any merits. It is pleaded that facts and circumstances of other cases always differ and could not be compared with each other. It is pleaded that Government of India has amended the Industrial Dispute Act 1947 whereby direct access has been given to workman for raising any dispute upon termination and dismissal of services directly to the Labour Court-cum-Industrial Tribunal within a period of three years from the date of termination. It is pleaded that as per amended Section 2-A dismissal of services of an individual workman would be deemed to be an industrial dispute. It is pleaded that non-alive issue could not be referred to Labour Court-cum-Industrial Tribunal for adjudication. Prayer for dismissal of civil writ petition sought.

3. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the respondents and Court also perused the entire record carefully.

4. Following points arise for determination in this civil writ petition:-

3. Whether order of learned Labour Commissioner (H.P.) No.11-23/84(Lab)ID/2012-Mandi dated 30th May 2012 is liable to be set aside as mentioned in memorandum of grounds of civil writ petition?
4. Final Order.

Findings on point No.1

5. Submission of learned Advocate appearing for the petitioner that matter in dispute is service matter and learned Labour Commissioner Himachal Pradesh has illegally declined to refer the matter to learned Labour Court-cum-Industrial Tribunal for adjudication is accepted for the reasons hereinafter mentioned. Court has carefully perused the order passed by learned Labour Commissioner dated 30.5.2012. Learned Labour Commissioner has specifically mentioned in the order that petitioner did not agitate the matter for more than four years and present dispute faded away with passage of time. It was held in case reported in ***AIR 1987 SC 1353 titled Collector Land Acquisition Anantnag and another vs. Mst. Katji and others*** that (1) Ordinarily a litigant does not stand to benefit by lodging matter late. (2) Refusing to condone delay can result meritorious matter thrown out at the very threshold and cause of justice defeated. It was held that if delay is condoned then highest that would happen would that case would be decided on merits after hearing the parties. (3) It was held that every day's delay must be explained does not mean that a pedantic approach should be made. It was further held that doctrine must be applied in a rational common sense. (4) It was held that when substantial justice and technical considerations are pitted against each other then cause of substantial justice deserves to be preferred. (5) It was held that there is no presumption that delay is occasioned deliberately or on account of culpable negligence or on account of mala fides. It was held that litigant does not stand to benefit by resorting to delay and in fact he runs a serious risk. (6) It was held that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. It was held in case reported in ***(2015)4 SCC 458 titled Jasmer Singh vs. State of Haryana and others*** that provisions of Article 137 of Limitation Act 1963 would not be applicable to Industrial Disputes Act 1947 and it was held that relief would not be denied to workman merely on ground of delay. It was held that no reference to Labour Court should be questioned on the ground of delay. It was further held that even in case where delay was condoned by Labour Court then Labour Court could mode the relief by declining the back wages to workman till he raised the demand regarding his illegal retrenchment, dismissal or termination. It was held in case reported in ***(2014)10 SCC 301 titled Raghuvir vs. G.M. Haryana Roadways Hissar*** that there is no limitation on reference to Labour Court under Section 10 of Industrial Disputes Act 1947. It was held that words "At any time" mentioned in Section 10 of Industrial Disputes Act 1947 clearly define that law of limitation would not be applicable qua proceedings of reference under Section 10 of Industrial Disputes Act 1947. Operative part of Section 10 of Industrial Disputes Act 1947 is quoted in toto:-

> "10.Reference of dispute to Boards, Courts or Tribunals-(1) Where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing-
>
> (a) Refer the dispute to a Board for promoting a settlement thereof.
>
> (b) Refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry.

(c) Refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication.

6. Submission of learned Additional Advocate General appearing on behalf of the respondents that petitioner did not agitate the matter for more than four years and on this ground civil writ petition filed by petitioner be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. Petitioner is illiterate and she has marked her thumb impression in writ petition and petitioner is a rustic woman and it is not expedient in the ends of justice to decline the relief to the petitioner. In view of the above stated facts point No. 1 is answered in affirmative.

Point No.2 (Final Order)

7. In view of above stated facts petition filed by petitioner is allowed. Order No. 11-23/84(Lab)ID/2012-Mandi dated 30.5.2012 passed by learned Labour Commissioner Himachal Pradesh is set aside and co-respondents Nos. 1 and 2 are directed to refer the dispute of petitioner for adjudication to H.P. Industrial Tribunal-cum-Labour Court Dharamshala under Section 10 of Industrial Disputes Act 1947 within one month from today. No order as to costs. Petition 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.

Manoj Singh …… Petitioner.
Vs.
Union of India & ors. ….. Respondents

CWP No. 4087 of 2014.
Judgement reserved on: 20.5.2015.
Date of decision: 27.5.2015.

Public Premises (Eviction of Unauthorized Occupants Act) 1971- Section 4- Petitioner claimed that his grand-father had been in possession of land and after his death, he is in possession- administrator had accorded sanction to carry out additions, alterations and re-construction- additions and alterations were carried out according to the sanctioned plan- he was wrongly held to be unauthorized possession – petitioner had failed to prove his ownership over the land- letters permitting him to carry out the construction were not sufficient to establish the ownership - his plea of adverse possession implied that he is not the owner but some other person is owner of the land, held, that in these circumstances, he was rightly evicted. (Para-17, 18 & 22 to 25)

Public Premises (Eviction of Unauthorized Occupants Act) 1971- Section 5- Petitioner claimed that his grand-father had been in possession of land and after his death he is in possession of the same - administrator had accorded sanction to carry out additions and alterations and re-construction- additions and alterations were carried out according to sanctioned plan- held that the petitioner was wrongly held to be in unauthorized possession.

Limitation Act, 1963- Article 65- Petitioner claimed ownership as well as adverse possession- held, that both these pleas were contradictory to each other - mere long possession is not equal to adverse possession - Court has to be circumspect while adjudicating the plea of adverse possession in case of an encroacher, illegal occupant or

land grabber of public property - petitioner had not mentioned the date from which his possession became adverse- hence, his plea of adverse possession was not acceptable.

(Para-19 to 21 and 26 to 29)

Cases referred:

P.T. Munichikkanna Reddy and others vs. Revamma and others (2007) 6 SCC 59
Mandal Revenue Officer vs. Goundla Venkaiah and another (2010) 2 SCC 461
P. Periasami (dead) by L.Rs. vs. P. Periathambi and others (1995) 6 SCC 523
Mohan Lal (deceased) vs. Mira Abdul Gaffar and another (1996) 1 SCC 639
L.N. Aswathama & anr. vs. P. Prakash (2009) 13 SCC 229
Om Parkash & ors. vs. Gian Chand & ors. 2014(2) Him.L.R. 1071
South Eastern Coalfields Limited vs. State of M.P. and others (2003) 8 SCC 648
Indian Council for Enviro-Legal-Action vs. Union of India and others (2011) 8 SCC 161

For the petitioner : Mr. S.D. Sharma, Advocate.
For the respondents : Mr. Ashok Sharma, Assistant Solicitor General of India.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioner is aggrieved by the order passed by the Appellate Authority under the Public Premises (Eviction of Unauthorized Occupants Act, 1971) (for short, the Act) whereby it affirmed the order passed by the Estate Officer on 28.11.2011 ordering the eviction of the petitioner from the unauthorized premises.

2. The case of the petitioner is that since 1937 his grand father late Udai Singh had been in possession of the land and property, comprised in khata/khatauni No 56/72, khasra No. 220, measuring 33.75 sq. meters situate at Shimla. After his death in 1989, the same is possessed by the petitioner.

3. In 1958 the then Administrator of Union territory of Himachal Pradesh accorded sanction to carry out additions and alterations and re-construction of stall. The then Shimla Municipality sanctioned the plan, pursuant to which the grand father of the petitioner carried out extensive additions and alterations in the existing premises in the year 1959.

4. It is the further case of the petitioner that he had been earning his livelihood from the premises in question and had been paying house tax to the Municipal Committee/ Corporation, Shimla.

5. In 1974 the Estate Officer, CPWD issued notice and thereafter initiated proceedings under the Act and the predecessor-in-interest of the petitioner was ordered to be evicted vide order dated 19.11.1975. On appeal, the order was set-side and the case was remanded back to the Estate Officer, Shimla. It was thereafter only in the year 2005 that petitioner again received a notice under section 4 of the Act and ultimately the petitioner was ordered to be evicted vide order dated 28.11.2011. This order was challenged further before the learned Appellate Authority, who too dismissed the appeal and upheld the order of eviction.

6. The petitioner has challenged this order on the ground that authorities have erred in concluding that petitioner was in unauthorized occupation. It was proved on record

that petitioner had become owner of the premises by way of adverse possession and further that the impugned order was not sustainable as the petitioner's right to live had been gravely infringed. The respondents have supported the orders and have prayed for the dismissal of the writ petition.

7. The respondents have opposed the petition by filing the reply. The factum of possession of the predecessor-in-interest since the year 1937 has been disputed, rather it has been stated that since the ownership was undisputedly that of the respondents, it had rightly initiated the aforesaid proceedings. It was further averred that the ownership of the respondent was duly supported by the revenue record and once the factum of ownership of the respondents is not disputed then they can take no exception to the lawful orders passed by the competent authority and affirmed by the Appellate Authority.

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

8. At the outset, it may be observed that the claim of the petitioner rests solely on the basis of two letters, dated 2.1.1958 (P-3) and dated 3.1.1959 (Annexure P-4), respectively. The letter dated 2.1.1958 (Annexure P-3) reads thus:-

"No.Sty-25-75/57

HIMACHAL PRADESH ADMINISTRATION
SECRETARIAT ADMINISTRATION.

From:

Shri M.S. Jandrotia,
Assistant Secretary (SAD)
To Himachal Pradesh Administration.

To

The Secretary,
Simla Municipal Committee,
SIMLA.

SUBJECT: CONSTRUCTION OF A STALL.
DATED SIMLA-4, the 2nd JANUARY, 1958.

MEMO

An application, dated the 26th December, 1957 alongwith form 'A" and a plan received from Sh. Udey Singh, Hawker, Himachal Pradesh Secretariat building for the construction of a stall are enclosed for necessary action. There is no objection, if permission is accorded by the Municipal Committee to the applicant for the construction of a stall at the proposed site.

Sd/-
M.S.Jandrotia,
ASSISTANT SECRETARY.

No. Sty- 25.75/57. Dated Simla-4, the 2nd January, 1958.

1. Copy forwarded to Udey Singh, Hawker Himachal Pradesh Secretariat Building, Simla for information with reference to his application referred to above.

2. All further correspondence on the subject may please be addressed direct to the above officer.

Sd/-
ASSISTANT SECRETARY."

Whereas the letter dated 3.1.1959 only accords sanction to make certain additions and alterations, re-construction of the stall. These letters are not of much help to the petitioner for the simple reason that respondents are not denying the existence of a stall at the site.

9. The only question to be determined is as to whether the petitioner is in authorized possession of the premises.

10. The respondents in order to prove their ownership examined two witnesses. PW 1 Dev Raj Sharma, Assistant Engineer, CPWD proved on record the copies of the revenue record alongwith the site plan and also the report prepared by the Junior Engineer.

11. PW 2 Hameer Singh is the Junior Engineer, who has stated that he had personally visited the spot and measured the land and prepared the lay out plan. The unauthorized construction was shown by him in the site plan Ex. PW 2/A.

12. While on the other hand the petitioner appeared as RW 1 and claimed that premises were in possession of his predecessor-in-interest ever since 1939 till his death on 15.1.1989 and thereafter it was the petitioner who had been in possession of the premises.

13. To the similar effect is the statement of RW 2 Rangeela Ram. RW 3 Hem Chand has proved on record the water connection installed in the premises by the predecessor-in-interest of the petitioner on 17.6.1977.

14. RW 4 Diwan Chand, Taxation Inspector has proved on record that the property was assessed to tax, which are being paid by the petitioner. However, he has stated that as per the revenue record it is the respondent who is the owner of the property.

15 RW 5 Radhay Shyam, Senior Assistant is an official from the HPSEB, who has proved on record the installation of electricity meter in the premises in the name of one of the predecessor-in-interests of the respondents.

16. The statements of RW 1 to RW 5 categorically proved on record the possession of the petitioner, but then who is disputing his possession. Even the respondents are not disputing his possession and it is only on account of his possession that the necessity of filing of the eviction petition under the Act has arisen. The dispute therefore is only qua the ownership.

17. The petitioner merely on the basis of letters dated 2.1.1958 (Annexure P-3) and 3.1.1959 (Annexure P-4) cannot be held to be the owner of the premises. The petitioner was required to produce contemporaneous records to prove his ownership. The "Public Premises" under the Act has been defined to mean:-

"2 [(e) "public premises" means—

(1) any premises belonging to, or taken on lease or requisitioned by, or on behalf of the Central Government, and includes any such premises which have been placed by that Government, whether before or after the commencement of the Public Premises (Eviction of Unauthorised Occupants) Amendment Act, 1980 (61 of 1980), under the control of the Secretariat of either House of Parliament for providing residential

accommodation to any member of the staff of that Secretariat;

(2) any premises belonging to, or taken on lease by, or on behalf of,—

(i) any company as defined in section 3 of the Companies Act, 1956 (1 of 1956), in which not less than fifty-one per cent. of the paid up share capital is held by the Central Government or any company which is a subsidiary (within the meaning of that Act) of the first-mentioned company;

(ii) any corporation (not being a company as defined in section 3 of the Companies Act, 1956 (1 of 1956) or a local authority) established by or under a Central Act and owned or controlled by the Central Government;

(iii) any University established or incorporated by any Central Act.

(iv) any Institute incorporated by the Institutes of Technology Act, 1961 (59 of 1961);

(v) any Board of Trustees constituted under the Major Port Trusts Act, 1963 (38 of 1963);

(vi) the Bhakra Management Board constituted under section 79 of the Punjab Reorganisation Act, 1966 (31 of 1966), and that Board as and when re-named as the Bhakra-Beas Management Board under sub-section (6) of section 80 of that Act; [3] [***]

[4] [(vii) any State Government or the Government of any Union Territory situated in the National Capital Territory of Delhi or in any other Union Territory;

(viii) any Cantonment Board constituted under the Cantonments Act, 1924 (2 of 1924); and]

(3) in relation to the 5[National Capital Territory of Delhi]—

(i) any premises belonging to the Municipal Corporation of Delhi, or any Municipal Committee or notified area committee; [3] [***]

(ii) any premises belonging to the Delhi Development Authority, whether such premises are in the possession of, or leased out by, the said Authority;] [and] [5]

[4] [(iii) any premises belonging to, or taken on lease or requisitioned by, or on behalf of any State Government or the Government of any Union Territory;]"

18. The petitioner has set up self contrary case wherein he has firstly tried to establish his lawful ownership and has thereafter attempted to canvass that he has become owner by way of adverse possession.

19. It is more than settled that long possession is not necessarily adverse possession. What would constitute adverse possession has repeatedly been subject matter of the courts. However, this concept was dealt in detail by the Hon'ble Supreme Court in **P.T. Munichikkanna Reddy and others** vs. **Revamma and others (2007) 6 SCC 59,** wherein, it was held as follows:-

“CHARACTERIZING ADVERSE POSSESSION

5. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessoror on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. [See Downing v. Bird, 100 So. 2d 57 (Fla. 1958), Arkansas Commemorative Commission v. City of Little Rock, 227 Ark. 1085, 303 S.W.2d 569 (1957); Monnot v. Murphy, 207 N.Y. 240, 100 N.E. 742 (1913); City of Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908, 97 A.L.R. 1 (1929).]

6. Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through effluxion of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or color of title. (See American Jurisprudence, Vol. 3, 2d, Page 81). It is important to keep in mind while studying the American notion of Adverse Possession, especially in the backdrop of Limitation Statutes, that the intention to dispossess can not be given a complete go by. Simple application of Limitation shall not be enough by itself for the success of an adverse possession claim.

7. To understand the true nature of adverse possession, Fairweather v St Marylebone Property Co [1962] 2 WLR 1020, [1962] 2 All ER 288 can be considered where House of Lords referring to Taylor v. Twinberrow [1930] 2 K.B. 16, termed adverse possession as a negative and consequential right effected only because somebody else's positive right to access the court is barred by operation of law:

> "In my opinion this principle has been settled law since the date of that decision. It formed the basis of the later decision of the Divisional Count in Taylor v. Twinberrow [1930] 2 K.B. 16, in which it was most clearly explained by Scrutton, L.J. that it was a misunderstanding of the legal effect of 12 years adverse possession under the Limitation Acts to treat it as if it gave a title whereas its effect is " merely negative " and, where the possession had been against a tenant, its only operation was to bar his right to claim against the man in possession (see loc. cit. p. 23). I think that this statement needs only one qualification: a squatter does in the end get a title by his possession and the indirect operation of the Act and he can convey a fee simple.
>
> If this principle is applied, as it must be, to the Appellant's situation, it appears that the adverse possession completed in 1932 against the lessee of No. 315 did not transfer to him either the lessee's' term or his rights against or has obligations to the landlord

> who held the reversion. The appellant claims to be entitled to keep the landlord at bay until the expiration of the term by effluxion of time in 1992: but, if he is, it cannot be because he is the transferee or holder of the term which was granted to the lessee. He is in possession by his own right, so far as it is a right: and it is a right so far as the statutes of limitation which govern the matter prescribe both when the rights to dispossess him are to be treated as accruing and when, having accrued, they are thereafter to be treated as barred. In other words, a squatter has as much protection as but no more protection than the statutes allow: but he has not the title or estate of the owner or owners whom he has dispossessed nor has he in any relevant sense an estate "commensurate with" the estate of the dispossessed. All that this misleading phrase can mean is that, since his possession only defeats the rights of those to whom it has been adverse, there may be rights not prescribed against, such, for instance, as equitable easements, which axe no less enforceable against him in respect of the land than they would have been against the owners he has dispossessed."

Also see Privy Council's decision in Chung Ping Kwan and Others v. Lam Island Development Company Limited (Hong Kong) [(1997) AC 38] in this regard.

8. Therefore, to assess a claim of adverse possession, two-pronged enquiry is required:

> 1. Application of limitation provision thereby jurisprudentially "willful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.
>
> 2. Specific Positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.

9. It is interesting to see the development of adverse possession law in the backdrop of the status of Right to Property in the 21st Century. The aspect of stronger Property Rights Regime in general, coupled with efficient legal regimes furthering the Rule of Law argument, has redefined the thresholds in adverse possession law not just in India but also by the Strasbourg Court. Growth of Human Rights jurisprudence in recent times has also palpably affected the developments in this regard.

NEW CONSIDERATION IN ADVERSE POSSESSION LAW

10. In that context it is relevant to refer to JA Pye (Oxford) Ltd v. United Kingdom [2005] 49 ERG 90, [2005] ECHR 921 wherein the European Court of Human Rights while referring to the Court of Appeal judgment ([2001]EWCA Civ 117, [2001]Ch 804) made the following reference:

> "Lord Justice Keene took as his starting point that limitation periods were in principle not incompatible with the Convention and that the process whereby a person would be barred from enforcing rights by the passage of time was clearly acknowledged by the Convention (Convention for the Protection of Human Rights and Fundamental Freedoms). This position obtained, in his view, even

> though limitation periods both limited the right of access to the courts and in some circumstances had the effect of depriving persons of property rights, whether real or personal, or of damages: there was thus nothing inherently incompatible as between the 1980 Act and Article 1 of the Protocol."

11. This brings us to the issue of mental element in adverse possession cases-intention.

1. Positive Intention

12. The aspect of positive intention is weakened in this case by the sale deeds dated 11.04.1934 and 5.07.1936. Intention is a mental element which is proved and disproved through positive acts. Existence of some events can go a long way to weaken the presumption of intention to dispossess which might have painstakingly grown out of long possession which otherwise would have sufficed in a standard adverse possession case.. The fact of possession is important in more than one ways: firstly, due compliance on this count attracts limitation act and it also assists the court to unearth as the intention to dispossess.

13. At this juncture, it would be in the fitness of circumstances to discuss intention to dispossess vis-`-vis intention to possess. This distinction can be marked very distinctively in the present circumstances.

14. Importantly, intention to possess can not be substituted for intention to dispossess which is essential to prove adverse possession. The factum of possession in the instant case only goes on to objectively indicate intention to possess the land. As also has been noted by the High Court, if the appellant has purchased the land without the knowledge of earlier sale, then in that case the intention element is not of the variety and degree which is required for adverse possession to materialize.

15. The High Court observed:

> "It is seen from the pleadings as well in evidence that the plaintiff came to know about the right of the defendants', only when disturbances were sought to be made to his possession."

16. In similar circumstances, in the case of Thakur Kishan Singh (dead) v. Arvind Kumar [(1994) 6 SCC 591] this court held:

> "5. As regards adverse possession, it was not disputed even by the trial court that the appellant entered into possession over the land in dispute under a licence from the respondent for purposes of brick-kiln. The possession thus initially being permissive, the burden was heavy on the appellant to establish that it became adverse. A possession of a co-owner or of a licencee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissible possession into adverse possession. Apart from it, the Appellate Court has gone into detail and after considering the evidence on record found it as a fact that the possession of the appellant was not adverse." (emphasis supplied)

17. The present case is one of the few ones where even an unusually long undisturbed possession does not go on to prove the intention of the adverse

possessor. This is a rare circumstance, which Clarke LJ in Lambeth London Borough Council v Blackburn (2001) 82 P & CR 494, 504 refers to:

> "I would not for my part think it appropriate to strain to hold that a trespasser who had established factual possession of the property for the necessary 12 years did not have the animus possidendi identified in the cases. I express that view for two reasons. The first is that the requirement that there be a sufficient manifestation of the intention provides protection for landowners and the second is that once it is held that the trespasser has factual possession it will very often be the case that he can establish the manifested intention. Indeed it is difficult to find a case in which there has been a clear finding of factual possession in which the claim to adverse possession has failed for lack of intention."
>
> (emphasis supplied)

18. On intention, The Powell v. Macfarlane (1977) 38 P & CR (Property, Planning & Compensation Reports) 452 _ 472 is quite illustrative and categorical, holding in the following terms:

> "If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('animus possidendi')."
>
> ** ** **
>
> If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner.
>
> ** ** **
>
> In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite animus possidendi in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner.
>
> ** ** **
>
> What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

19. Thus, there must be intention to dispossess. And it needs to be open and hostile enough to bring the same to the knowledge and plaintiff has an opportunity to object. After all adverse possession right is not a substantive right but a result of the waiving (willful) or omission (negligent or otherwise) of right to defend or care for the integrity of property on the part of the paper owner of the land. Adverse possession statutes, like other statutes of

limitation, rest on a public policy that do not promote litigation and aims at the repose of conditions that the parties have suffered to remain unquestioned long enough to indicate their acquiescence.

20. While dealing with the aspect of intention in the Adverse possession law, it is important to understand its nuances from varied angles.

21. Intention implies knowledge on the part of adverse possessor. The case of Saroop Singh v. Banto and Others [(2005) 8 SCC 330] in that context held:

> "29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. (See Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak)
>
> 30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Mohd. Mohd. Ali v. Jagadish Kalita, SCC para 21.)"

22. A peaceful, open and continuous possession as engraved in the maxim nec vi, nec clam, nec precario has been noticed by this Court in Karnataka Board of Wakf v. Government of India and Others [(2004) 10 SCC 779] in the following terms:

> "_Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

23. It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper owner.

24. In Narne Rama Murthy v. Ravula Somasundaram and Others [(2005) 6 SCC 614], this Court held:

> "However, in cases where the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved. In this

case the question of limitation is intricately linked with the question whether the agreement to sell was entered into on behalf of all and whether possession was on behalf of all. It is also linked with the plea of adverse possession. Once on facts it has been found that the purchase was on behalf of all and that the possession was on behalf of all, then, in the absence of any open, hostile and overt act, there can be no adverse possession and the suit would also not be barred by limitation. The only hostile act which could be shown was the advertisement issued in 1989. The suit filed almost immediately thereafter." (emphasis supplied)

25. The test is, as has been held in R.V. Oxfordshine County Council :

"… Bright v. Walker (1834) 1 Cr. M. & R. 211, 219, "openly and in the manner that a person rightfully entitled would have used it. . ." The presumption arises, as Fry J. said of prescription generally in Dalton v. Angus (1881) 6 App.Cas. 740, 773, from acquiescence.

26. The case concerned interpretation of section 22(1) of the Commons Registration Act 1965. Section 22(1) defined "town or village green" as including

"…land _ on which the inhabitants of any locality have indulged in [lawful] sports and pastimes as of right for not less than 20 years."

27. It was observed that the inhabitants' use of the land for sports and pastimes did not constitute the use "as of right". The belief that they had the right to do so was found to be lacking. The House held that they did not have to have a personal belief in their right to use the land. The court observed:

"….[the words 'as of right] import the absence of any of the three characteristics of compulsion, secrecy or licence_ 'nec vi, nec clam, nec precario', phraseology borrowed from the law of easements….."

28. Later in the case of Beresford, R (on the application of) v. City of Sunderland [2003] 3 WLR 1306, [2004] 1 All ER 160 same test was referred to.

29. Thus the test of nec vi, nec clam, nec precario i.e., "not by force, nor stealth, nor the license of the owner" has been an established notion in law relating to the whole range of similarly situated concepts such as easement, prescription, public dedication, limitation and adverse possession.

30. In Karnataka Wakf Board (Supra), the law was stated, thus:

"11. In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well- settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See : S M Karim v. Bibi Sakinal AIR 1964 SC

1254, Parsinni v. Sukhi (1993) 4 SCC 375 and D N Venkatarayappa v. State of Karnataka (1997) 7 SCC 567.) Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

2. Inquiry into the particulars of Adverse Possession

31. Inquiry into the starting point of adverse possession i.e. dates as to when the paper owner got dispossessed is an important aspect to be considered. In the instant case the starting point of adverse possession and Other facts such as the manner in which the possession operationalized, nature of possession: whether open, continuous, uninterrupted or hostile possession - have not been disclosed. An observation has been made in this regard in S.M. Karim v. Mst. Bibi Sakina [AIR 1964 SC 1254]:

"Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea." (emphasis supplied)

32. Also mention as to the real owner of the property must be specifically made in an adverse possession claim.

33. In Karnataka Wakf Board (Supra), it is stated:

"12. Plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. In P Periasami v. P Periathambi (1995) 6 SCC 523 this Court ruled that –

"Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."

The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with Mohan Lal v. Mirza Abdul Gaffar (1996) 1 SCC 639 that is similar to the case in hand, this Court held:

"4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right there under and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had

> acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period his title by prescription nec vi, nec clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."
>
> (emphasis supplied)

"3. New Paradigm to Limitation Act

34. The law in this behalf has undergone a change. In terms of Articles 142 and 144 of the Limitation Act, 1908, the burden of proof was on the plaintiff to show within 12 years from the date of institution of the suit that he had title and possession of the land, whereas in terms of Articles 64 and 65 of the Limitation Act, 1963, the legal position has underwent complete change insofar as the onus is concerned: once a party proves its title, the onus of proof would be on the other party to prove claims of title by adverse possession. The ingredients of adverse possession have succinctly been stated by this Court in S.M. Karim v. Mst. Bibi Sakina [AIR 1964 SC 1254] in the following terms:

> "... Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found."

[See also M. Durai v. Madhu and Others 2007 (2) SCALE 309]

35. The aforementioned principle has been reiterated by this Court in Saroop Singh v. Banto and Others [(2005) 8 SCC 330] stating:

> "29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. (See Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak)
>
> 30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Mohd. Mohd. Ali v. Jagadish Kalita, SCC para 21.)"

36. In Mohammadbhai Kasambhai Sheikh and Others v. Abdulla Kasambhai Sheikh [(2004) 13 SCC 385], this Court held:

> "But as has been held in Mahomedally Tyebally v. Safiabai the heirs of Mohammedans (which the parties before us are) succeed to the estate in specific shares as tenants-in-common and a suit by an heir for his/her share was governed, as regards immovable property, by Article 144 of the Limitation Act, 1908. Article 144 of the Limitation Act, 1908 has been materially re-enacted as Article 65 of the Limitation Act, 1963 and provides that the suit for possession of immovable property or any interest therein based on title must be filed within a period of 12 years from the date when the possession of

the defendant becomes adverse to the plaintiff. Therefore, unless the defendant raises the defence of adverse possession to a claim for a share by an heir to ancestral property, he cannot also raise an issue relating to the limitation of the plaintiffs claim."

37. The question has been considered at some length recently in T. Anjanappa and Others v. Somalingappa and Another [(2006) 7 SCC 570], wherein it was opined :

"21. The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the same was inconsequential. Obviously, the requirements of proving adverse possession have not been established. If the defendants are not sure who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not arise. Above being the position the High Court's judgment is clearly unsustainable."

[See also Des Raj and Ors. v. Bhagat Ram (Dead) By LRs. and Ors., 2007 (3) SCALE 371; Govindammal v. R. Perumal Chettiar & Ors., JT 2006 (10) SC 121 : (2006) 11 SCC 600]."

20. It has to be remembered that whenever an encroacher, illegal occupant or land grabber of public property raises a plea that he has perfected title by adverse possession, the court is duty bound to act with greater seriousness, care and circumspection. Any laxity in this regard may result in destruction of right/ title of the State to immovable property and give upper hand to the encroachers, unauthorized occupants or land grabbers.

21. In this context, it shall be fruitful to refer to the following observations of the Hon'ble Supreme Court in **Mandal Revenue Officer** vs. **Goundla Venkaiah and another (2010) 2 SCC 461**:-

"47. In this context, it is necessary to remember that it is well neigh impossible for the State and its instrumentalities including the local authorities to keep every day vigilance/watch over vast tracts of open land owned by them or of which they are the public trustees. No amount of vigil can stop encroachments and unauthorised occupation of public land by unscrupulous elements, who act like vultures to grab such land, raise illegal constructions and, at times, succeeded in manipulating the State apparatus for getting their occupation/possession and construction regularized. It is our considered view that where an encroacher, illegal occupant or land grabber of public property raises a plea that he has perfected title by adverse possession, the Court is duty bound to act with greater seriousness, care and circumspection. Any laxity in this regard may result in destruction of right/title of the State to immovable property and give upper hand to the encroachers, unauthorised occupants or land grabbers.

48. In State of Rajasthan v. Harphool Singh (Dead) through Lrs. 2000 (5) SCC 652, this Court considered the question whether the respondents had acquired title by adverse possession over the suit land situated at Nohar-Bhadra Road at Nohar within the State of Rajasthan. The suit filed by the respondent against his threatened dispossession was decreed by the trial Court with the finding that he had acquired title by adverse possession. The

first and second appeals preferred by the State Government were dismissed by the lower appellate Court and the High Court respectively. This Court reversed the judgments and decrees of the courts below as also of the High Court and held that the plaintiff-respondent could not substantiate his claim of perfection of title by adverse possession. Some of the observations made on the issue of acquisition of title by adverse possession which have bearing on this case are extracted below:-

> "12. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the State to immovable property and conferring upon a third-party encroacher title where he had none. The decision in P. Lakshmi Reddy v. L. Lakshmi Reddy adverted to the ordinary classical requirement -- that it should be nec vi, nec clam, nec precario -- that is the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. It was also observed therein that whatever may be the animus or intention of a person wanting to acquire title by adverse possession, his adverse possession cannot commence until he obtains actual possession with the required animus."

49. A somewhat similar view was expressed in A.A. Gopalakrishnan v. Cochin Devaswom Board 2007 (7) SCC 482. While adverting to the need for protecting the properties of deities, temples and Devaswom Boards, the Court observed as under:-

> "The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their trustees/archakas/ shebaits/employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the authorities concerned. Such acts of "fences eating the crops" should be dealt with sternly. The Government, members or trustees of boards/trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation."

22. Reverting to the facts, it would be seen that petitioner in response to the notice issued under the Act filed his reply, wherein he set up the plea of so called ownership in the following manner:-

> "That the contents of notice pertaining to alleged un-authorised occupation of Respondent with regard to Khasra No. 220, measuring 33.75 sq. meters, are denied as wrong and incorrect, it is submitted that grant father of Respondent late Udai Singh had been in possession of premises in question since the year Nineteen hundred thirty seven (1937). The ownership of predecessor of the Respondent with regard to premises in question was duly acknowledged by the concerned government authorities from time to time. Accordingly the predecessor of present Respondent made extensive

additions and alterations in the premises presently in occupation of the Respondent with the due approval of then Municipal body in the year 1959-60. Since the possession of predecessor/s of Respondent dates back to time before independence, with regard to premises in question, the ownership of the predecessor/ s of the Respondent has been much prior to time when the premises in question came under control of concerned governments i.e. Union territory Himachal Pradesh government and the Central government."

23. In the later part of the reply, he set up the plea in the following manner:-

"In the alternative, it is submitted that the predecessor/s of Respondent had become owner of the premises in question by way of adverse possession and that stand of the predecessor of Respondent his grandfather Sh. Udai Singh, is duly established in the judgement by the Appellate Authority Simla division, Himachal Pradesh in Case No. CHA-s/ 14 of 1975, dt. 29.5.1976 (copy enclosed);

……… The respondent has been enjoying/ using the premises in question peacefully, openly and his hostile possession with regard to premises in question, was never objected to by any quarter whatsoever……"

24. The plea of ownership simpliciter is based on the concept of title, which one may acquire through various sources like succession, gift, will, sale, exchange, grant etc. etc. and the person in possession is essentially to be treated as being in lawful possession. While on the other hand when the plea of adverse possession is projected inherent is the plea that someone else is the ownership of the property. (See: **P. Periasami (dead) by L.Rs.** vs. **P. Periathambi and others (1995) 6 SCC 523.** Having said so, it can safely be concluded that the pleas based on title and simultaneously on adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. (Ref: **Mohan Lal (deceased)** vs. **Mira Abdul Gaffar and another (1996) 1 SCC 639** and **L.N. Aswathama & anr.** vs. **P. Prakash (2009) 13 SCC 229.**

25. It was incumbent upon the petitioner to have chosen one line of defence and could not have raised the plea of ownership and also the plea of adverse possession. Moreover, the plea of adverse possession as raised by the petitioner is absolutely vague as the petitioner has not cared to mention the date from which his possession in fact became adverse. This question assumes importance as the petitioner initially had set up a lawful title in himself.

26. In **Om Parkash & ors.** vs. **Gian Chand & ors. 2014(2) Him.L.R. 1071** one of us (Tarlok Singh Chauhan, J) dealt in detail with the question of adverse possession particularly when the defendant therein had not spelt out any specific date from which his possession became adverse and it was observed as follows:-

"11. Therefore, the moot question is as to whether the pleadings set out by the defendants can meet the requirement of law or not. This question assumes importance, because admittedly, the defendants have not spelt out any specific date from which their possession became adverse.

In **Kamla and others** vs. **Baldev Singh and others 2008(1) Shim. LC 215,** this court has held as under:-

"……..Moreover, in case defendant or his father were in possession of the suit land as owner and the possession was never taken by the plaintiffs in pursuance of the decree, they can be said to be in possession as owner, but they cannot be treated to be in adverse possession of the suit land in any manner. The learned trial Court has

not given its findings that the defendant or his father continued to be owner of the suit land even after passing of the decree since the decree was never executed, but has given the findings in the alternative that the defendant has become owner by way of adverse possession. This plea was taken by the defendant in the alternative but he never pleaded as to from which date his permissive possession as owner became adverse to the true owners i.e. plaintiffs and what overt act was done by him to show his hostile title to the suit land. There were no allegations as to when the possession became adverse, in which year or month or in what manner and the simple general allegation made by the defendant in the alternative were accepted by the trial Court without looking into the question that the original possession of the defendant over the suit land or that of his father was permissive being an owner and it never became adverse as against the true owner and if it became adverse in what manner and from which date, month or year. The permissive possession as owner does not itself become adverse as against the true owner until and unless some overt act is done by the defendant to show his hostile title towards the true owner which pleadings were very much lacking in the written statement and as such, the defendant was never proved to be in adverse possession of the suit land as owner. Those findings were rightly reversed by the learned first Appellate Court and the learned first Appellate Court had rightly observed that there was complete lack of animus on the part of the defendant to hold the suit land adversely to the plaintiffs. It was also observed that it has also not been shown as to what time possession of the defendant became hostile to that of the plaintiffs which had ripened into ownership. To my mind, there was nothing for the trial Court to conclude that the defendant has become owner by way of adverse possession in the absence of specific pleadings or proof and, therefore, the learned first appellate Court had come to a right conclusion in reversing the findings under Issue No. 1 in regard to the plea of adverse possession. Once the defendant had failed to prove adverse possession over the suit land, the only conclusion that can be drawn is the plaintiffs were entitled to the relief of possession and it was rightly given by the first appellate Court."

12. This court in **Brij Mohan Sood** vs. **Parshotam Singh and others 2014(1) Him. L.R. 556,** has held as follows:-

"11. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is well settled principle that a party claiming adverse possession must prove that his possession is " nec vi, nec clam, nec precario" i.e. peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual visible, exclusive, hostile and continued over the statutory period. Therefore, a person who claims adverse possession has to show (a) on what date he came into possession; (b) what was the nature of his possession; (c) whether the factum of possession was known to the other party ; (d) how long his possession is continued; and (e) his possession was open and undisturbed. It has to be remembered that the person pleading

adverse possession has no equity in his favour since he is trying to defeat the right of the true owner, therefore, it is for him to clearly plead and establish all facts necessary to establish his adverse possession (Refer Dr. Mahesh Chand Sharma vs. Raj Kumari Sharma (Smt.) and others (1996) 8 SCC 128).

12. Having observed so, it is clear from the pleadings of the defendant that he has failed to plead the essential ingredients of adverse possession. In absence of the essential ingredients of adverse possession, no amount of evidence can be looked into by this Court. Even otherwise, the defendant has set-up a title in himself and has not acknowledged or attorned the plaintiffs to be the owners. Apart from preliminary objection No.1 (supra), in paragraph-3 of the preliminary objection, the defendant has made the following averments:

"The plaintiffs are not the owners of the land rather the defendants are its owners and the plaintiffs have got no locus standi to file the suit." Throughout in the written statement, the defendants have claimed themselves to be the owners of the suit property and thus the plea of adverse possession is not available to them. "

13. This court further in **Deepak Parkash** vs. **Sunil Kumar 2014(1) Him. L.R. 654** has emphasized on the requirement of law of pleading the exact date from which the possession became adverse, in the following terms:

"14. It appears that the learned lower Appellate Court completely ignored the pleadings of the parties or else the judgment and decree passed by the learned trial Court on the basis of such pleadings would not have been disturbed much less reversed. A perusal of the written statement would show that pleadings with regard to adverse possession were not only deficient but in fact did not meet the requirement of law. The defendant even failed to specify the definite date on which his possession became adverse.

16. Faced with such situation, learned counsel for the respondent/defendant would contend that he had led sufficient evidence to prove his plea of adverse possession. I am afraid that I cannot agree with the submissions made by learned counsel for the respondent/defendant.

17. It is settled law that no amount of evidence beyond pleadings can be looked into. It is further well settled principle of law that the evidence adduced beyond the pleading would not be admissible nor can any evidence be permitted to be adduced which is at variance with the pleadings. The Court at the later stage of the trial as also the Appellate Court having regard to the rule of pleading would be entitled to reject the evidence wherefor there does not exist any pleading."

28. It is more than settled that mere possession for a long time does not result in converting permissive possession into adverse possession.

29. The learned counsel for the petitioner has argued that the impugned order is bad in law as the right to live has been gravely infringed. This contention is absolutely fallacious as nobody much-less an encroacher has fundamental right under Article 21 of the Constitution of India to carry on business at the place of his choice and convenience. The right to carry on business cannot be absolute but has to be limited and subservient to

overall public interest. If the right of the petitioner and the similar situated persons is conceded, then they could hold the society to ransom by squatting on the center of busy thoroughfares thereby paralyzing all civic life.

30. The petitioner admittedly is squatting over a prime property at Shimla that too without paying a penny to its owner and has thereby turned the litigation into a fruitful industry. The Hon'ble Supreme Court in **South Eastern Coalfields Limited** vs. **State of M.P. and others (2003) 8 SCC 648,** held as under:

> *"28 ......Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation."*

31. It is therefore the duty of this court to neutralize any unjust enrichment and undeserved gain made by the litigants only on account of keeping the litigation alive. In **Indian Council for Enviro-Legal-Action** vs. **Union of India and others (2011) 8 SCC 161,** it is noticed that conduct of the parties is to be taken into consideration and it was held as follows:-

> *"197. The other aspect which has been dealt with in great details is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view:*
>
> *1. It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.*
>
> *2. When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.*
>
> *3. Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.*
>
> *4. A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.*
>
> *5. No litigant can derive benefit from the mere pendency of a case in a court of law.*
>
> *6. A party cannot be allowed to take any benefit of his own wrongs.*

> *7. Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.*
>
> *8. The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts."*

32. In view of the aforesaid discussion, we find no merit in this petition and the same is dismissed, so also the pending application(s), if any.

33. The petitioner has illegally deprived the respondents of the possession of the property of which he had no right, or title. He illegally retained the same for decades together. Therefore, it is the duty of the court to see that such wrong doers are discouraged at every stage and even if he has succeeded in prolonging the litigation, then he must suffer the costs of all these years and also bear the expenses of such unwanted and otherwise avoidable litigation. Therefore, the petitioner is burdened with costs, which is assessed at Rs.1,00,000/-.

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

Sada Ram …Petitioner
Versus
Chief Secretary Govt. of H.P. . …Respondent.

Ex. Petition No. 7 of 2015 in
CWP No. 224 of 2006
Reserved on: 18.5.2015
Date of Decision : May 27, 2015

Code of Civil Procedure, 1908- Order 21- Petitioners filed a Writ Petition before the High Court which was transferred to Administrative Tribunal- petition was allowed and the respondent No. 1 was directed to constitute Review Departmental Promotion Committee and place the cases of the petitioners before the Committee for consideration of their promotion w.e.f. 27.2.1980, the date from which their juniors were promoted and in case petitioners are ordered to be promoted they would be entitled to all consequential benefits- respondent promoted the petitioner notionally and denied the benefits of arrears of salary to the petitioner- petitioner claimed the higher pay only on the ground that one 'K' was drawing more pay than him but record showed that 'K' was stagnated on the post of Senior Assistant and was given two proficiency increments- this difference was only on the ground of fortuitous circumstances – the petitioner cannot be equated to 'K' as he had not suffered the pain and pangs of stagnating on one post for more than 21 years- hence, pay was rightly fixed- petition dismissed. (Para- 14 to 23)

For the petitioner	:	Mr. Dilip Sharma, Senior Advocate with Ms. Nishi Goel, Advocate.
For the respondents	:	Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma, Mr. Anup Rattan, Addl. A.Gs. and Mr. J. K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

<u>Tarlok Singh Chauhan, Judge</u>

It is for the second time that the petitioner has approached this Court for executing the judgment dated 14.5.2010 passed in CWP No. 224 of 2006 in case titled State of H.P. vs. Sada Ram and another whereby the judgment of the learned H.P. State Administrative Tribunal dated 7.12.2005 in TA No. 545 of 1986 was affirmed.

The brief facts of the case may be noticed.

2. The petitioner initially filed CWP No. 134 of 1982 before this Court. However, after constitution of the Administrative Tribunal, it was transferred and registered as TA No. 545 of 1986. The same was allowed by the learned Tribunal vide judgment dated 7.12.2005 and the respondent No.1 was directed to constitute Review Departmental Promotion Committee within eight weeks of the passing of the order and place the cases of the petitioners before such committee for consideration of their promotion with effect from 27.2.1980, the date from which their juniors were promoted. In case the petitioners on such consideration are ordered to be promoted they would be entitled for all consequential benefits and the same would be paid to them.

3. Admittedly, the order passed by the Tribunal has attained finality inasmuch as CWP No. 224 of 2006 filed before this Court challenging the order of the Tribunal was affirmed vide judgment dated 24.3.2006. Though, the same was initially set aside by the Hon'ble Supreme Court vide order dated 18.3.2009 with a direction to hear the same afresh, even thereafter, this Court vide judgment dated 14.5.2010 has again affirmed the judgment passed by the learned Tribunal.

4. When the judgment was not fully implemented, the petitioner alongwith co-petitioner filed Contempt Petition which was treated as Execution Petition (T) No. 29 of 2012 and was disposed of by this Court vide judgment dated 9.9.2013 by directing the respondent to comply with the judgment within three months, failing which the amount was to carry 9% interest.

5. Even before the aforesaid Execution Petition had been disposed of, the respondent themselves on 4.8.2011 issued a notification whereby the petitioner was promoted as Senior Assistant from 27.2.1980 to 15.12.1982 and Superintendent from 29.11.1994 to 29.8.1997 and further Section Officer from 2.2.1998 to 31.3.2002 on notional basis.

6. The petitioner complains that in terms of the judgment of the learned Tribunal as affirmed by this Court, he was entitled to all consequential benefits. Therefore, the arrears of salary becoming due cannot be denied to him by treating his promotion as notional without arrears. The petitioner has been promoted as Under Secretary on notional basis w.e.f. 31.1.2003 to 31.5.2004 vide notification dated 9.12.2013. Thereafter, vide notification dated 21.12.2013, the pay of the petitioner as on 31.1.2003 on promotion as Under Secretary was fixed at Rs.11660/-. His pay as Section Officer on promotion to the said post w.e.f. 2.2.1998 was fixed at Rs.9200/-.

7. The precise grievance of the petitioner is that once his Army service has been ordered to be counted for extending all benefits and he has been treated to be in service in the year 1965 as against one Karam Singh Thanta, who was appointed as Clerk on 26.3.1966, his pay cannot be less than him. It is alleged that Karam Singh Thanta was appointed as Section Officer on 31.1.2003 and his pay was fixed at Rs.11660/-, on

promotion as Under Secretary on 31.1.2003 his pay was fixed at Rs.12375/-. While on the contrary, when the petitioner was promoted as Section Officer on 31.1.2003 his pay has been shown to be Rs.10300/- and upon promotion to the post of Under Secretary on 31.1.2003 he had been fixed at Rs.11660/-. Similarly, on promotion of Karam Singh Thanta as Superintendent Grade-II on 29.11.1994, his pay was fixed at Rs.2775/-. He got next increment on 1.7.1995 raising his pay at Rs.2925/-.It is conceded by the petitioner that he was given promotion pursuant to the judgment in his favour with reference to Karam Singh Thanta, but on promotion as Superintendent Grade-II on 29.11.1994 his pay has been fixed at Rs.2440/- + 50 AP which was less than Karam Singh Thanta. The petitioner furnished the comparative details of his pay fixation vis-à-vis Karam Singh Thanta and the same are reproduced below:

Comparative Statement of pay drawn in respect of Sh. Karam Singh Thanta & Sh. Sada Ram,					
Sh. Karam Singh Thanta			***Sh. Sada Ram***		***Notional***
Sr. No.	*Dates*	*Basic pay*	*Dates*	*Basic pay*	*As per Off. Order*
1.	*29.11.94*	*2775*	*29.11.94*	*2490*	*Promoted as Supdt. Gr-II.*
2.	*01.07.95*	*2925*	*01.03.95*	*2550*	
3.	*01.01.96*	*8925*	*01.01.96*	*7880*	
4.	*01.07.96*	*9200*	*01.03.96*	*8100*	
5.	*01.07.97*	*9475*	*01.03.97*	*8375*	
6.	*02.02.98*	*9750*	*02.02.98*	*8650*	*Promoted as S.O.*
7.	*01.07.98*	*10300*	*01.03.98*	*9200*	
8.	*01.07.99*	*10640*	*01.03.99*	*9475*	
9.	*01.07.00*	*10980*	*01.03.00*	*9750*	
10.	*01.07.01*	*11320*	*01.03.01*	*10025*	
11.	*01.07.02*	*11660*	*01.03.02*	*10300*	
12.	*31.01.03*	*12375*	*31.01.03*	*10640*	*Promoted as U/Sectt.*
13.	*01.01.04*	*12750*	*01.01.04*	*10980*	*11660 Disparity.*

8. It is alleged that despite the directions of this Court, the respondent has not cared to fully implement the judgment. Though, the petitioner in order to give quietus to the matter had himself made a statement to confine the benefits from 1994 i.e. with respect to his pay fixation at par with Karam Singh Thanta, who was promoted as Superintendent on 29.11.1994. But despite this, the respondent till date has not given the benefit of such pay fixation from 29.11.1994.

9. The respondent-judgment debtor, in the reply has stated that the judgment as passed by the learned Tribunal has been implemented both in its letter and spirit and the main reason of difference of pay of both the retired officers i.e. the petitioner and Karam Singh Thanta is on account of their different dates of appointment. The petitioner joined the cadre on 4.8.1979 and within seven months he was promoted as Assistant w.e.f. 27.2.1980, in the pay scale of Rs.600-1120/- and as per Fundamental Rule 22, his pay was fixed at Rs.600/- at the initial of pay of the post, whereas Karam Singh Thanta joined the cadre on 26.3.1966 and was promoted as Assistant on 4.9.1973 and his pay as Assistant was fixed at Rs.225/-. However, due to revision of pay scale w.e.f. 1.1.1978 and by allowing annual increments, his pay as on 27.2.1980 was arrived at Rs.750/-.

10. It is further contended that the dates of promotion of both as Superintendents and Section Officers are identical, yet as per Rule, the pay of the petitioner cannot be fixed at par with the pay of Karam Singh Thanta. The reason as to why the pay of the petitioner cannot be fixed at par with the pay of Karam Singh Thanta is that Karam Singh Thanta was stagnated on the post of Senior Assistant for 21 years and as per instructions of Finance Department issued on 14th June, 1989, two proficiency increments were allowed to him on completion of 8 and 18 years service on the same post. Secondly, Karam Singh Thanta got 28 regular annual increments uptil 1994, whereas the petitioner remained on the post of Senior Assistant for 14 years and got one proficiency increment on completion of 8 years service on the same post and got 14 regular annual increments uptil 1994. Further under FR 22 (I) (a) (1) the junior officer/official can draw higher pay than the senior if the junior officer/official draws from time to time higher rate of pay than the senior by virtue of grant of advance increments. Karam Singh Thanta against whom the parity of pay is being claimed, has always drawn higher pay to the petitioner. Therefore, the pay of the petitioner cannot be fixed at par with Karam Singh Thanta w.e.f. 29.11.1994.

11. Sh. Dilip Sharma, learned Senior counsel assisted by Ms. Nishi Goel, has vehemently argued that the defence taken by the respondent has already been negated by the erstwhile Tribunal and also by this Court on more than one occasion and therefore, the respondent has no option but to implement the judgment not only in its letter but also in spirit.

12. On the other hand, Mr. Shrawan Dogra, learned Advocate General would contend that the reason why the petitioner cannot be fixed at par with the pay of Karam Singh Thanta is because Karam Singh Thanta had stagnated on the post of Senior Assistant for 21 years and therefore, had been extended the benefit of notification dated 14th June, 1989 whereby two proficiency increments were allowed to him on completion of 8 and 18 years service on the same post. In this way, Karam Singh Thanta got 28 regular annual increments uptil 1994, whereas the petitioner remained on the post of Senior Assistant for 14 years and got one proficiency increment on completion of 8 years service on the same post and got 14 regular annual increments uptil 1994.

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

14. Indisputably, the petitioner while filing CWP No. 134 of 1982 had claimed the following substantive reliefs:

(a) That the promotion of respondents No. 2 to 88 be quashed.

(b) That the petitioners be considered for the purpose of promotion to the post of Assistant and be eventually promoted w.e.f.27.2.1980 i.e. from the dates the respondents 27.2.1980 were promoted.

(c) The petitioners may also be paid arrears of pay allowances and allied benefits ensuing from quashing of the promotion.

15. The learned Tribunal vide order dated 7.12.2005 allowed this petition in the following terms:

"In view of the above, this TA is allowed to the extent that the respondent No.1 is directed to constitute Review Departmental Promotion Committee within 8 weeks of the passing of this order and place the cases of the applicants before such committee for consideration of their promotion w.e.f. 27.2.1980, the date from which their juniors were promoted. In case the applicants on such

consideration are promoted they will be entitled for all consequential benefits and the same shall be paid to them."

16. For arriving at the aforesaid conclusion, it was observed by the learned Tribunal that while allotting seniority to the petitioner it had not been shown that the same had been worked out after taking into account his military services and therefore, the same was illegal or irregular because the benefit of such seniority could not be denied to the petitioner for the purpose of eligibility for consideration for promotion.

17. The order passed by the learned Tribunal was upheld by a learned Division Bench of this Court vide judgment dated 14.5.2010. The petitioner thereafter filed Execution Petition (T) No. 29 of 2012 and this Court on 12.6.2013 passed the following order:

"In the judgment dated 07.12.2005 passed by the learned Tribunal in O.A. TA-545/86 (Sada Ram & another Versus the State of Himachal Pradesh and others), it has been indicated in paragraph 17, which reads thus:-

> *"In view of this, this TA is allowed to the extent that the respondent No.1 is directed to constitute Review Departmental Promotion Committee within 8 weeks of the passing of this order and place the cases of the applicants before such committee for consideration of their promotion w.e.f. 27.2.1980, the date from which their juniors were promoted. In case the applicants on such consideration are promoted they will be entitled for all consequential benefits and the same shall be paid to them."*

The said observation of the learned Tribunal has also been affirmed by this Court (DB) vide judgment dated 14.05.2010 passed in CWP No. 224 of 2006 (State of Himachal Pradesh Versus Sada Ram and Another). From the affidavit of the respondent/alleged contemnor, it appears that the Departmental Promotion Committee so constituted to review the earlier recommendations of the DPC, considered and recommended the case of the petitioners for promotion w.e.f. 27.2.1980, the date when juniors to petitioners were considered in its meeting held on 11.7.2011 and the petitioners were shown to have been promoted vide Notification dated 04.08.2011. According to the petitioners, nothing has been indicated in the affidavit as to how the consequential benefit has been given to the petitioners and how the review DPC has considered the case of the petitioners vis a vis their juniors for further promotion.

In the aforesaid facts and circumstances, the respondents are directed to file better affidavit within three weeks from today and the records of the review DPC be also produced before this Court on 3rd July, 2013."

18. The respondent in response to the execution petition had filed their reply-affidavit wherein it was averred that the petitioner while filing CWP No. 134 of 1982 had impleaded 87 persons as respondents over whom he had claimed seniority/promotion w.e.f. 27.2.1980, but out of 87 respondents, respondents No. 2 to 48 were appointed as Clerks between 1966 to 1974. They were further promoted as Assistants in the year 1980 and were working as such at the time of filing the initial petition in the year 1982. But subsequently, on the representations made by the respondents and on the directions of the Tribunal, these respondents were given promotions as Assistants from back dates between the period 4.9.1973 to 7.3.1979, prior to the dates of joining of the petitioners as Clerks. It was further contended that the petitioners therein had joined as Clerks against the post reserved for Ex-Serviceman category on 4.8.1979 and 18.8.1979, respectively. Therefore, the respondents

No. 2 to 48 who were promoted as Assistants prior to 7.3.1979 could not be said to be juniors to the petitioners who had been appointed as Clerks on 4.8.1979 and 18.8.1979.

19. This Court however rejected the aforesaid stand of the respondents and held that the petitioners could not be said to be juniors to respondents No. 2 to 48. As per the judgment, the petitioners were entitled to the benefit of the past service in the Army and, therefore, ranked senior to respondents No. 2 to 48 and accordingly the following order was passed:

> *"14. Since the petitioners as well as private respondents stand already retired from the service, now they are required to be considered for promotion as Under Secretary notionally from the date, it fell due as Shri Karam Singh, who was at Sr.No. 78 below petitioner No.1 at Sr. No. 77-A, was promoted as Under Secretary on 31.1.2003, which is clear from list of Section Officers, Annexure E-4. Similarly, Shamsher Singh, who was at Sr. No. 88, below petitioner No.2 at Sr. No. 87-A in the seniority list of Clerks, was promoted as Under Secretary w.e.f. 4.4.2003, whereas petitioner No.1 stood retired on 31.5.2004 and petitioner No.2 on 31.7.2005 as Section Officers. Therefore, it is clear that the petitioners were to be considered as senior to the aforesaid persons. Hence, the impugned judgment is not fully complied with as the consequential benefits of pay fixation etc. are also to be given to the petitioners at par with their juniors consequent upon their promotions notionally, as stated above."*

20. It would be seen from the judgment passed by the erstwhile Tribunal that the petitioner was held entitled to be considered for promotion w.e.f. 27.2.1980, the date when his juniors were promoted and in case on such consideration he was found eligible for promotion, he would be entitled for all consequential benefits.

21. The respondents in their reply have clearly stated that Karam Singh Thanta was drawing more pay only because he stagnated on the post of Senior Assistant for 21 years and was then given two proficiency increments on completion of 8 and 18 years service respectively on the basis of the instructions of the Finance Department dated 14.6.1989. The petitioner in fact had joined the services of the respondent only w.e.f. 4.8.1979 and had been granted the benefit of his services rendered in the Army.

22. The difference in pay is only on account of fortuitous circumstance which is not uncommon in service. If a junior gets a higher pay that does not mean that the senior also should necessarily get it without a foundation for such a claim in law. Fortuitous events are part of life. Fixation of pay is generally with reference to an individual. Various reasons may account for the grant of higher pay to a junior. Equal protection means the rights of equal treatment in similar circumstance. Different treatment does not per se, amount to discrimination violative of Article 14. It denies equal protection only when there is no basis for differentiation.

23. The petitioner admittedly has not suffered the pain and pangs of stagnating on one post for more than 21 years and cannot therefore claim the benefit similar to those of Karam Singh Thanta because no such benefit has been granted to the petitioner either by the Tribunal or by this Court. It is also not established on record that the contentions as have now been raised by the respondents had already been adjudicated in the earlier litigation, particularly while adjudicating the Execution Petition (T) No. 29 of 2012. Rather this question was never in issue and has cropped up only at the stage when the petitioner has been promoted to the post of Under Secretary.

24. In view of the aforesaid discussion, we find no merit in this petition and the same is accordingly dismissed, so also the pending application(s), if any.

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

The Director, Telecom Project-II ...Appellant.
VERSUS
Smt.Neelam Chadha and another ...Respondents.

LPA No.279 of 2012.
Reserved on : 20.05.2015
Pronounced on: May 27, 2015.

Industrial Disputes Act, 1947- Section 25- Employer contended that workman had not completed 240 days in the preceding 12 months, however, no such plea was taken before the Writ Court- it was further contended that project had come to an end and there is no work, however, Labour Court had specifically found that management was having the work- no material was placed on record to controvert this finding - workman was terminated without any cause and the order was in breach of the principles of natural justice.
(Para- 8 to 10)

Case referred:
Mackinnon Mackenzie and Company Limited vs. Mackinnon Employees Union, (2015) 4 Supreme Court Cases 544

For the Appellant: Mr.Y.P.S. Dhaulta, Advocate.
For the Respondents: Mr.Sameer Thakur, Advocate, for respondent No.1.
Nemo for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

This Letters Patent Appeal has been filed by the appellant-employer (writ petitioner) questioning the judgment and order, dated 17th November, 2011, passed by the learned Single Judge of this Court in CWP No.4378 of 2009, titled The Director, Telecom Project vs. Neelam Chadha and another, whereby the award passed by the Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court-I, Chandigarh, (for short, the Labour Court), in favour of the respondent-workman, came to be modified, (for short, the impugned judgment).

2. Facts of the case, as averred, are that the respondent-workman was engaged as Typist-Casual Worker by the appellant on daily rate basis w.e.f. 12th August, 1995. The respondent-workman continued to work as such till April, 1996 and her services came to be terminated by the appellant-employer verbally w.e.f. May, 1996.

3. Upon a reference having been received from the Government of India, the Labour Court entered into the reference and after examining the pleadings and the evidence adduced by the parties, passed the award in favour of the workman (respondent herein) by

directing the appellant-employer to reinstate the services of the workman and to pay her entire back wages.

4. Feeling aggrieved, the employer challenged the award passed by the Labour Court by filing the writ petition (supra). The Writ Court, after examining the award and the pleadings of the parties, modified the award by providing that the workman would be entitled only to reinstatement and not to the wages for the period during which her services remained terminated.

5. The workman-writ respondent has not questioned the impugned judgment on any count. Only the employer/writ petitioner has questioned the impugned judgment on the grounds taken in the memo of appeal.

6. Before we deal with the grounds on which the impugned judgment has been sought to be assailed, we deem it proper to make a reference to the grounds taken by the writ petitioner in the writ petition, seeking quashment of the award passed by the Labour Court:

> *"(i) That the Ld. Presiding Officer of the Labour Court has based his award on conjectures and surmises. There was no material whatsoever to show that Respondent No.1 has worked with the petitioner in the month of February, 1996. The voucher which has been relied upon for holding that Respondent No.1 has worked in the month of February, 1996 pertains to one Neena Chadha. It will be worthwhile to mention here that it was never the case of Respondent No.1 prior to 1999 that for the month of February, 1996 she was paid the wages in the name of Neena Chadha. As such, the foundation of her case is based upon falsehood and except her bald statement, there is nothing to show that she has worked in the month of February, 1996. As such the findings returned by the Ld. Presiding Officer of the Labour Court are perverse and contrary to the record. Hence, the award Annexure P-4 dated 21.7.2009 is liable to be set aside.*
>
> *(ii) That it was specific case of the petitioner that Respondent No.2 was a casual worker and was engaged on a project work. When the camp office of the project was to be closed, the services of the Respondent No.1 were no longer required. Even the entire project work has come to an end. As such, the Ld. Presiding Officer, Industrial Tribunal has erred in law in granting re-instatement in employment to Respondent No.1. On this ground also, the impugned award is liable to be set aside.*
>
> *(iii) That it was never the case of the Respondent No.1 that she is not in gainful employment after termination of her services. In fact, no body will remain unemployed for a long period of 13 years. The Ld. Presiding Officer has granted full back wages to Respondent No.1 against the well settled law. In the present case, the Respondent No.1 at the most was entitled for compensation not the full back wages and reinstatement. On this ground also, the impugned award is liable to set aside.*
>
> *(iv) That the award of the Ld. Presiding Officer, Industrial Tribunal amounts to undue enrichment of Respondent No.1 at the cost of public money, which is against the public policy and on this ground also, the impugned award is liable to be set aside."*

7. During the course of hearing, the learned counsel for the appellant-employer vehemently argued that the workman-respondent had not completed 240 days in the preceding 12 months, when her services were terminated. The learned counsel for the appellant was specifically asked to show whether any such ground was taken in the writ

petition. The learned counsel frankly conceded that no such ground was urged before the writ Court, as is also evident from a perusal of the grounds of the writ petition reproduced supra.

8. The learned counsel for the appellant also argued that the project has come to an end and there is no work. The Labour Court, after examining the rival contentions of the parties and the evidence adduced, has categorically recorded in the award as under:

> *"As per the evidence available on record the management was having the work and still having the work so there is no force in the contention of the management that project for which the workman was engaged has been closed."*

9. The learned counsel for the appellant has not been able to show from the record that the said findings recorded by the Labour Court, are erroneous or are not based upon correct appreciation of the material placed on record. Thus, the contention raised by the learned counsel for the appellant-employer is repelled, being not sustainable in the eyes of law.

10. The Apex Court in a latest decision in **Mackinnon Mackenzie and Company Limited vs. Mackinnon Employees Union, (2015) 4 Supreme Court Cases 544,** has held that when no positive evidence was adduced in support of the claim of the appellant-Company that the retrenchment was effected on account of closure of the department/unit of the Company, the finding of fact recorded by the Labour Court in that regard against the employer cannot be interfered with. It is apt to reproduce paragraph 33 of the said decision hereunder:

> *"33. On the contention urged on behalf of the appellant-Company that it was a closure of the department/unit of the appellant-Company as per the definition of "closure" under Section 2(cc) of the I.D. Act, we are of the view that with respect to the above contentious issues framed by the Industrial Court have been answered against the appellant-Company based on the finding of fact recorded by it. Therefore, the said contention urged on behalf of the appellant-Company cannot be allowed to sustain in law."*

11. It was also observed by the Apex Court in the decision supra that Court cannot sympathize with a party which gambles in litigation to put off the evil day, and when that day comes, prays to be saved from its own gamble. It is apt to reproduce paragraph 53 hereunder:

> *"53. Further, it is urged by the learned senior counsel on behalf of appellant-Company that there is no question of reinstatement of the workmen concerned and payment of back wages to them since the concerned department/unit of the appellant-Company in which they were employed no longer exists and therefore, requested this Court to mould the relief granted by the courts below. The said contention is rightly rebutted by the learned senior counsel on behalf of the respondent-Union by placing reliance on Workmen of Sudder Workshop , wherein this Court held that the Court cannot sympathise with a party which gambles in litigation to put off the evil day, and when that day comes, prays to be saved from its own gamble. The said contention urged on behalf of the respondent-Union must be accepted by us as the same is well founded. Therefore, we hold that moulding of the relief is not permissible in this case at this stage when the matter has reached this Court keeping in mind the legal principle laid down by this Court on this aspect of the matter in the case referred to supra."*

12. The Labour Court, after examining the evidence and the facts rightly came to the conclusion that the services of the workman were terminated without any cause and that the termination order was in breach of the principles of natural justice.

13. In view of the above discussion, we are of the opinion that the impugned judgment is speaking one and needs no interference.

14. Having said so, there is no merit in the appeal, the same is dismissed and the impugned judgment is upheld.

15. Pending CMPs, if any, also stand disposed of.

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

Vyasa Devi wife of Sh. Shyam Lal ....Petitioner
Versus
State of H.P. & others ....Respondents

CWP No. 6244 of 2013
Order Reserved on 15th May 2015
Date of Order 27th May, 2015

Constitution of India, 1950- Article 226- Petitioner and 1600 workmen were retrenched on 9.2.2004- services of more than 1000 workmen were reinstated but the services of the petitioner were not reinstated- retrenchment order was set aside but the petitioner was not given employment- petitioner raised an industrial dispute but his case was rejected on the ground of delay and was not referred to Industrial Tribunal- held, that relief cannot be denied to workmen on the ground of delay- petitioner is a labourer and should not have been denied the relief simply on the ground of delay. (Para-5 and 6)

Cases referred:

Collector Land Acquisition Anantnag and another vs. Mst. Katji and others, AIR 1987 SC 1353
Jasmer Singh vs. State of Haryana and others, (2015)4 SCC 458
Raghuvir vs. G.M. Haryana Roadways Hissar, (2014)10 SCC 301

For the Petitioner: Mr. Rahul Mahajan, Advocate.
For the Respondents: Mr. M.L. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

<u>P.S. Rana, Judge</u>

It is pleaded that in the month of December 1998 petitioner was engaged by co-respondent No.3 on daily wages basis on muster roll as Beldar. It is pleaded that thereafter on dated 9.2.2004 the services of 1600 workmen were retrenched by co-respondent No.3 including the services of petitioner. It is pleaded that in the months of April and May 2004 services of more than 1000 retrenched workmen were reinstated by respondents but petitioner was not given opportunity of reemployment despite of senior workman. It is also pleaded that on dated 8.7.2005 services of 1087 workmen again

retrenched by the respondents. It is further pleaded that retrenchment order dated 8.7.2005 was set aside by Hon'ble H.P. Industrial Tribunal-cum-Labour Court Dharamshala and services of workmen were reinstated by the respondents but being a senior workman the petitioner was not given the opportunity for re-engagement. It is pleaded that on dated 26.9.2009 petitioner raised her industrial dispute against her illegal termination order dated 9.2.2004 after about five years. It is further pleaded that on dated 9.11.2009 one Smt. Bhichi Devi raised demand notice against her illegal termination of dated June 2004 after elapse of more than five years and five months. It is pleaded that on dated 6.8.2010 case of Inder Singh was referred by co-respondent No.3 to learned H.P. Industrial Tribunal-cum-Labour Court Dharamshala and said Inder Singh has raised his industrial dispute after elapse of more than seven years. It is also pleaded that on dated 31.3.2012 the case of Bhichi Devi was referred by co-respondent No. 2 to Hon'ble H.P. Industrial Tribunal-cum-Labour Court Dharamshala for adjudication. It is also pleaded that on dated 13.6.2013 case of petitioner was rejected by co-respondent No. 2 and was not referred to Hon'ble Industrial H.P. Tribunal-cum-Labour Court Dharamshala for adjudication. It is pleaded that order dated 13.6.2013 passed by Labour Commissioner H.P. whereby Labour Commissioner has refused to refer the dispute of petitioner to H.P. Industrial Tribunal-cum-Labour Court Dharamshala be set aside and co-respondent Nos. 1 and 2 be directed to refer the dispute of petitioner for adjudication to Hon'ble H.P. Industrial Tribunal-cum-Labour Court Dharamshala. Prayer for acceptance of petition sought.

2. Per contra reply filed on behalf of co-respondent Nos. 1 and 2 pleaded therein that petitioner served demand notice on dated 26.9.2009 on co-respondent No.3 and same was submitted to Labour Officer-cum-Conciliation Officer Mandi. It is pleaded that Labour Officer-cum-Conciliation Officer tried to settle the dispute amicably but dispute could not be settled by way of conciliation. It is pleaded that thereafter Labour Officer-cum-Conciliation Officer Mandi sent the report under Sub-section 4 of Section 12 of Industrial Disputes Act 1947 to the Labour Commissioner. It is pleaded that co-respondent No. 2 exercising the powers of appropriate government examined the report sent by Labour Officer-cum-Conciliation Officer Mandi and also perused the reply filed by respondent No.1 and found that petitioner had raised dispute vide demand notice dated 26.9.2009 after a lapse of more than five years without giving any detailed reasons relating to delay. It is pleaded that dispute was not kept alive by petitioner for long period and learned Labour Commissioner came to the conclusion that dispute had faded away after a lapse of long time and demand notice raised by petitioner was found to be vexatious and devoid of any merits. It is pleaded that facts and circumstances of the case always differ and could not be compared with each other. It is pleaded that Government of India has amended the Industrial Dispute Act 1947 whereby direct access has been given to workman for raising any dispute upon termination and dismissal of services directly to the Labour Court-cum-Industrial Tribunal within a period of three years from the date of termination. It is pleaded that as per amended Section 2-A dismissal of services of an individual workman would be deemed to be an industrial dispute. It is pleaded that non-alive issue could not be referred to Labour Court-cum-Industrial Tribunal for adjudication. Prayer for dismissal of civil writ petition sought.

3. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the respondents and Court also perused the entire record carefully.

4. Following points arise for determination in this civil writ petition:-

1. Whether order of learned Labour Commissioner (H.P.) No.11-23/84(Lab)ID/2013-Mandi dated 13.6.2013 is liable to be set aside as mentioned in memorandum of grounds of civil writ petition?
2. Final Order.

Findings on point No.1

5. Submission of learned Advocate appearing for the petitioner that matter in dispute is service matter and learned Labour Commissioner Himachal Pradesh has illegally declined to refer the matter to learned Labour Court-cum-Industrial Tribunal for adjudication is accepted for the reasons hereinafter mentioned. Court has carefully perused the order passed by learned Labour Commissioner dated 13.6.2013. Learned Labour Commissioner has specifically mentioned in the order that petitioner did not agitate the matter for more than five years and present dispute faded away with passage of time. It was held in case reported in ***AIR 1987 SC 1353 titled Collector Land Acquisition Anantnag and another vs. Mst. Katji and others*** that (1) Ordinarily a litigant does not stand to benefit by lodging matter late. (2) Refusing to condone delay can result meritorious matter thrown out at the very threshold and cause of justice defeated. It was held that if delay is condoned the highest that can be happened is that a case would be decided on merits after hearing the parties. (3) It was held that every day's delay must be explained does not mean that a pedantic approach should be made. It was held that doctrine must be applied in a rational common sense. (4) It was held that when substantial justice and technical considerations are pitted against each other then cause of substantial justice deserves to be preferred. (5) It was held that there is no presumption that delay is occasioned deliberately or on account of culpable negligence or on account of mala fides. It was held that a litigant does not stand to benefit by resorting to delay and in fact he runs a serious risk. (6) It was held that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. It was held in case reported in ***(2015)4 SCC 458 titled Jasmer Singh vs. State of Haryana and others*** that provisions of Article 137 of Limitation Act 1963 would not be applicable to Industrial Disputes Act 1947 and it was held that relief would not be denied to workman merely on ground of delay. It was held that no reference to Labour Court should be questioned on the ground of delay alone. It was further held that even in case where delay was condoned by Labour Court then Labour Court could mode the relief by declining the back wages to workman till he raised the demand regarding his illegal retrenchment, dismissal or termination. It was held in case reported in ***(2014)10 SCC 301 titled Raghuvir vs. G.M. Haryana Roadways Hissar*** that there is no limitation for reference to Labour Court under Section 10 of Industrial Disputes Act 1947. It was held that words "At any time" mentioned in Section 10 of Industrial Disputes Act 1947 clearly define that law of limitation would not be applicable qua proceedings of reference under Section 10 of Industrial Disputes Act 1947. Operative part of Section 10 of Industrial Disputes Act 1947 is quoted in toto:-

> "10.Reference of dispute to Boards, Courts or Tribunals-(1) Where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing-
>
> (d) Refer the dispute to a Board for promoting a settlement thereof.
>
> (e) Refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry.
>
> (f) Refer the dispute or any matter appearing to be connected with or relevant to the dispute if it relates to any matter specified in the Second Schedule, to a Labour Court for adjudication.

6. Submission of learned Additional Advocate General appearing on behalf of the respondents that petitioner did not agitate the matter for more than five years and on this ground civil writ petition filed by petitioner be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. Since petitioner is a rustic woman hence it is not expedient in the ends of justice to decline the relief to the petitioner. In view of the above stated facts point No. 1 is answered in affirmative.

Point No.2 (Final Order)

7. In view of above stated facts petition filed by petitioner is allowed. Order No. 11-23/84(Lab)ID/2013-Mandi dated 13.6.2013 passed by learned Labour Commissioner Himachal Pradesh is set aside and co-respondents Nos. 1 and 2 are directed to refer the dispute of petitioner for adjudication to H.P. Industrial Tribunal-cum-Labour Court Dharamshala under Section 10 of Industrial Disputes Act 1947 within one month from today. No order as to costs. Petition stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Dhameshwar ……Appellant.
Vs.
Gish Pati and others …..Respondents-Proforma respondents.

RSA No. 328 of 2002
Reserved on: 19.05.2015
Date of decision: 28.05.2015

Indian Succession Act, 1925- Section 63- Will was stated to have been executed by 'D', aged more than 78 years old- it was proved on record that the contents of the Will were read over and explained to 'D' who put her thumb impression on the same- marginal witness had signed the Will thereafter- merely because the marginal witness had used different ink will not make the Will suspicious- mere non-registration of the Will is not sufficient to doubt the same. (Para-16 and 17)

For the appellant : Mr. Sanjeev Kuthiala, Advocate.
For the respondents : Mr. Devyani Sharma, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Rajiv Sharma, J.

This Regular Second Appeal is directed against the judgment and decree, dated 01.06.2002, passed by the learned Additional District Judge, Mandi in Civil Appeal No. 43 of 1999.

2. Key facts necessary for the adjudication of this Regular Second Appeal are that the appellant-plaintiff (hereinafter referred to as 'the plaintiff' for the sake of convenience), has filed a suit against the respondent-defendant, namely, Gish Pati and proforma respondents-defendants (hereinafter referred to as 'the defendants' for the sake of convenience) for declaration and for permanent prohibitory injunction as a consequential relief. According to the plaintiff, Smt.Drumati Devi had not executed the Will, dated

15.06.1985, Ex. DW2/A in favour of defendant, Sh. Gish Pati. Drumati Devi was 78 years of age in the year 1985. The defendant No. 1 in collusion with the subordinate revenue staff and behind the back of the plaintiff and proforma defendants, got the mutation attested in his favour with regard to the share of late Smt. Drumati Devi. He came to know about this in the month of January, 1994. The Will is unregistered. Smt. Drumati Devi was an old, illiterate and simple lady. She had never expressed her will or desire to disentitle the plaintiff and other proforma defendants from her share in the suit property. The execution of the Will was result of undue influence, mis-representation and coercion. The Will, dated 15.06.1985, was null and void. He also sought the decree of permanent prohibitory injunction against the defendant No. 1. The details of the suit land have been given in paragraphs No. 1(a) & 1(b) of the plaint.

3. The suit was contested by the defendant No. 1. According to him, Smt. Draumati Devi was fully capable and sensible lady. She in lieu of the services rendered by him, executed a Will in his favour. Thereafter, on the basis of the Will, dated 15.06.1985, the mutation was also attested. The revenue entries were in accordance with the law.

4. Replication was filed by the plaintiff. The issues were framed by the learned Sub Judge, Ist Class, Court No. 3, Mandi, H.P. on 09.09.1994 and 24.02.1999. The Sub Judge, Ist Class, Court No. 3, Mandi, H.P. decreed the suit on 31.03.1999. The defendant No. 1, Gish Pati filed an appeal against the judgment and decree, dated 31.03.1999, before the learned Additional District Judge, Mandi, H.P. He allowed the appeal on 01.06.2002. Hence, this Regular Second Appeal.

5. This Regular Second Appeal was admitted on the following substantial questions of law on 24.07.2002:

> *"1. Whether upon proper construction and interpretation of the document Ex.DW2/A, the un-registered Will, the presumption of validly executed Will in favour of the beneficiary/propounder could be raised?*
>
> *2. Whether the learned courts below have misread and misconstrued the oral and documentary evidence especially the statements of PW1 Shyam Lal alias Ghanshyam, PW2 Satya Devi, DW 2 Het Ram, Ex. DW2/A Unregistered Will, Ex. PA Special Power of Attorney?*
>
> *3. Whether the question as to whether the Will was set up by the propounder to be the last will of testator has to be attested in law of the conditions imposed under Sections 67 and 68 of the Indian Evidence Act as also Section 59 and 63 of the Indian Succession Act, specially when challenge is laid as to the genuineness and validity of the document?*
>
> *4. Whether the Court can deny an opportunity to the plaintiff for appearing as his own witness in rebuttal after the discharge of onus of the particular issue by the defendant with respect to the will and whether it is proper for the court after denying the opportunity to dismiss the application under the provision of Section 41 rule 27 CPC seeking to lead evidence in rebuttal to the onus so discharged by the defendant?*
>
> *5. Whether provision of Section 57 of the Indian Evidence Act stood satisfied in the facts of the case when rational of the Will the testatamentary capacity and mental faculty of the testator could be established and whether the Will could be held to be genuine or not?*

6. Mr. Sanjeev Kuthiala, learned counsel for the appellant has vehemently argued that Ex. DW2/A was an unregistered Will. He then contended that the learned first Appellate Court has mis-read and mis-construed the oral as well as documentary evidence.

According to him, there is non-compliance with the mandatory conditions under Sections 67 and 68 of the Indian Evidence Act and Sections 59 and 63 of the Indian Succession Act. He further contended that the application preferred by his client under Order 41 Rule 27 has been wrongly decided. According to him, Smt. Drumati Devi was more than 78 years old at the time of execution of alleged Will, dated 15.06.1985.

7. Ms. Devyani Sharma, learned counsel for the respondent No. 1 has supported the judgment and decree, dated 01.06.2002, passed by the learned Additional District Judge, Mandi, H.P.

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

9. Since all the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid the repetition of discussion of evidence.

10. The Will, dated 15.06.1985, Ex. DW2/A was scribed by Dile Ram. Himan and Het Ram have appeared as marginal witnesses. The plaintiff has not appeared as a witness. One Shri Ghanshyam has appeared as PW-1. The Special Power of Attorney was executed in favour of Shri Sham Lal, son of of Shri Sardaru Ram and not in favour of PW-1, Ghanshyam. The plaint was signed by the plaintiff.

11. PW-1, Ghanshyam has produced Special Power of Attorney, Ex.PA. According to him, the age of Drumati Devi was 80 years. She was an old, illiterate and simple lady. She was looked after by both the sons, i.e., the plaintiff and defendant No. 1. The Will is fake and fictitious. In his cross-examination, he has deposed that Dhameshwar used to live towards Kaza side. He has executed Special Power of Attorney Ex.-PA in his favour. Draumati died in 1984-85. He has come to his village after 1 ½ -2 years after the death of his mother.

12. PW-2, Satya Devi, is the wife of Dhameshwar. She testified that her mother-in-law had never executed any Will. Her husband used to work in Kaza. They came to know about the Will after eight years of the death of Draumati Devi.

13. Defendant No. 1, Gish Pati Ram, has appeared as DW-1. According to him, his mother died on 25.08.1985. Dhameshwar has not visited the house after the death of his mother. He came after two months. He used to live in Kaza. He further stated that he used to lookafter his mother. He performed her last rites. The Will was executed in his favour. The mutation was attested in 1986. The Will was got executed by Drumati Devi at home. Het Ram and Himan were present at that time. In his cross-examination, he deposed that the Will was scribed by Dile Ram, who belongs to his village. His mother used to live with him.

14. DW-2 Het Ram has proved Will Ex. DW2/A. He signed the same as a marginal witness. The Will was scribed by Dile Ram. The contents of the same were read over and explained to her. Thereafter, she put her thumb impression on the same. Himan, the marginal was present on the spot. Draumati was in her senses at the time of execution of the Will. In his cross-examination, he has deposed that the Will was scribed in his presence. Himan has come to call him. DW-3, Damoder has testified that the defendant No. 1 used to look after his mother.

15. What emerges after analysis of the statements of the witnesses, is that the Will is dated 15.06.1985. It was scribed by Dile Ram. The contents of the Will were read over and explained to Draumati Devi. She has put her thumb impression on the same. Thereafter, the marginal witnesses, Himan and Het Ram have signed the same. The

defendant No. 1 used to look after his mother. The plaintiff was out of village. The last rites were performed by defendant No. 1. Draumati was in her senses at the time of execution of the Will.

16. The Court has already noticed that the plaintiff has not appeared as a witness. He has executed his Special Power of Attorney in favour of Sh. Sham Lal. But, one Shri Ghanshyam has appeared as PW-1 claiming himself to be as the Special Power of Attorney of the plaintiff. The plaintiff has also filed an application under Order 41 Rule 27 and Order 41 Rule 33 of the Code of Civil Procedure in order to establish that Shyam Lal, son of Sh. Sardaru Ram, R/o Bhalwani was also known as Shyam Lal alias Ghanshyam Lal, S/o Sardaru Ram, R/o Village Bhalwani. This is an afterthought. The application has been filed merely to fill up the legal lacuna. The affidavit cannot be read as evidence. Even if it is assumed that Shyam Lal, S/o Sh. Sardaru Ram is also known as Shyam Lal alias Ghanshyam Lal, the application should have been filed at the earliest, rather, the plaintiff has also moved an application under Order 41 Rule 27, CPC before the learned First Appellate Court, which stood already rejected.

17. Mr. Sanjeev Kuthiala, learned counsel for the plaintiff has drawn the attention of the Court to Ex.DW2/A. According to him, there is a column of date, but there is no date mentioned. However, the date 15.06.1985 is mentioned below the signatures of DW-2 Het Ram. He then contended that the marginal witnesses have used different ink. But, merely the fact that the marginal witnesses have used different ink, will not make the Will suspicious. He then contended that column No. 2 of the right side of the Will is blank. It would not make any difference. Even, in the Will Ex. DW2/A, below this column, Himan has put his signatures with Het Ram as marginal witnesses and the addresses of both the marginal witnesses have been given specifically on the left side of the Will. The Will was executed on 15.06.1985. The mutation was attested in 1986 and Civil Suit has been filed in 1994. It is not believable that the brother, i.e., the plaintiff was not aware of the entries made in the revenue record pursuant to Will, dated 15.06.1985. The first Appellate Court has correctly appreciated the oral as well as documentary evidence. The non registration of the Will will not make it suspicious. The Will has been executed strictly as per the provisions of the Indian Evidence Act and the Indian Succession Act. The substantial questions of law are answered accordingly.

18. Accordingly, in view of the observations and discussions made hereinabove, there is no merit in this Regular Second Appeal and the same is dismissed.

CMP No. 5439 of 2015

19. In view of the discussions made hereinabove, there is no merit in this application and the same is dismissed.

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

Himachal Pradesh Petroleum Dealers Association. …Petitioner.

Versus

Neeraj Mittal and others. … Respondents.

COPC No.587 of 2014
Reserved on: 12.5.2015
Decided on: 28.5.2015

Constitution of India, 1950- Article 226- Petitioner claimed that retail outlets are being opened indiscriminately without any regard to distance, volume and growth potential- High Court issued an order that no letter of intent shall be issued without obtaining order from the Court- Government of India issued fresh guidelines stating that existing roster was closed in July, 2012- petitioner contended that order issued by High Court was not complied with in letter and spirit- held, that respondents have complied with major portion of the directions except that the locations already advertised were ordered to be governed as per the old conditions- respondents directed to consider the old cases which are pending at the time of filing of the petition as per new guidelines. (Para-5 to 12)

Cases referred:

Delhi Development Authority vs. Skipper Construction Co. (P) Ltd. and another, (1996) 4 SCC 622

Palitana Sugar Mills Private Limited and another vs Vilasiniben Ramachandran and others, (2007) 15 SCC 218

For the Petitioner: Ms. Jyotsna Rewal Dua, Advocate.

For the Respondents: Mr. Sanjay Jain, Addl. Solicitor General of India with Mr. Ashok Sharma, Assistant Solicitor General of India and Mr. Ankit Jain, Advocate for respondent No.1.
Mr. K.D. Sood, Sr. Advocate with Mr. Mukul Sood, Advocate for respondents No.2 and 34.
Mr. Rahul Mahajan, Advocate for respondent No.4.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

Petitioner had filed CWP No.3723/2010 in this Court. Case of the petitioner, precisely, was that retail outlets were being opened indiscriminately without any regard to distance, volume and growth potential. On 5.7.2010, the following order was passed by this Court:

> "Notice. Short reply within a month. Post on 16.8.2010. Any steps in the matter of opening of new petrol pumps in the meanwhile will subject to the result of the writ petition and it shall be made so clear in the proceedings."

2. On 21.9.2011, the Court passed the following order:

> "Respondents seek two weeks' time to file reply. Post on 19.10.2011. In the meanwhile, no letter of intent shall be issued without obtaining the orders from the Court."

3. CWP No. 3723 of 2010 was allowed by this Court on 17.5.2012. Respondents preferred LPAs No.280 of 2012 and 389 of 2012 against the judgment dated 17.5.2012. LPA No. 280 of 2012 was dismissed as withdrawn on 18.3.2014 and LPA No. 389 of 2012 was dismissed as withdrawn on 5.3.2014.

4. The Government of India has issued letter dated 17.2.2014 whereby new guidelines were framed for selection of retail outlet (RO) dealership for setting up of new ROs. These guidelines came into force with effect from the date of issuance of letter, i.e. 17.2.2014. Thereafter, Indian Oil has framed PSU Oil Marketing Company's Manual for selection of dealers for regular and rural retail outlets. It is at page 85 of the paper book.

5. Mr. Sanjay Jain, learned Additional Solicitor General of India, has drawn the attention of the Court to clause 'D' of this manual. It reads as under:

> "D. Existing Roster of earlier SRMPs and advertisement of Back Log locations-
>
> The existing Roster of old SRMPs made under the earlier guidelines has been frozen and closed in July 2012. The locations already advertised and which are at various stages of commissioning will be governed as per their advertisement conditions."

6. Ms. Jyotsna Rewal Dua, learned counsel for the petitioner, has vehemently argued that direction issued by this Court in CWP No.3723/2010 have not been followed in letter and spirit. According to her, the process for opening new outlets even though advertised prior to judgment dated 17.5.2012 was to be regulated under the new norms. In other words, her submission is that the cut-off date laid down in letter dated 17.2.2014 and PSU Oil Marketing Company's Manual for selection of dealers for regular and rural retail outlets vide clause 'D's is not in conformity with the judgment rendered by this Court on 17.5.2012.

7. It is evident from the interim order dated 5.7.2010 that any steps for opening of new petrol pumps were subject to the result of the writ petition. The Court had specifically issued direction to the respondents not to issue any letter of intent without obtaining orders from the Court on 21.9.2011. These orders were issued to ensure that till the disposal of the petition, status quo is maintained qua those retail outlets for which advertisement had already been issued. Respondents have complied with the major portion of the directions issued on 17.5.2012 except that the location already advertised were ordered to be governed as per the old conditions. This is in contravention of the judgment passed by this Court on 17.5.2012, which was upheld in LPAs No. 280/2012 and 389/2012.

8. Learned counsel appearing on behalf of the respondents have vehemently argued that there is no willful and deliberate disobedience of judgment dated 17.5.2012 rendered by this Court. Rather the judgment has been complied with. However, there is a *bona fide* mistake committed by the respondents while implementing the judgment dated 17.5.2012 by applying new guidelines prospectively, which has resulted into miscarriage of justice. The grievance of the petitioner, as noticed hereinabove, precisely was that new retail outlets were being opened pursuant to old advertisement without taking into consideration the feasibility report. It is for this reason petitioner had come to this Court seeking direction to the respondents to frame guidelines. It is reiterated that new guidelines issued as per letter dated 17.2.2014 for selection of retail outlet dealership for setting up of new retail outlets and clause 'D' of PSU Oil Marketing Company's Manual for selection of dealers for regular and rural retail outlets would relate back to the opening of those retail outlets, which had already been advertised.

9. Mr. Sanjay Jain, learned Addl. Solicitor General of India, has vehemently argued that this Court cannot issue directions once the judgment has already been announced on 17.5.2012. It is the duty of the Court as a policy to set the wrong right and not to allow the perpetuation of the wrong doing by permitting the respondents to enforce the guidelines prospectively. The judgment takes into consideration the facts existing on the date of filing of the petition and the subsequent developments as well upto the stage of delivering the judgment.

10. Their Lordships of the Hon'ble Supreme Court in ***Delhi Development Authority*** vs. ***Skipper Construction Co. (P) Ltd. and another,*** (1996) 4 SCC 622 have

held that imposition of punishment for contempt would not denude the Court of its power to issue directions to remedy the wrong done by the contemner including those so as not to enable the contemner to retain the benefit derived by the contempt and this power cannot be defeated on procedural or other technical objections. Their Lordships have held as under:

> "17. The principle that a contemner ought not to be permitted to enjoy and/or keep the fruits of his contempt is well-settled. In Mohd. Idris v. R. J. Babuji, (1985) 1 SCR 598 : (AIR 1984 SC 1826), this Court held clearly that undergoing the punishment for contempt does not mean that the Court is not entitled to give appropriate directions for remedying and rectifying the things done in violation of its Orders. The petitioners therein had given an undertaking to the Bombay High Court. They acted in breach of it. A learned Single Judge held them guilty of contempt and imposed a sentence of one months' imprisonment. In addition thereto, the learned Single Judge made appropriate directions to remedy the breach of undertaking. It was contended before this Court that the learned Judge was not justified in giving the aforesaid directions in addition to punishing the petitioners for contempt of Court. The argument was rejected holding that "the Single Judge was quite right in giving appropriate directions to close the breach (of undertaking)".
>
> 19. To the same effect are the decisions of the Madras and Calcutta High Courts in Century Flour Mills Limited v. S. Suppiah, AIR 1975 Madras 270 (FB) and Sujit Pal v. Prabir Kumar Sun, AIR 1986 Calcutta 220. In Century Flour Mills Limited, it was held by a Full Bench of the Madras High Court that where an act is done in violation of an order of stay or injunction, it is the duty of the Court, as a policy, to set the wrong right and not allow the perpetuation of the wrong-doing. The inherent power of the Court, it was held, is not only available in such a case, but it is bound to be exercise it to undo the wrong in the interest of justice. That was a case where a meeting was held contrary to an order of injunction. The Court refused to recognise that the holding of the meeting is a legal one. It put back the parties in the same position as they stood immediately prior to the service of the interim order.
>
> 21. There is no doubt that this salutary rule has to be applied and given effect to by this Court, if necessary, by overruling any procedural or other technical objections. Article 129 is a constitutional power and when exercised in tandem with Article 142, all such objections should give away. The Court must ensure full justice between the parties before it."

11. Similarly, their Lordships of the Hon'ble Supreme Court in ***Palitana Sugar Mills Private Limited and another*** vs ***Vilasiniben Ramachandran and others***, (2007) 15 SCC 218 have held that the Supreme Court has inherent power under to set the wrong right where there has been any disobedience and not to allow to perpetuate the wrongdoing. Their Lordships have held as under:

> 16. ....
>
> It is thus clear and apparent that despite the clear observations of this Court in paragraphs above of the present judgment that no issue raised in prior litigations can be raised again and no attempt to challenge the right and title in respect of the land in question could be made against the petitioners, namely, the respondents have once again sought to raise the same issues with a view to flout the directions of this Court and deprive the petitioners of the legitimate rights accruing to them from the judgment of

this Court. The aforesaid attitude persists notwithstanding that the judgment of this Court has been passed in contempt proceedings and this Court has expressly observed that any further lapse shall be viewed extremely seriously.

17. We have already elaborately dealt with the history of the present litigation between the parties which shows that despite the petitioners having succeeded before this Court in 4 different hotly contested litigations vide judgments dated 14.11.2002, 03.12.2002, 05.12.2002 and 06.02.2003, the respondents have in one way or the other not complied with the judgment or not given the petitioners the development and building permissions required to construct on the lands in question.

19. During the pendency of the contempt petition and the IAs, a letter was written by the Revenue Department to the Collector, Bhavnagar to take steps as the Government has taken a decision to accept the judgment of this Court dated 15.10.2004 for the land admeasuring 17 acres 4 guntas and 0.32 guntas and 1 acre 14 guntas upon which sundervas bungalow is located. The Collector was directed to comply with the said direction. However, in order to nullify the aforesaid acceptance of the judgment in respect of the land mentioned above, permission for non-agricultural use has been given for the recreation use and not for the residential use thus depriving the petitioner of the right to construct residential houses. The action of the respondents and the Collector in issuing permission for non-agricultural use for the recreation use is with an oblique motive to deprive the petitioner of the right to construct residential houses as already ordered in our judgment dated 15.10.2004. We, therefore, direct the Revenue Department and the Collector, Bhavnagar to forthwith issue permission to the petitioner for residential use with a right to construct residential houses for the above survey Nos. as mentioned in the letter dated 10.01.2007 of the Revenue Department to the Collector, Bhavnagar.

24. Courts have held in a catena of decisions that where in violation of an order of this Court, something has been done in disobedience, it will be the duty of this Court as a policy to set the wrong right and not to allow the perpetuation of the wrong doing. In our opinion, the inherent power will not only be available under Section 151 CPC as available to us in such a case but it is bound to be exercised in that manner in the interest of justice and public interest. All the respondents are senior and experienced officers and must be presumed to know that under the constitutional scheme of this country orders of this Court have to be punctually obeyed and should not be trifled with. We have already found hereinabove that they have acted deliberately to subvert the orders of this Court. We, therefore, hold them guilty of contempt of Court and do hereby censure severely their conduct. Though a copy of this order could be sent which shall form part of the annual confidential record of service of each of the said officers, we refrain from doing so by taking a lenient view of the matter considering the future prospects of the officers. As already stated, the officers shall not indulge in any adventurous act and strictly obey the orders passed by the Courts of law. We by this order grant four weeks time to the respondents to comply with all our directions given in the judgment dated 15.10.2004. The petitioner is at liberty to move this Court if the directions are not complied with in its letter and spirit.”

12. Thus, in furtherance of implementation of judgment of this Court in CWP No.3723/2010 dated 17.5.2012 in letter and spirit, respondents are directed to consider the old cases, which were pending at the time of filing of the petition also, as per the new guidelines. Accordingly, the petition is disposed of and the notice is discharged. No costs.

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

Jai Kishan and others ...Appellants/Defendants
Versus
Sardari Lal and others ...Respondents/Plaintiff

R.S.A. No. 463 of 2002
Date of decision: 28th May, 2015.

Specific Relief Act, 1963- Article 65- Plaintiff claimed to be the owner in possession of the suit land- he claimed that defendants have got themselves recorded as Kabazan in connivance with settlement staff- defendant claimed to be in adverse possession- held, that there is a distinction between long possession and adverse possession- mere long possession is not equivalent to adverse possession- defendants categorically admitted that he was not in hostile possession of the land- he claimed ownership and it is inherent in the plea that someone else is owner of the land. (Para- 9 to 12)

Cases referred:
P.T. Munichikkanna Reddy and others vs. Revamma and others (2007) 6 SCC 59
Mandal Revenue Officer vs. Goundla Venkaiah and another (2010) 2 SCC 461
P. Periasami (dead) by L.Rs. vs. P. Periathambi and others (1995) 6 SCC 523
Mohan Lal (deceased) vs. Mira Abdul Gaffar and another (1996) 1 SCC 639 and L.N. Aswathama & anr. vs. P. Prakash (2009) 13 SCC 229
Om Parkash & ors. vs. Gian Chand & ors. 2014(2) Him.L.R. 1071

For the Appellants : Mr. Rahul Mahajan, Advocate.
For the Respondents : Mr. Ajay Sharma, Advocate with Mr. Vinod Chauhan, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

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

2. The facts as necessary for the adjudication of the case are that the respondent/plaintiff Sardari Lal filed the suit for declaration to the effect that plaintiff is owner in possession over the land , comprised in Khasra Nos. 414, 416, 420, plots 3, measuring 0-60-52 HM (15 Kanals 15 Marlas), situated in Tika and Mohal Jhagara, Tehsil Indora, District Kangra (hereinafter referred to as the suit land) and the entries showing the defendants as Kabazan are the paper entries and are not binding upon the plaintiff. According to the plaintiff, he is the owner in possession of the suit land. The defendants in connivance with the settlement officials, got themselves recorded as Kabazan. During the settlement, on the basis of the alleged wrong entry, the defendants threatened to interfere in

possession of the plaintiff over the suit land, and as such, the plaintiff filed the suit for declaration and in alternative the suit for possession.

3. The suit was contested and resisted by appellants/defendants by raising preliminary objections of maintainability, plaintiff estopped from filing the present suit on account of his act and conduct and the plaintiff had no cause of action to file the suit. On merits, it was pleaded that the plaintiff has no concern with the suit land as the suit land is in possession of the defendants since the month of January, 1970 and the possession of the defendants is continuous, uninterrupted for more than 12 years and to the knowledge of the plaintiff and as such, they have become owners of the suit land by way of adverse possession.

4. On the pleadings of the parties, the learned trial Court on 18.8.1993 framed the following issues:

1. Whether the plaintiff is owner in possession of the suit land, as prayed? OPP
2. Whether the revenue entries showing the defendants as 'Kabazan' are wrong and illegal? OPP
3. Whether in the alternative, the plaintiff is entitled for possession of the suit land, as prayed? OPP
4. Whether the suit is not maintainable? OPD
5. Whether the defendants have become owners of the suit land by way of adverse possession? OPD
6. Relief.

5. The learned trial Court vide judgment and decree dated 1.3.2000 decreed the suit of the plaintiff. The appeal filed by the defendants/appellants resulted in dismissal and this is how the defendants are before this Court by way of the present regular second appeal.

6. On 18.6.2002 this Court was pleased to admit the appeal on the following substantial question of law:

> *"Whether the learned appellate Court has erred in law in misinterpreting the revenue record resulting in wrong and erroneous finding on law?"*

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

8. Learned counsel for the appellants has vehemently argued that both the learned Courts below, more particularly, the learned lower Appellate Court has misinterpreted the documentary evidence on record. The appellants had produced the copy of jamabandi for the years 1981-82 and 1992-93 wherein the appellants had been shown in possession of the suit land and therefore necessary inference was that they were in adverse possession of the property. I am afraid that such inference cannot readily be drawn.

9. It is more than settled that long possession is not necessarily adverse possession. What would constitute adverse possession has repeatedly been subject matter of the courts. However, this concept was dealt in detail by the Hon'ble Supreme Court in **P.T. Munichikkanna Reddy and others** vs. **Revamma and others (2007) 6 SCC 59,** wherein, it was held as follows:-

> "CHARACTERIZING ADVERSE POSSESSION
>
> 5. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse

possessoror on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. [See Downing v. Bird, 100 So. 2d 57 (Fla. 1958), Arkansas Commemorative Commission v. City of Little Rock, 227 Ark. 1085, 303 S.W.2d 569 (1957); Monnot v. Murphy, 207 N.Y. 240, 100 N.E. 742 (1913); City of Rock Springs v. Sturm, 39 Wyo. 494, 273 P. 908, 97 A.L.R. 1 (1929).]

6. Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through effluxion of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or color of title. (See American Jurisprudence, Vol. 3, 2d, Page 81). It is important to keep in mind while studying the American notion of Adverse Possession, especially in the backdrop of Limitation Statutes, that the intention to dispossess can not be given a complete go by. Simple application of Limitation shall not be enough by itself for the success of an adverse possession claim.

7. To understand the true nature of adverse possession, Fairweather v St Marylebone Property Co [1962] 2 WLR 1020, [1962] 2 All ER 288 can be considered where House of Lords referring to Taylor v. Twinberrow [1930] 2 K.B. 16, termed adverse possession as a negative and consequential right effected only because somebody else's positive right to access the court is barred by operation of law:

> "In my opinion this principle has been settled law since the date of that decision. It formed the basis of the later decision of the Divisional Count in Taylor v. Twinberrow [1930] 2 K.B. 16, in which it was most clearly explained by Scrutton, L.J. that it was a misunderstanding of the legal effect of 12 years adverse possession under the Limitation Acts to treat it as if it gave a title whereas its effect is " merely negative " and, where the possession had been against a tenant, its only operation was to bar his right to claim against the man in possession (see loc. cit. p. 23). I think that this statement needs only one qualification: a squatter does in the end get a title by his possession and the indirect operation of the Act and he can convey a fee simple.
>
> If this principle is applied, as it must be, to the Appellant's situation, it appears that the adverse possession completed in 1932 against the lessee of No. 315 did not transfer to him either the lessee's' term or his rights against or has obligations to the landlord who held the reversion. The appellant claims to be entitled to keep the landlord at bay until the expiration of the term by effluxion of time in 1992: but, if he is, it cannot be because he is the transferee

> or holder of the term which was granted to the lessee. He is in possession by his own right, so far as it is a right: and it is a right so far as the statutes of limitation which govern the matter prescribe both when the rights to dispossess him are to be treated as accruing and when, having accrued, they are thereafter to be treated as barred. In other words, a squatter has as much protection as but no more protection than the statutes allow: but he has not the title or estate of the owner or owners whom he has dispossessed nor has he in any relevant sense an estate "commensurate with" the estate of the dispossessed. All that this misleading phrase can mean is that, since his possession only defeats the rights of those to whom it has been adverse, there may be rights not prescribed against, such, for instance, as equitable easements, which axe no less enforceable against him in respect of the land than they would have been against the owners he has dispossessed."

Also see Privy Council's decision in Chung Ping Kwan and Others v. Lam Island Development Company Limited (Hong Kong) [(1997) AC 38] in this regard.

8. Therefore, to assess a claim of adverse possession, two-pronged enquiry is required:

> 1. Application of limitation provision thereby jurisprudentially "willful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.
>
> 2. Specific Positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.

9. It is interesting to see the development of adverse possession law in the backdrop of the status of Right to Property in the 21st Century. The aspect of stronger Property Rights Regime in general, coupled with efficient legal regimes furthering the Rule of Law argument, has redefined the thresholds in adverse possession law not just in India but also by the Strasbourg Court. Growth of Human Rights jurisprudence in recent times has also palpably affected the developments in this regard.

NEW CONSIDERATION IN ADVERSE POSSESSION LAW

10. In that context it is relevant to refer to JA Pye (Oxford) Ltd v. United Kingdom [2005] 49 ERG 90, [2005] ECHR 921 wherein the European Court of Human Rights while referring to the Court of Appeal judgment ([2001]EWCA Civ 117, [2001]Ch 804) made the following reference:

> "Lord Justice Keene took as his starting point that limitation periods were in principle not incompatible with the Convention and that the process whereby a person would be barred from enforcing rights by the passage of time was clearly acknowledged by the Convention (Convention for the Protection of Human Rights and Fundamental Freedoms). This position obtained, in his view, even though limitation periods both limited the right of access to the courts and in some circumstances had the effect of depriving persons of property rights, whether real or personal, or of damages: there was

> thus nothing inherently incompatible as between the 1980 Act and Article 1 of the Protocol."

11. This brings us to the issue of mental element in adverse possession cases-intention.

1. Positive Intention

12. The aspect of positive intention is weakened in this case by the sale deeds dated 11.04.1934 and 5.07.1936. Intention is a mental element which is proved and disproved through positive acts. Existence of some events can go a long way to weaken the presumption of intention to dispossess which might have painstakingly grown out of long possession which otherwise would have sufficed in a standard adverse possession case.. The fact of possession is important in more than one ways: firstly, due compliance on this count attracts limitation act and it also assists the court to unearth as the intention to dispossess.

13. At this juncture, it would be in the fitness of circumstances to discuss intention to dispossess vis-`-vis intention to possess. This distinction can be marked very distinctively in the present circumstances.

14. Importantly, intention to possess can not be substituted for intention to dispossess which is essential to prove adverse possession. The factum of possession in the instant case only goes on to objectively indicate intention to possess the land. As also has been noted by the High Court, if the appellant has purchased the land without the knowledge of earlier sale, then in that case the intention element is not of the variety and degree which is required for adverse possession to materialize.

15. The High Court observed:

> "It is seen from the pleadings as well in evidence that the plaintiff came to know about the right of the defendants', only when disturbances were sought to be made to his possession."

16. In similar circumstances, in the case of Thakur Kishan Singh (dead) v. Arvind Kumar [(1994) 6 SCC 591] this court held:

> "5. As regards adverse possession, it was not disputed even by the trial court that the appellant entered into possession over the land in dispute under a licence from the respondent for purposes of brick-kiln. The possession thus initially being permissive, the burden was heavy on the appellant to establish that it became adverse. A possession of a co-owner or of a licencee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissible possession into adverse possession. Apart from it, the Appellate Court has gone into detail and after considering the evidence on record found it as a fact that the possession of the appellant was not adverse." (emphasis supplied)

17. The present case is one of the few ones where even an unusually long undisturbed possession does not go on to prove the intention of the adverse possessor. This is a rare circumstance, which Clarke LJ in Lambeth London Borough Council v Blackburn (2001) 82 P & CR 494, 504 refers to:

"I would not for my part think it appropriate to strain to hold that a trespasser who had established factual possession of the property for the necessary 12 years did not have the animus possidendi identified in the cases. I express that view for two reasons. The first is that the requirement that there be a sufficient manifestation of the intention provides protection for landowners and the second is that once it is held that the trespasser has factual possession it will very often be the case that he can establish the manifested intention. Indeed it is difficult to find a case in which there has been a clear finding of factual possession in which the claim to adverse possession has failed for lack of intention."

(emphasis supplied)

18. On intention, The Powell v. Macfarlane (1977) 38 P & CR (Property, Planning & Compensation Reports) 452 _ 472 is quite illustrative and categorical, holding in the following terms:

"If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ('animus possidendi')."

** ** **

If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner.

** ** **

In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite animus possidendi in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner.

** ** **

What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

19. Thus, there must be intention to dispossess. And it needs to be open and hostile enough to bring the same to the knowledge and plaintiff has an opportunity to object. After all adverse possession right is not a substantive right but a result of the waiving (willful) or omission (negligent or otherwise) of right to defend or care for the integrity of property on the part of the paper owner of the land. Adverse possession statutes, like other statutes of limitation, rest on a public policy that do not promote litigation and aims at

the repose of conditions that the parties have suffered to remain unquestioned long enough to indicate their acquiescence.

20. While dealing with the aspect of intention in the Adverse possession law, it is important to understand its nuances from varied angles.

21. Intention implies knowledge on the part of adverse possessor. The case of Saroop Singh v. Banto and Others [(2005) 8 SCC 330] in that context held:

> "29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. (See Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak)
>
> 30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Mohd. Mohd. Ali v. Jagadish Kalita, SCC para 21.)"

22. A peaceful, open and continuous possession as engraved in the maxim nec vi, nec clam, nec precario has been noticed by this Court in Karnataka Board of Wakf v. Government of India and Others [(2004) 10 SCC 779] in the following terms:

> "_Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

23. It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper owner.

24. In Narne Rama Murthy v. Ravula Somasundaram and Others [(2005) 6 SCC 614], this Court held:

> "However, in cases where the question of limitation is a mixed question of fact and law and the suit does not appear to be barred by limitation on the face of it, then the facts necessary to prove limitation must be pleaded, an issue raised and then proved. In this case the question of limitation is intricately linked with the question

whether the agreement to sell was entered into on behalf of all and whether possession was on behalf of all. It is also linked with the plea of adverse possession. Once on facts it has been found that the purchase was on behalf of all and that the possession was on behalf of all, then, in the absence of any open, hostile and overt act, there can be no adverse possession and the suit would also not be barred by limitation. The only hostile act which could be shown was the advertisement issued in 1989. The suit filed almost immediately thereafter." (emphasis supplied)

25. The test is, as has been held in R.V. Oxfordshine County Council :

"... Bright v. Walker (1834) 1 Cr. M. & R. 211, 219, "openly and in the manner that a person rightfully entitled would have used it. . ." The presumption arises, as Fry J. said of prescription generally in Dalton v. Angus (1881) 6 App.Cas. 740, 773, from acquiescence.

26. The case concerned interpretation of section 22(1) of the Commons Registration Act 1965. Section 22(1) defined "town or village green" as including

"...land on which the inhabitants of any locality have indulged in [lawful] sports and pastimes as of right for not less than 20 years."

27. It was observed that the inhabitants' use of the land for sports and pastimes did not constitute the use "as of right". The belief that they had the right to do so was found to be lacking. The House held that they did not have to have a personal belief in their right to use the land. The court observed:

"....[the words 'as of right] import the absence of any of the three characteristics of compulsion, secrecy or licence_ 'nec vi, nec clam, nec precario', phraseology borrowed from the law of easements....."

28. Later in the case of Beresford, R (on the application of) v. City of Sunderland [2003] 3 WLR 1306, [2004] 1 All ER 160 same test was referred to.

29. Thus the test of nec vi, nec clam, nec precario i.e., "not by force, nor stealth, nor the license of the owner" has been an established notion in law relating to the whole range of similarly situated concepts such as easement, prescription, public dedication, limitation and adverse possession.

30. In Karnataka Wakf Board (Supra), the law was stated, thus:

"11. In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well- settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See : S M Karim v. Bibi Sakinal AIR 1964 SC 1254, Parsinni v. Sukhi (1993) 4 SCC 375 and D N Venkatarayappa

v. State of Karnataka (1997) 7 SCC 567.) Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

2. Inquiry into the particulars of Adverse Possession

31. Inquiry into the starting point of adverse possession i.e. dates as to when the paper owner got dispossessed is an important aspect to be considered. In the instant case the starting point of adverse possession and Other facts such as the manner in which the possession operationalized, nature of possession: whether open, continuous, uninterrupted or hostile possession - have not been disclosed. An observation has been made in this regard in S.M. Karim v. Mst. Bibi Sakina [AIR 1964 SC 1254]:

> "Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea." (emphasis supplied)

32. Also mention as to the real owner of the property must be specifically made in an adverse possession claim.

33. In Karnataka Wakf Board (Supra), it is stated:

> "12. Plaintiff, filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. In P Periasami v. P Periathambi (1995) 6 SCC 523 this Court ruled that –
>
> > "Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property."

The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Dealing with Mohan Lal v. Mirza Abdul Gaffar (1996) 1 SCC 639 that is similar to the case in hand, this Court held:

> "4. As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right there under and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12

years, i.e., up to completing the period his title by prescription nec vi, nec clam, nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

(emphasis supplied)

"3. New Paradigm to Limitation Act

34. The law in this behalf has undergone a change. In terms of Articles 142 and 144 of the Limitation Act, 1908, the burden of proof was on the plaintiff to show within 12 years from the date of institution of the suit that he had title and possession of the land, whereas in terms of Articles 64 and 65 of the Limitation Act, 1963, the legal position has underwent complete change insofar as the onus is concerned: once a party proves its title, the onus of proof would be on the other party to prove claims of title by adverse possession. The ingredients of adverse possession have succinctly been stated by this Court in S.M. Karim v. Mst. Bibi Sakina [AIR 1964 SC 1254] in the following terms:

> "... Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found."

[See also M. Durai v. Madhu and Others 2007 (2) SCALE 309]

35. The aforementioned principle has been reiterated by this Court in Saroop Singh v. Banto and Others [(2005) 8 SCC 330] stating:

> "29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. (See Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak)
>
> 30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Mohd. Mohd. Ali v. Jagadish Kalita, SCC para 21.)"

36. In Mohammadbhai Kasambhai Sheikh and Others v. Abdulla Kasambhai Sheikh [(2004) 13 SCC 385], this Court held:

> "But as has been held in Mahomedally Tyebally v. Safiabai the heirs of Mohammedans (which the parties before us are) succeed to the estate in specific shares as tenants-in-common and a suit by an heir for his/her share was governed, as regards immovable property, by Article 144 of the Limitation Act, 1908. Article 144 of the Limitation Act, 1908 has been materially re-enacted as Article 65 of the Limitation Act, 1963 and provides that the suit for possession of immovable property or any interest therein based on title must be filed within a period of 12 years from the date when the possession of the defendant becomes adverse to the plaintiff. Therefore, unless the

defendant raises the defence of adverse possession to a claim for a share by an heir to ancestral property, he cannot also raise an issue relating to the limitation of the plaintiffs claim."

37. The question has been considered at some length recently in T. Anjanappa and Others v. Somalingappa and Another [(2006) 7 SCC 570], wherein it was opined :

"21. The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the same was inconsequential. Obviously, the requirements of proving adverse possession have not been established. If the defendants are not sure who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not arise. Above being the position the High Court's judgment is clearly unsustainable."

[See also Des Raj and Ors. v. Bhagat Ram (Dead) By LRs. and Ors., 2007 (3) SCALE 371; Govindammal v. R. Perumal Chettiar & Ors., JT 2006 (10) SC 121 : (2006) 11 SCC 600]."

10. The Hon'ble Supreme Court in **Mandal Revenue Officer** vs. **Goundla Venkaiah and another (2010) 2 SCC 461** held:

"47. In this context, it is necessary to remember that it is well neigh impossible for the State and its instrumentalities including the local authorities to keep every day vigilance/watch over vast tracts of open land owned by them or of which they are the public trustees. No amount of vigil can stop encroachments and unauthorised occupation of public land by unscrupulous elements, who act like vultures to grab such land, raise illegal constructions and, at times, succeeded in manipulating the State apparatus for getting their occupation/possession and construction regularized. It is our considered view that where an encroacher, illegal occupant or land grabber of public property raises a plea that he has perfected title by adverse possession, the Court is duty bound to act with greater seriousness, care and circumspection. Any laxity in this regard may result in destruction of right/title of the State to immovable property and give upper hand to the encroachers, unauthorised occupants or land grabbers.

48. In State of Rajasthan v. Harphool Singh (Dead) through Lrs. 2000 (5) SCC 652, this Court considered the question whether the respondents had acquired title by adverse possession over the suit land situated at Nohar-Bhadra Road at Nohar within the State of Rajasthan. The suit filed by the respondent against his threatened dispossession was decreed by the trial Court with the finding that he had acquired title by adverse possession. The first and second appeals preferred by the State Government were dismissed by the lower appellate Court and the High Court respectively. This Court reversed the judgments and decrees of the courts below as also of the High Court and held that the plaintiff-respondent could not substantiate his claim of perfection of title by adverse possession. Some of the observations made on the issue of acquisition of title by adverse possession which have bearing on this case are extracted below:-

> "12. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/title of the State to immovable property and conferring upon a third-party encroacher title where he had none. The decision in P. Lakshmi Reddy v. L. Lakshmi Reddy adverted to the ordinary classical requirement -- that it should be nec vi, nec clam, nec precario -- that is the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. It was also observed therein that whatever may be the animus or intention of a person wanting to acquire title by adverse possession, his adverse possession cannot commence until he obtains actual possession with the required animus."

49. A somewhat similar view was expressed in A.A. Gopalakrishnan v. Cochin Devaswom Board 2007 (7) SCC 482. While adverting to the need for protecting the properties of deities, temples and Devaswom Boards, the Court observed as under:-

> "The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their trustees/ archakas/shebaits/employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the authorities concerned. Such acts of "fences eating the crops" should be dealt with sternly. The Government, members or trustees of boards/trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation."

11. Reverting to the facts, it would be seen that when the defendant Karam Chand appeared in the witness box as DW-1 he in his cross-examination had categorically stated that he is not in hostile possession against anybody meaning thereby he is claiming ownership as of right. It is more than settled that whenever a plea of adverse possession is set up, inherent is the plea that someone is the owner of the land.

12. The plea of ownership simpliciter is based on the concept of title, which one may acquire through various sources like succession, gift, will, sale, exchange, grant etc. etc. and the person in possession is essentially to be treated as being in lawful possession. While on the other hand when the plea of adverse possession is projected inherent is the plea that someone else is the ownership of the property. (See: **P. Periasami (dead) by L.Rs.** vs. **P. Periathambi and others (1995) 6 SCC 523.** Having said so, it can safely be concluded that the pleas based on title and simultaneously on adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. (Ref: **Mohan Lal (deceased)** vs. **Mira Abdul Gaffar and another (1996) 1 SCC 639** and **L.N. Aswathama & anr.** vs. **P. Prakash (2009) 13 SCC 229.**

13. Learned counsel for the appellants would then argue that the findings recorded by the learned Courts below are perverse. I am afraid that this contention of the

appellants cannot be accepted. What is perverse has been dealt with in detail by this Court in ***RSA No. 436 of 2000 titled Smt. Rubi Sood and another*** vs. ***Major (Retd.) Vijay Kumar Sud and others,*** decided on 28.5.2015**,** in the following manner:

> *"(i) A finding of fact recorded by the learned Courts below can only be said to be perverse, which has been arrived at without consideration of material evidence or such finding is based on no evidence or misreading of evidence or is grossly erroneous that, if allowed to stand, it would result in miscarriage of justice, is open to correction, because it is not treated as a finding according to law.*
>
> *(ii) If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or even the findings so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eyes of law.*
>
> *(iii) If the findings of the Court are based on no evidence or evidence, which is thoroughly unreliable or evidence that suffers from vice of procedural irregularity or the findings are such that no reasonable persons would have arrived at those findings, than the findings may be said to be perverse.*
>
> *(iv) Further if the findings are either ipse dixit of the Court or based on conjectures and surmises, the judgment suffers from the additional infirmity of non application of mind and thus, stands vitiated."*

None of the principles as enunciated above are attracted or applicable to the facts of this case.

14. The appellants have failed to prove on record the ouster of the real owner and the exact time when they have asserted their right of ownership over the suit property. The mere fact that they are in possession of the land since 1970 would not mean that the same is adverse. The appellants were bound to plead the exact date from when their possession became adverse.

15. In **Om Parkash & ors.** vs. **Gian Chand & ors. 2014(2) Him.L.R. 1071**, this Court dealt in detail with the question of adverse possession particularly when the defendant therein had not spelt out any specific date from which his possession became adverse and it was observed as follows:-

> "11. Therefore, the moot question is as to whether the pleadings set out by the defendants can meet the requirement of law or not. This question assumes importance, because admittedly, the defendants have not spelt out any specific date from which their possession became adverse.
>
> In **Kamla and others** vs. **Baldev Singh and others 2008(1) Shim. LC 215,** this court has held as under:-
>
> > *"……..Moreover, in case defendant or his father were in possession of the suit land as owner and the possession was never taken by the plaintiffs in pursuance of the decree, they can be said to be in possession as owner, but they cannot be treated to be in adverse possession of the suit land in any manner. The learned trial Court has not given its findings that the defendant or his father continued to be owner of the suit land even after passing of the decree since the decree was never executed, but has given the findings in the alternative that the defendant has become owner by way of adverse possession. <u>This</u>*

plea was taken by the defendant in the alternative but he never pleaded as to from which date his permissive possession as owner became adverse to the true owners i.e. plaintiffs and what overt act was done by him to show his hostile title to the suit land. There were no allegations as to when the possession became adverse, in which year or month or in what manner and the simple general allegation made by the defendant in the alternative were accepted by the trial Court without looking into the question that the original possession of the defendant over the suit land or that of his father was permissive being an owner and it never became adverse as against the true owner and if it became adverse in what manner and from which date, month or year. The permissive possession as owner does not itself become adverse as against the true owner until and unless some overt act is done by the defendant to show his hostile title towards the true owner which pleadings were very much lacking in the written statement and as such, the defendant was never proved to be in adverse possession of the suit land as owner. Those findings were rightly reversed by the learned first Appellate Court and the learned first Appellate Court had rightly observed that there was complete lack of animus on the part of the defendant to hold the suit land adversely to the plaintiffs. It was also observed that it has also not been shown as to what time possession of the defendant became hostile to that of the plaintiffs which had ripened into ownership. To my mind, there was nothing for the trial Court to conclude that the defendant has become owner by way of adverse possession in the absence of specific pleadings or proof and, therefore, the learned first appellate Court had come to a right conclusion in reversing the findings under Issue No. 1 in regard to the plea of adverse possession. Once the defendant had failed to prove adverse possession over the suit land, the only conclusion that can be drawn is the plaintiffs were entitled to the relief of possession and it was rightly given by the first appellate Court."

12. This court in **Brij Mohan Sood** vs. **Parshotam Singh and others 2014(1) Him. L.R. 556,** has held as follows:-

"11. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is well settled principle that a party claiming adverse possession must prove that his possession is " nec vi, nec clam, nec precario" i.e. peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual visible, exclusive, hostile and continued over the statutory period. Therefore, a person who claims adverse possession has to show (a) on what date he came into possession; (b) what was the nature of his possession; (c) whether the factum of possession was known to the other party ; (d) how long his possession is continued; and (e) his possession was open and undisturbed. It has to be remembered that the person pleading adverse possession has no equity in his favour since he is trying to defeat the right of the true owner, therefore, it is for him to clearly plead and establish all facts necessary to establish his adverse

possession (Refer Dr. Mahesh Chand Sharma vs. Raj Kumari Sharma (Smt.) and others (1996) 8 SCC 128).

12. Having observed so, it is clear from the pleadings of the defendant that he has failed to plead the essential ingredients of adverse possession. In absence of the essential ingredients of adverse possession, no amount of evidence can be looked into by this Court. Even otherwise, the defendant has set-up a title in himself and has not acknowledged or attorned the plaintiffs to be the owners. Apart from preliminary objection No.1 (supra), in paragraph-3 of the preliminary objection, the defendant has made the following averments:

"The plaintiffs are not the owners of the land rather the defendants are its owners and the plaintiffs have got no locus standi to file the suit." Throughout in the written statement, the defendants have claimed themselves to be the owners of the suit property and thus the plea of adverse possession is not available to them."

13. This court further in **Deepak Parkash** vs. **Sunil Kumar 2014(1) Him. L.R. 654** has emphasized on the requirement of law of pleading the exact date from which the possession became adverse, in the following terms:

"14. It appears that the learned lower Appellate Court completely ignored the pleadings of the parties or else the judgment and decree passed by the learned trial Court on the basis of such pleadings would not have been disturbed much less reversed. A perusal of the written statement would show that pleadings with regard to adverse possession were not only deficient but in fact did not meet the requirement of law. The defendant even failed to specify the definite date on which his possession became adverse.

16. Faced with such situation, learned counsel for the respondent/defendant would contend that he had led sufficient evidence to prove his plea of adverse possession. I am afraid that I cannot agree with the submissions made by learned counsel for the respondent/defendant.

17. It is settled law that no amount of evidence beyond pleadings can be looked into. It is further well settled principle of law that the evidence adduced beyond the pleading would not be admissible nor can any evidence be permitted to be adduced which is at variance with the pleadings. The Court at the later stage of the trial as also the Appellate Court having regard to the rule of pleading would be entitled to reject the evidence wherefor there does not exist any pleading."

16. In view of the aforesaid discussion, I find no merit in this appeal and the same is accordingly dismissed, so also the pending application(s) if any. The parties are left to bear their own costs.

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

Manbir Singh .....Petitioner/Tenant.
Versus
Suresh Bansal and others .....Respondents/Landlords.

C.R. No.19 of 2006.
Judgment reserved on :22.05.2014.
Date of decision: May 28th, 2015.

Himachal Pradesh Urban Rent Control Act, 1987- Section 24(5)- Petitioner claimed that respondent was in arrears of rent, tenant had changed the user of premises and he was causing nuisance by testing and firing the guns in the area- tenant himself stated that he was not carrying the business after the cancellation of his license, therefore, allegation of the landlord that tenant was causing nuisance by firing and testing gun was not acceptable- tenant pleaded that he had a franchisee of respondent No. 2 but he had failed to place on record any document appointing him as a franchisee – witnesses claiming to be employees failed to produce any document like appointment letter, salary slip etc. – record of employees was not furnished to the shop inspector- tenant was no longer residing at Solan and was not carrying the business of arms and ammunition from the premises – he was not paying any salary to the employees of respondent No. 2 nor he was paying any taxes to the authority- held, that in these circumstances, it can be held that tenant had walked out of the premises and had given possession of the property to sub-tenant who is running business of courier service from the premises. (Para-9 to 26)

Cases referred:
Parvinder Singh versus Renu Gautam and others (2004) 4 SCC 794
Amar Nath Agarwalla versus Dhillon Transport Agency (2007) 4 SCC 306
Celina Coelho Pereira (Ms) and others versus Ulhas Mahabaleshwar Kholkar and others (2010) 1 SCC 217
Hindustand Petroleum Corporation Limited versus Dilbahar Singh (2014) 9 SCC 78
S.F. Engineer versus Metal Box India Limited and Another (2014) 6 SCC 780

For the Petitioner : Mr.R.K.Bawa, Senior Advocate with Mr.Jeevesh Sharma, Advocate.
For the Respondents: Mr.Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate, for respondents No.1 and 2.
Mr.Suneet Goel, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This revision petition under Section 24(5) of the H.P. Urban Rent Control Act (for short the 'Act') is directed against the order passed by the learned appellate authority in a rent appeal whereby the petitioner/tenant has been ordered to be evicted from the premises in dispute and the order to the contrary as passed by the learned Rent Controller has been ordered to be set aside.

The facts, in brief, may be noticed thus.

2. The premises i.e. Shop No.5 situate in Ward No.8, Solan had been let out to the tenant (petitioner herein) for non residential purposes on a monthly rent of `404.25 since

01.04.1994. The tenant had been running business of arms and ammunition in the premises. The premises was alleged to have been sub let by him firstly to M/s Desk to Desk Couriers Service and thereafter to M/s Blaze Flash Couriers Pvt. Ltd. The tenant was also alleged to be in arrears of rent and also to have changed the user of the premises and he was also alleged to be causing nuisance by testing and firing the air guns in the area affecting the passage to the Hotel. Eviction of the tenant was sought on the grounds stated above.

3. The petition was contested by the respondent/tenant by controverting the allegations. The tenant claimed to be Franchisee/Commission agent of respondent No.2. He denied having sublet the premises either to M/s Desk and Desk Couriers or M/s Blaze Flash Couriers Pvt. Ltd. It was averred that no rent was charged from the said Company. It was admitted that he was in arrears of rent but denied change of user or impairing the value and utility of the premises and causing nuisance.

4. During the pendency of the petition, the unpaid rent due to petitioners was paid by the tenant. The eviction of the tenant on this ground was not pressed before the appellate authority.

5. On 19.12.2002 the learned Rent Controller framed the following issues:-

1. Whether the respondent No.1 has sub let the premises, in question to respondent No.2, without the consent of landlord/petitioners, as alleged? OPP.
2. Whether the respondent has changed the user of the premises, as alleged? OPP
3. Whether the respondent had materially impaired the value and utility of the premises as alleged? OPP.
4. Relief.

6. The learned Rent Controller after recording the evidence and evaluating the same dismissed the petition. However, the landlords filed rent appeal before the appellate authority, who allowed the same and this is how the matter is before this Court in revision petition.

7. Shri R.K.Bawa, Senior Advocate, assisted by Shri Jeevesh Sharma, Advocate, has vehemently argued that the appellate authority has misread and misconstrued the pleadings/grounds of petition filed by the landlords, a perusal whereof would show that the same was self-contradictory and self-destructive. On one hand, the landlords have maintained that nuisance is being caused by the tenant in the area wherein the tenanted premises are situated whereas, on the other hand, the landlords have made an averment that the original tenant had left the premises after letting out the same to the proforma respondent. It is further contended that the learned appellate authority has failed to appreciate that it had not at all been proved on record that the premises in question was not with the tenant. It otherwise had not recorded any findings that it was the proforma respondent, who was in exclusive possession of the property.

8. On the other hand, Shri Bhupender Gupta, Senior Advocate, assisted by Shri Neeraj Gupta, Advocate, has supported the findings of the learned lower appellate Court.

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

9. It is the case of the tenant himself that he is no longer carrying on the business of arms and ammunition at Solan after the cancellation of licence in 1983. If that be so, then even if the landlords had sought eviction against the respondent on the ground of nuisance being caused by testing and firing air guns in the area, the same too would be of no avail. It has specifically come in the statement of RW-3 that the respondent is not having arms and ammunition licence after 1996. The licence belonged to his brother Narbir Singh after it was transferred in his name in 1996. He further states that Solan Arms and Ammunition is partnership firm. To similar effect is the statement of RW-4.

10. Now in case the tenant does not have the licence to deal with arms and ammunition, then the allegation of the landlords that respondent was indulging in creating nuisance by testing and firing the arms appears to be an exaggeration. But, then the tenant cannot be permitted to take any advantage, especially, in light of the other facts which have come on record.

11. The tenant has taken a specific plea of being a franchisee on behalf of respondent No.2, a Courier Company, but then he has failed to place on record any document whereby he has been appointed as franchisee. Though a certificate Annexure A issued by Harinder Mohan Singh, General Manager, for M/s Blaze Flash Courier Pvt. Ltd. mentioning therein that M/s Solan Arms and Ammunitions is authorized franchisee to generate the courier business has been placed on record, but the same has not been proved in accordance with law. Therefore, there being no authorization proved on record, it is difficult to hold that the tenant has been appointed as franchisee of respondent No.2.

12. Shri Bawa has taken me through the statements of RW-2 Lokesh Kumar and RW-3 O.N.Bali to try and establish that they are the employees of the tenant, but the tenant cannot derive any benefit from their statements because none of these persons could prove that they were infact the employees of tenant. These witnesses failed to produce any documentary proof in the form of appointment letter, payment of salary etc. etc. whereby there could, prima facie, appear to be an employer/employee relationship between tenant and these two witnesses.

13. The learned lower appellate authority has rightly held that once the provisions of the H.P. Shop Act are applicable, then it is incumbent upon the tenant of the shop to furnish to the Shop Inspector number and names of the employees employed in his shop to carry on the business. He was also required to maintain the records of such employees. But then, as observed the tenant has placed no material whatsoever on record. Another factor which cannot be lost sight of is that the Blaze Flash Courier is a private company and can only speak through resolutions, then why no resolution has been placed on record, is not forthcoming.

14. At this stage, it would be relevant to note that RW-3 had initially admitted that he was paid salary by the Courier Company, but then he changed the statement and said that tenant was making the payment. He further stated that the payment was being made by cheque. This witness failed to produce on record statement of accounts of the concerned bank which could have supported the stand of this witness. The tenant as observed earlier had not at all cared to produce any documentary evidence including his cheque book which could have supported version of RW-3 with regard to payment of salary. On similar grounds is the statement of RW-4 and for this very reason the statement of RW-4 can safely be discarded. Therefore, this Court in such circumstances is left with no other option but to draw an adverse inference against the tenant for withholding the best evidence.

15. The learned counsel for the respondent is perfectly justified when he contends that the petitioner is required to stand on his own legs and not to take advantage of the weaknesses of the case of the opposite party. The onus to prove that the petitioner is a tenant and is still in possession of the premises solely rests upon the tenant. Though the tenant claims to be a franchisee of the respondent No.2, yet tenant does not even know the Managing Director of the company.

16. It is more than settled that it is difficult to produce direct evidence of subletting and is, therefore, to be inferred from the facts and circumstances of the case.

17. The learned counsel for the petitioner has placed reliance upon the judgment of the Hon'ble Supreme Court in ***Parvinder Singh*** *versus* ***Renu Gautam and others (2004) 4 SCC 794*** to contend that once the tenant is actively associated with the business and retains the use and control over the tenanted premises with him may be alongwith the partners, the tenant cannot be said to have parted with possession. It is relevant to reproduce the following observations:-

> *"8. The rent control legislations which extend many a protection to the tenant, also provide for grounds of eviction. One such ground, most common in all the legislations, is subletting or parting with possession of the tenancy premises by the tenant. Rent control laws usually protect the tenant so long as he may himself use the premises but not his transferee inducted into possession of the premises, in breach of the contract or the law, which act is often done with the object of illegitimate profiteering or rack renting. To defeat the provisions of law, a device is at times adopted by unscrupulous tenants and sub-tenants of bringing into existence a deed of partnership which gives the relationship of tenant and sub-tenant an outward appearance of partnership while in effect what has come into existence is a sub-tenancy or parting with possession camouflaged under the cloak of partnership. Merely because a tenant has entered into a partnership he cannot necessarily be held to have sublet the premises or parted with possession thereof in favour of his partners. If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, may be along with the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal the transaction not permitted by law, the Court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant.*
>
> *9. A person having secured a lease of premises for the purpose of his business may be in need of capital or finance or someone to assist him in his business and to achieve such like purpose he may enter into partnership with strangers. Quite often partnership is entered into between the members of any family as a part of tax planning. There is no stranger brought on the premises. So long as the premises remain in occupation of the tenant or in his control, a mere entering into partnership may not provide a ground for eviction by running into conflict with prohibition against subletting or parting with possession. This is a general statement of law which ought to be read in the light of the lease agreement and the law governing the tenancy. There are cases wherein the tenant sublets the premises or parts with possession in defiance of the terms of lease or the rent control legislation and in order to save himself from the*

peril of eviction brings into existence, a deed of partnership between him and his sub-lessee to act as a cloak on the reality of the transaction. The existence of deed of partnership between the tenant and the alleged sub-tenant would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross examination, making out a case of sub-letting or parting with possession or interest in tenancy premises by tenant in favour of a third person. The rule as to exclusion of oral by documentary evidence governs the parties to the deed in writing. A stranger to the document is not bound by the terms of the document and is, therefore, not excluded from demonstrating the untrue or collusive nature of the document or the fraudulent or illegal purpose for which it was brought into being. An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction. Tyagaraja Vs. Vedathanni, AIR 1936 PC 70 is an authority for the proposition that oral evidence in departure from the terms of a written deed is admissible to show that what is mentioned in the deed was not the real transaction between the parties but it was something different. A lease of immovable property is transfer of a right to enjoy such property. Parting with possession or control over the tenancy premises by tenant in favour of a third person would amount to the tenant having 'transferred his rights under the lease' within the meaning of Section 14(2)(ii)(a) of the Act."

18. He further relied upon the judgment of the Hon'ble Supreme Court in ***Amar Nath Agarwalla*** *versus* **Dhillon Transport Agency (2007) 4 SCC 306** to contend that the mere fact that another person is also allowed to use the premises would not amount to sub-letting. He in particular relied upon the following observations:-

"8. *In Murli Dhar v. Chuni Lal and Ors.,1969 Ren CR 563 this Court had repelled the contention that the old firm and the new firm being two different legal entities, the occupation of the shop by the new firm was occupation by the legal entity other than the original tenant and such occupation proved sub-letting. Repelling the contention this Court held:-*

> *"This contention is entirely without substance. A firm, unless expressly provided for the purpose of any statute which is not the case here, is not a legal entity. The firm name is only a compendious way of describing the partners of the firm. Therefore, occupation by a firm is only occupation by its partners. Here the firms have a common partner. Hence the occupation has been by one of the original tenants."*

9. In Mohammedkasam Haji Gulambhai v. Bakerali Fatehali (1998) 7 SCC 608 this Court observed: (SCC p.618, para 13)

> *"There is absolute prohibition on the tenant from sub-letting, assigning or transferring in any other manner his interest in the tenanted premises. There appears to be no way around this subject of course if there is any contract to the contrary between the landlord and the tenant. In a partnership where the tenant is a partner, he retains legal possession of the premises as a partnership is a compendium of the names of all the partners. In a partnership, the tenant does not divest himself of his right in the premises. On the question of sub-letting etc. the law is now very explicit. There is prohibition in absolute terms on*

> *the tenant from sub- letting, assignment or disposition of his interest in the tenanted premises."*

10. The same principle was reiterated by this Court in Mahendra Saree Emporium (II) v. G.V. Srinivasa Murthy, (2005) 1 SCC 481 wherein this Court held: (SCC p.492, para 16)

> *"The mere fact that another person is allowed to use the premises while the lesses retains the legal possession is not enough to create a sub lease. Thus, the thrust is, as laid down by this Court, on finding out who is in legal possession of the premises. So long as the legal possession remains with the tenant the mere factum of the tenant having entered into partnership for the purpose of carrying on the business in the tenancy premises would not amount to sub-letting. In Parvinder Singh v. Renu Gautam (2004) 4 SCC 794 a three-Judge Bench of this Court devised the test in these terms: (SCC P. 799, Para 8)*
>
> > *"If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, may be along with the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal a transaction not permitted by law, the Court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant."*

11. Applying these principle to the instant case, it is patent that one of the partners of the firm which was the original tenant has continued in legal possession of the premises as a partner of another firm constituted after dissolution of the original firm. Thus the legal possession is retained by a partner who was one of the original tenants. In these circumstances, we find no fault with the finding of the High Court there was no sub-letting of the premises and hence the suit for eviction deserved to be dismissed."

19. To similar effect is the judgment of the Hon'ble Supreme Court in ***Celina Coelho Pereira (Ms) and others*** *versus* ***Ulhas Mahabaleshwar Kholkar and others (2010) 1 SCC 217*** wherein the legal position regarding subletting was summarized as follows:-

"25. *The legal position that emerges from the aforesaid decisions can be summarized thus:*

(i) In order to prove mischief of subletting as a ground for eviction under rent control laws, two ingredients have to be established, (one) parting with possession of tenancy or part of it by tenant in favour of a third party with exclusive right of possession and (two) that such parting with possession has been done without the consent of the landlord and in lieu of compensation or rent.

(ii) Inducting a partner or partners in the business or profession by a tenant by itself does not amount to subletting. However, if the purpose of such partnership is ostensible and a deed of partnership is drawn to conceal the real transaction of sub-letting, the court may tear the veil of partnership to find out the real nature of transaction entered into by the tenant.

(iii) The existence of deed of partnership between tenant and alleged sub-tenant or ostensible transaction in any other form would not preclude the landlord from bringing on record material and circumstances, by adducing evidence or by means of cross-examination, making out a case of sub-letting or parting with possession in tenancy premises by the tenant in favour of a third person.

(iv)If tenant is actively associated with the partnership business and retains the control over the tenancy premises with him, may be along with partners, the tenant may not be said to have parted with possession.

(v) Initial burden of proving subletting is on landlord but once he is able to establish that a third party is in exclusive possession of the premises and that tenant has no legal possession of the tenanted premises, the onus shifts to tenant to prove the nature of occupation of such third party and that he (tenant) continues to hold legal possession in tenancy premises.

(vi) In other words, initial burden lying on landlord would stand discharged by adducing prima facie proof of the fact that a party other than tenant was in exclusive possession of the premises. A presumption of sub-letting may then be raised and would amount to proof unless rebutted."

20. There can be no quarrel with the aforesaid propositions. But the question is as to whether the petitioner is still occupying the disputed premises or even part thereof. It has come on record that the tenant is no longer residing at Solan and is no longer carrying on the business of arms and ammunition from the premises. It has also been proved that he is not paying salary to the employees of respondent No.2 and is also not paying any taxes to the authorities.

21. This Court in exercise of its revisional jurisdiction cannot interfere with the findings of fact recorded by the first appellate Court/first appellate authority because on reappreciation of the evidence, the Rent Act as applicable to the State does not entitle this Court to interfere with the findings of fact recorded by the first appellate authority merely because on reappreciation of the evidence, its views may be different from the authority below.

22. The legal position has been summed up by the Hon'ble Supreme Court in a Constitution Bench decision in ***Hindustand Petroleum Corporation Limited*** *versus* ***Dilbahar Singh (2014) 9 SCC 78*** wherein it was observed as under:-

"*43. We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the First Appellate Court/First Appellate Authority because on re-appreciation of the evidence, its view is different from the Court/Authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the Court/Authority below is according to law and does not suffer from any error of law. A finding of fact recorded by Court/Authority below, if perverse or has*

been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to re- appreciate or re-assess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity."

23. As observed earlier, sub-tenancy is often created in a clandestine manner and, therefore, subletting can be proved on the basis of legitimate inferences. It shall be apt to reproduce the following observations of Hon'ble Supreme Court in ***S.F. Engineer*** *versus* ***Metal Box India Limited and Another (2014) 6 SCC 780*** wherein it has been held as under:-

"19. In Smt. Rajbir Kaur and another v. S. Chokesiri and Co.(1989) 1 SCC 19, after referring to the decision in Dipak Banerjee v. Smt. Lilabati Chakraborty (1987) 4 SCC 161 and other decisions the Court opined that (Rajbir Kaur case, SCC p.43, para 59)

> *"59……If exclusive possession is established, and the version of the respondent as to the particulars and the incidents of the transaction is found acceptable in the particular facts and circumstances of the case, it may not be impermissible for the court to draw an inference that the transaction was entered into with monetary consideration in mind."*

It has been further observed that: (Rajbir Kaur case, SCC p.43, para 59)

> *"59…..Such transactions of subletting in the guise of licences are in their very nature, clandestine arrangements between the tenant and the subtenant and there cannot be direct evidence got and it is not, unoften, a matter for legitimate inference."*

Dealing with the issue of burden it held that:(Rajbir Kaur case, SCC p.43, para 59)

> *"59…..The burden of making good a case of subletting is, of course, on the appellants. The burden of establishing facts and contentions which support the party's case is on the party who takes the risk of non-persuasion. If at the conclusion of the trial, a party has failed to establish these to the appropriate standard, he will lose. Though the burden of proof as a matter of law remains constant throughout a trial, the evidential burden which rests initially upon a party bearing the legal burden, shifts according as the weight of the evidence adduced by the party during the trial."*

20. In this context, reference to a two-Judge Bench decision in Bhairab Chandra Nandan v. Ranadhir Chandra Dutta (1988) 1 SCC 383 would be apposite. In the said case the tenant had permanently shifted his residence

elsewhere leaving the rooms completely to his brother for his occupation without obtaining the landlord's permission. In that context, the Court observed thus: (SCC pp. 387-88, para 5)

> *"5. Now coming to the question of sub-letting, once again we find that the courts below had adequate material to conclude that the respondent had sub-let the premises, albeit to his own brother and quit the place and the sub-letting was without the consent of the appellant. Admittedly, the respondent was living elsewhere and it is his brother Manadhir who was in occupation of the rooms taken on lease by the respondent. The High Court has taken the view that because Manadhir is the brother of the respondent, he will only be a licensee and not a sub-tenant. There is absolutely no warrant for this reasoning. It is not as if the respondent is still occupying the rooms and he has permitted his brother also to reside with him in the rooms. On the contrary, the respondent has permanently shifted his residence to another place and left the rooms completely to his brother for his occupation without obtaining the consent of the appellant. There is therefore no question of the respondent's brother being only a licensee and not a sub-tenant."*

21. In M/s. Shalimar Tar Products Ltd. v. H.C. Sharma and others(1988) 1 SCC 70 while dealing with parting of legal possession, the two-Judge Bench observed that:(SCC p.78, para 17)

> *"17.....There is no dispute in the legal proposition that there must be parting of the legal possession. Parting to the legal possession means possession with the right to include and also right to exclude others."*

22. In United Bank of India v. Cooks and Kelvey Properties (P) Limited (1994) 5 SCC 9 the question arose whether the appellant-Bank had sublet the premises to the union. This Court set aside the order of eviction on the ground that : (SCC pp. 13-14, para 10)

> *"10....though the appellant had inducted the trade union into the premises for carrying on the trade union activities, the bank has not received any monetary consideration from the trade union, which was permitted to use and enjoy it for its trade union activities. It is elicited in the cross-examination of the President of the trade union that the bank had retained its power to call upon the union to vacate the premises at any time and they had undertaken to vacate the premises. It is also elicited in the cross-examination that the bank has been maintaining the premises at its own expenses and also paying the electricity charges consumed by the trade union for using the demised premises. Under these circumstances, the inference that could be drawn is that the appellant had retained its legal control of the possession and let the trade union to occupy the premises for its trade union activities. Therefore, the only conclusion that could be reached is that though exclusive possession of the demised premises was given to the trade union, the possession must be deemed to be constructive possession held by it on behalf of the bank for using the premises for trade union activities so long as the union used the premises for trade union activities. The bank retains its control over the trade union whose membership is only confined to the employees of the bank. Under these circumstances, the inevitable conclusion is, that there is*

> *no transfer of right to enjoy the premises by the trade union exclusively, for consideration."*

23. In this context we may fruitfully refer to the decision in Joginder Singh Sodhi (supra) wherein the Court, dealing with the concept of subletting, has observed that to establish a plea of subletting two ingredients, namely, parting with possession and monetary consideration, therefor have to be established. In the said case reliance was placed on Shama Prashant Raje v. Ganpatrao (2000) 7 SCC 522 and Smt. Rajbir Kaur (supra). The Court also extensively referred to the principle stated in Bharat Sales Ltd. (supra) wherein it has been observed that it would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid monetary consideration to the tenant. Though payment of rent, undoubtedly, is an essential element of lease or sub-lease, yet it may be paid in cash or in kind or may have been paid or promised to be paid, or it may have been paid in lump sum in advance covering the period for which the premises is let out or sub-let or it may have been paid or promised to be paid periodically. The Court further observed that since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sub-let.

24. In this regard reference to Celina Coelho Pereira (Ms) and others v. Ulhas Mahabaleshwar Kholkar and others (2010) 1 SCC 217 would be pertinent. In the said case a two-Judge Bench, after referring to number of authorities and the rent legislation, summarized the legal position relating to issue of sub-letting or creation of sub-tenancy. The two aspects which are of relevance to the present case are: (SCC p.231, para 25)

> *"(i) In order to prove mischief of sub-letting as a ground for eviction under rent control laws, two ingredients have to be established: (i) parting with possession of tenancy or part of it by the tenant in favour of a third party with exclusive right of possession, and (two) that such parting with possession has been done without the consent of the landlord and in lieu of compensation or rent.*
>
> *(ii)-(iv) * * **
>
> *(v) Initial burden of proving sub-letting is on the landlord but once he is able to establish that a third party is in exclusive possession of the premises and that tenant has no legal possession of the tenanted premises, the onus shifts to the tenant to prove the nature of occupation of such third party and that he (tenant) continues to hold legal possession in tenancy premises."*

25. In Vinaykishore Punamchand Mundhada and another v. Shri Bhumi Kalpataru and others (2010) 9 SCC 129 it has been held that : (SCC. 136, para 18)

> *"18. it is well settled that sub-tenancy or sub-letting comes into existence when the tenant voluntarily surrenders possession of the tenanted premises wholly or in part and puts another person in exclusive possession thereof without the knowledge of the landlord. In all such cases, invariably the landlord is kept out of the scene rather, such arrangement whereby and whereunder the possession is parted*

away by the tenant is always clandestine and such arrangements takes place behind the back of the landlord. It is the actual physical and exclusive possession of the newly inducted person, instead of the tenant, which is material and it is that factor which reveals to the landlord and that the tenant has put some other person into possession of the tenanted property."

It has been further observed that (SCC pp.136-37, para 19)

"19….It would not be possible to establish by direct evidence as to whether the person inducted into possession by the tenant had paid monetary consideration to the tenant and such an arrangement cannot be proved by affirmative evidence and in such circumstances the court is required to draw its own inference upon the facts of the case proved at the enquiry."

24. After taking into consideration all the aforesaid judgments, it was held as under:-

"26. We have referred to the aforesaid decisions only to reaffirm the proposition that the Court under certain circumstances can draw its own inference on the basis of materials brought at the trial to arrive at the conclusion that there has been parting with the legal possession and acceptance of monetary consideration either in cash or in kind or having some kind of arrangement. The aforesaid authorities make it further spectacularly clear that the transaction of subletting can be proved by legitimate inference though the burden is on the person seeking eviction. The materials brought out in evidence can be gathered together for arriving at the conclusion that a plea of subletting is established. The constructive possession of the tenant by retention of control like in Cooks and Kelvey Properties (P) Limited (supra) would not make it parting with possession as it has to be parting with legal possession. Sometimes emphasis has been laid on the fact that the sub-tenancy is created in a clandestine manner and there may not be direct proof on the part of a landlord to prove it but definitely it can bring materials on record from which such inference can be drawn."

25. The tenant has failed to establish that he was a franchisee of respondent No.2 and even his plea that he was a booking agent on behalf of respondent No.2 could not be proved as the documents Ex. P-1 to P-109 were admittedly not executed by the respondent in his own hand. In case the tenant would have been carrying out the business from the rented premises, he could have conveniently produced his books of accounts, bank accounts, income tax, sales tax, VAT returns and number of other documents. Having failed to do so, it can conveniently be held that the tenant has walked out of the premises and exclusive possession of the property has been given to a sub-tenant, who is running business or Courier Services from the premises.

26. The findings recorded by the first appellate authority can in no manner be termed to be perverse or said to have been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice. There is no illegality or impropriety in the order passed by the appellate authority.

27. There is no merit in this petition and the same is accordingly dismissed leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

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

Smt. Rubi Sood and another ...Appellants
Versus
Major (Retd.) Vijay Kumar Sud & others ...Respondents

RSA No. 436 of 2000
Reserved on 21.5.2015
Date of decision: 28.5.2015

Code of Civil Procedure, 1908- Section 100- Court will not upset the concurrent finding of fact, unless the findings are perverse, without consideration of material evidence, based on no evidence or misreading of evidence or is grossly erroneous or if allowed to stand, would result in miscarriage of justice. (Para-25 to 28)

Indian Evidence Act, 1872- Section 114- Defendant No. 1 did not appear in the witness box and did not offer himself for cross-examination- therefore, the presumption can be drawn that case set up by him was not correct. (Para-36 and 37)

Case referred:
Man Kaur (dead) by LRs. Vs. Hartar Singh Sangha, (2010) 10 SCC 512

For the Appellants: Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.
For the Respondents: Mr.Ajay Kumar, Senior Advocate with Mr.Dheeraj K. Vashisht, Advocate, for respondents No. 5, 7 and 8.
Mr.Bhupinder Gupta, Senior Advocate with Mr.Neeraj Gupta, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The defendants/appellants have filed this appeal against the concurrent findings of fact recorded by the learned Courts below. The facts of the case may be noticed as follows:-

The respondents/plaintiffs filed a suit for partition and separate possession, contending therein that Shri Kedar Nath Sud and Sh.Sansar Chand Sud sons of late Shri Shiv Dayal jointly owned 1/4th undivided share in the double storeyed building known as shop No. 72, Lower Bazar, Shimla standing built upon portion of land bearing Khasra No. 313, Bazar Ward, Bara Shimla Tehsil and District Shimla (herein after referred to as suit property) and the remaining 3/4th share in the said building No. 72, Lower Bazar Shimla was owned by Smt.Udhi Devi W/o late Dr. Shiv Dayal and grandmother of late Sh. Ajay Sud (defendant No. 1 in the suit) and respondents Nos. 1, 2, 4, 5 to 7 and 8 and mother-in-law of plaintiffs No. 3 and 9 (plaintiffs in the suit).

2. After death of late Sh. Kedar Nath which occurred in December, 1985, his 1/8th undivided share in the said property No. 72, Lower Bazar, Shimla was inherited by his legal heirs i.e. respondents/plaintiffs No. 5 to 9 and the other 1/8th undivided share owned by Sh. Sansar Chand in the said property was inherited by plaintiffs No. 1 to 4. Smt. Udhi Devi W/o late Dr. Shiv Dayal bequeathed her 3/4th undivided share in the said shop No. 72,

Lower Bazar, Shimla standing built upon land comprised in Khasra No. 313 in favour of her grandson defendant No. 1 vide Will dated 5.11.1974 registered in the office of Sub Registrar, Hamirpur, H.P. Thus 1/4th undivided share in the property known as Shop No. 72, Lower Bazar, Shimla was owned by the plaintiffs jointly and the remaining 3/4th share in the said double storeyed building was owned by defendant No. 1.

3. In the ground floor defendant No. 2 Shri Kanehya Lal Mehra was the tenant for the last many years and in the first floor of the said shop legal heirs of Mangat Ram are doing their business. Therefore, it was the plaintiffs and defendant No. 1, who were the joint owners of the said property and are in constructive and legal possession of the said property through their tenants.

4. The plaintiffs had recently come to know that since the property situated in the commercial heart of the town and its ownership value and premium value runs into lacs, defendant No. 3 had surreptitiously purchased the same for a paltry sum from defendant No. 1 and was trying to oust defendant No. 2 from the ground floor of the said shop No. 72, Lower Bazar, Shimla by paying some money to him for surrendering possession and then was trying to induct some other person in the said shop by pocketing huge amount of *'Pagri'* for which the defendants were colluding with each other. Since defendant No. 3 was not legally entitled to purchase the said property under Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 as amended in April, 1988, defendant No. 3 had obtained a General Power of Attorney from defendant No. 1 which was registered in the office of Sub Registrar (Urban), Shimla on 25.7.89 to camouflage and hide the original unlawful sale transaction which was illegal null and void abinitio being directly hit by Section 118 of the H.P. Tenancy and Land Reforms Act, 1972. In fact, the said General Power of Attorney had been made with a view to defeat and frustrate and nullify the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act, 1972. Therefore, the said power of attorney had been manufactured for unlawful purposes. On the strength of the said document, the defendants were trying to part with the possession of shop in the ground floor of shop No. 72 Lower Bazar, Shimla without the consent of the plaintiffs who were also co-owners to the extent of 1/4th share in the said property. The defendants had no right to induct any new tenant or change the tenancy of the said shop without the consent or permission of the plaintiffs who are the co-owners thereof.

5. It was further averred that the interest of the plaintiffs in the suit property is not safe in the hands of defendants who are out to defraud and cheat the plaintiffs and pocket huge sum of premium by inducting some new person in Shop No. 72, Lower Bazar, Shimla. Therefore, the plaintiffs do not want to keep the property joint. Defendant No. 1 had also realized rents of the said property but had not rendered the accounts for the last about 12 years to the plaintiffs. Defendant No. 1 was also, therefore, liable to render accounts of the income and profits of the said property. The plaintiffs were, therefore, entitled to an injunction restraining the defendants to induct any person in the said property without their consent or permission. If the injunction was not granted the plaintiffs would suffer irreparable loss and injury which could not be compensated in terms of money.

6. The suit was resisted and contested by defendants by filing separate written statements. Defendant No. 1 in written statement had raised preliminary objections to the effect that the plaintiffs had no locus standi to file the present suit because the plaintiffs had no right, title or interest in the suit property, as it was exclusively owned and possessed by late Smt. Udhami Devi as an absolute owner and after her death the property had come to the replying defendant through a Will dated 5.11.1974, the plaintiffs were estopped from filing the present suit on account of their acts, deed and acquiescences, that the present suit was barred in view of the dismissal of earlier suit by Sub Judge Ist Class (1) Shimla, on

19.4.1988 between the same parties pertaining to the same property and that the replying defendant is not the accounting party being the exclusive owner in possession of the property.

7. On merits, it is submitted that the suit property was exclusively purchaded by Smt.Udhami Devi along with 3/4th share in shop No. 72/1 from Sh.Himat Singh through a registered sale deed dated 24.7.1956, duly registered in the office of Sub Registrar, Shimla for a consideration of Rs.18,975/-. Sh. Himat Singh had purchased the same from custodian through a sale certificate in the year 1952 and mutation was attested in his favour. It was denied that Sh. Kedar Nath Sood and Sh. Sansar Chand Sood had any share in the suit property. The relationship of plaintiffs with late Smt.Udhami Devi was not denied. It was submitted that Sh. Kedar Nath Sood had no share in the suit property and as such there was no occasion for the plaintiffs No. 5 to 9 or other plaintiffs to had inherited his share in the suit property. It was admitted that Smt.Udhami Devi had executed a Will dated 5th November, 1974 in favour of replying defendant duly registered in the office of Sub Registrar, Hamirpur by which her 3/4th share in Shop No. 72/1 and the entire property known as Shop No. 72 was bequeathed in favour of replying defendant. It was denied that 1/4th share in the suit property was owned by the plaintiffs, as the entire property was owned by replying defendant on the basis of will executed by Smt.Udhami Devi.

8. It was admitted that Sh. Kanhya Lal Mehra was the tenant in the ground floor of suit property and in the first floor the legal heirs of Sh. Mangat Ram were the tenants. The rent from both the defendants was being realized by Smt.Udhami Devi during her life time and thereafter by replying defendant. It was denied that the plaintiffs were the joint owners with defendant No. 1. It was also denied that they are in constructive and legal possession of the said property through their tenants.

9. Respondent No. 1 further denied that defendant No. 3 had purchased the suit property and defendant No. 3 had been unnecessarily impleaded as a party to the suit. It was also denied that defendant No. 1 was trying to oust defendant No. 2 from the ground floor of the shop in which the business was being run by defendant No. 2. It was also denied that defendant No. 2 was taking any premium from defendant No. 3. Since defendant No. 3 neither purchased nor intended to purchase the property, the applicability of the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 were not attracted in the present case. It was also denied that any power of attorney had been manufactured for unlawful purpose. Since the plaintiffs had no right, title or interest in the suit property, they had no right to object to any new tenant which may be inducted by defendant No. 1 nor there was any necessity to get their consent. The replying defendant being the owner of the suit property was within his rights to let out the same to anyone.

10. It was further submitted that since the plaintiffs had no right, title or interest in the property, there was no question of their being cheated by the replying defendant, who was exclusive owner of the property. The plaintiffs had no right to seek partition of the property nor ask for rendition of accounts. The defendant No. 1 being exclusive owner of the property was not liable to render any accounts to the plaintiffs, who are only strangers to the property in dispute. The plaintiffs also were not entitled to any injunction.

11. Defendant No. 2 in his written statement had also raised preliminary objections that the suit was not maintainable, the plaintiffs had got no locus standi to file the suit against the replying defendant and the plaintiffs were estopped from filing the suit against the replying defendants on account of their own acts, conducts and deeds.

12. On merits, it was submitted that Smt. Udhi Devi was the owner of Shop No. 72, Lower Bazar, Shimla and after her death and as per Will dated 5.11.1974 (which was the subject matter of the suit), Mr. Vijay Kumar Sud, minor son of late Shri Virender Kumar Sud (i.e. defendant No. 1), became the absolute owner qua the said shop, in the tenancy and in the use and occupation of M/s Mehra Bros. Late Sh. Kedar Nath was appointed as a guardian by the Court, only to receive rent on behalf of minor Shri Ajay Kumar, defendant No. 1. After few years of realizing rent from the tenants M/s Mehar Brothers, on behalf of minor Ajay Kumar, Shri Kedar Nath Sud, moved an application before the Court, expressing his desire that some other guardian be appointed for the minor, as he wanted to withdraw.

13. Shri Kedar Nath was only entitled to receive rent on behalf of minor Ajay Kumar, defendant No. 1, which right he even relinquished before his death by moving an application in the Court in the eviction case, which had been filed on behalf of minor Ajay Kumar, defendant No. 1 against defendant No. 2. Smt. Udhi Devi mother of late Shri Kedar Nath had bequeathed the absolute ownership of Shop No. 72, Lower Bazar Shimla (in the tenancy of M/s Mehra Brothers) in favour of Sh. Ajay Kumar who was minor at that time and who was the son of late Sh. Virender Kumar. Late Sh. Kedar Nath or Sh. Sansar Chand had never laid any claim in their individual capacity as owner over the said shop or its rent etc in the tenancy and use and occupation of M/s Mehra Brothers.

14. It was further submitted that M/s Mehra Brothers were the tenants qua the ground floor of Shop No. 72, Lower Bazar, Shimla since the time of custodian department, who had allotted the said shop to M/s Mehra Brothers. Sh. Ajay Sud, defendant No. 1 was the owner/landlord qua the same after death of Smt. Udhi Devi. It was denied that the plaintiffs are the co-owners qua the said shop after the death of Smt.Udhi Devi. It was further averred that the plaintiffs had never laid their claim over the rents of Shop No. 72. It was only defendant No. 1 who had been realizing rent from M/s Mehar Brothers, tenant qua the said shop after death of Smt. Udhi Devi.

15. Defendant No. 3 in his written statement also raised preliminary objections qua maintainability, locus standi, estoppel etc. In addition to it, defendant No. 3 had submitted that the suit was not properly valued for the purpose of court fee and jurisdiction.

16. On merits, it was submitted that Sh.Ajay Kumar Sood S/o ShVarinder Kumar Sood was the owner of Shop No. 72, Lower Bazar, Shimla (two storeyed building) by way of Will executed by Udhi Devi, dated 5.11.1974 registered with Sub Registrar, Hamirpur in favour of Ajay Kumar, defendant No. 1. It was further submitted that late Sh. Kedar Nath or Sh. Sansar Chand had never laid any claims in their individual capacity as owners over the said shop or its rent etc, in the tenancy and use and occupation of M/s Mehar Brothers. It was admitted that M/s Mehra Brothers were the tenants qua the ground floor of Shop No. 72, Lower Bazar, Shimla. It was submitted that Ajay Kumar Sood, defendant No. 1 was the sole owner of Shop No. 72 by way of a will and question of joint ownership did not arise.

17. It was denied that the plaintiffs were the co-owners qua the said shop after the death of Smt. Udhi Devi. The General Power of Attorney of Sh.Ajay Kumar Sood in favour of Sh.Kuldip Singh, defendant No. 3 was admitted, as defendant No. 1 was residing thousand miles away from Shimla, as such, he had executed a general power of attorney in favour of defendant No. 3. Defendant No. 3 had not purchased the property in question, so the question of any Section of Land Reforms Act did not arise. It was submitted that it was only defendant No. 1 who had been receiving rents from the tenants after death of Smt. Udhi Devi.

18. In replication, the plaintiff controverted the allegations of the written statement and re-asserted the averments contended in the plaint. The learned trial Court vide orders dated 21.12.1989 framed the following issues:-

"*1. Whether the plaintiffs are owners to the extent of 1/4th share in shop No. 72 in dispute as alleged? OPP*

2. Whether the plaintiffs are entitled to the relief of partition, separate possession of their share in the suit property as alleged? OPP

3. Whether the plaintiffs are entitled to the relief of rendition of accounts from defendant No. 1 as alleged? OPP

4. Whether the plaintiffs are entitled to the relief of permanent prohibitory injunction as claimed? OPP

5. Whether the suit is not maintainable in view of preliminary objection No. 1 in the written statement of defendant No. 2 and preliminary objection No. 3 in the written statement of defendant No. 1? OPD

6. Whether the plaintiffs had no locus standi to file the suit? OPD

7. Whether the suit is not maintainable in view of preliminary objection No. 3 as alleged by defendant No. 2? OPD-2

8. Whether the plaintiffs are estopped from filing the present suit as alleged? OPD

9. Whether the Smt. Udhmi Devi W/o Shiv Dayal was the exclusive owner of shop No. 72 as alleged? OPD

10. If issue No. 9 is held in affirmative, whether defendant No. 1 has become absolute owner of the suit property as alleged? OPD

11. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD

12. Whether the plaintiffs had no cause of action to had file the suit against defendant No. 3, as alleged? OPD-3

13. Whether this Court has no jurisdiction to try the suit as alleged by defendant No. 3? OPD

14. Relief."

19. After recording evidence, the learned trial Court decreed the suit. Aggrieved by the judgment and decree passed by the learned trial Court, the defendants preferred an appeal before the learned lower Appellate Court and the same also was dismissed. Undeterred, the defendants had preferred the present appeal.

20. This Court admitted the appeal on the following substantial question of law:-

"*Whether the Courts below had misconstrued and misread the oral as well as documentary evidence and especially the documents Exhibits P-1 to P-6, P-15, PW-9/A to PW-9/14?"*

21. Mr.G.C. Gupta learned Senior Advocate, duly assisted by Ms. Meera Devi, Advocate has vehemently argued that the findings recorded by the learned Court below though concurrent are yet perverse. Both the Courts below have failed to take into consideration the fact that the plaintiffs/respondents had failed to prove that their predecessor-in-interest had purchased shop bearing No. 72. According to him, the predecessor-in-interest of the respondents had purchased the shop through Ex.P-2, which is the sale deed dated 15.2.1926, which clear shows that what was purchased by Dr.Mukand Lal and Sh. Sansar Chand was 1/4th share of Shop No. 72/1 and 72/2, which they had purchased for a consideration of Rs.6,000/-. Subsequently, vide sale deed Ex. P-1, 1/8th

share in shop No. 72/1 and 72/2, owned by Dr.Mukand Lal was transferred in favor of Sh. Kedar Nath on 8.12.1977 and as such Sh.Kedar Nath became owner of his 1/8th share and the other 1/8th share remained in the ownership of Sh.Sansar Chand. Subsequently, on the death of Sh.Sansar Chand, vide Ex.P-15, 1/8th share in the shop No. 72/1 was mutated in favour of his legal heirs on 18th October, 1969.

22. He further contended that the predecessor-in-interest of the respondents, during their life time till 1983 never claimed any interest in shop No. 72 nor made any application to any authority in regard to the fact that there did not exists any shop bearing No. 72/2 and it was in fact shop No. 72, which was purchased by their predecessor-in-interest to the extent of 1/4th share. Even the documents Ex. PW-9/1 to Ex. PW-9/13 were showing Smt.Udhi Devi as the exclusive owner to the extent of 3/4th share in shop No. 72/1 till her death and after her death Sh.Ajay Kumar was recorded as owner. Prior to the purchase by Smt.Udhi Devi, the tax assessment report for the years 1952 to 1955 shows Sh. Naimant-ullah and others to be the owners of Shop No. 72 and they along with Dr.Mukand Lal and Sh. Sansar Chand as owners of shop No. 72/1. It was only in the year 1983, that too behind the back of the appellants that the name of respondents was added in the column of owners along with Ajay Kumar in the assessment list relating to the year 1982-83.

23. He further contended that map Ex. P-4 had also not been properly considered by the learned Courts below, which clearly shows that there exists three shops on the spot and subsequently the third shop was merged in shop No. 72/1 by the predecessor-in-interest of the respondents. Learned Senior Counsel for the appellants further contended that vide sale deed Ex. P-5, it was established on record that Sh.Himant Singh had sold the property in favour of the predecessor-in-interest of the appellants, wherein also it have been clearly mentioned that he had sold shop No. 72 and 3/4th share in shop No. 72/1. This description tallied with the description of the property as mentioned in the sale certificate Ex. P-6. In this background it was for the respondents to have led cogent and trustworthy evidence to prove that their predecessor-in-interest had in fact purchased shop No. 72, while as a matter of fact no evidence worth the name had been produced.

24. On the other hand, Mr.Ajay Kumar, and Mr.Bhupinder Gupta, learned Senior Advocates, duly assisted by Mr.Dheeraj K. Vashishta and Mr.Neeraj Gupta, Advocates have argued that merely by terming the finding to be perverse, the same cannot be held to be perverse, particularly, when not only the learned trial Court, but even the learned Lower Appellate Court has dealt with the issue thread bare and only thereafter decreed the suit of the plaintiffs. It is further stated that this Court in exercise of its jurisdiction under Section 100 of the Code of Civil Procedure Code ought not to interfere with pure findings of fact.

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

25. It is more than settled that this Court in exercise of its jurisdiction under Section 100 CPC would not upset the concurrent finding of fact, unless the finding so recorded are shown to be perverse. A finding of fact recorded by the learned Courts below can only be said to be perverse, which has been arrived at without consideration of material evidence or such finding is based on no evidence or misreading of evidence or is grossly erroneous that, if allowed to stand, it would result in miscarriage of justice, is open to correction, because it is not treated as a finding according to law.

26. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or even the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law.

27. If the findings of the Court are based on no evidence or evidence, which is thoroughly unreliable or evidence that suffers from vice of procedural irregularity or the findings are such that no reasonable persons would have arrived at those findings, than the findings may be said to be perverse.

28. Further if the findings are either ipse dixit of the Court or based on conjectures and surmises, the judgment suffers from the additional infirmity of non application of mind and thus, stands vitiated.

29. The main thrust of the appellants is that by merely by saying that shop No. 72 has wrongly been mentioned as shop No. 72/2 in the sale deed dated 5.2.1926, was not a ground in itself, which would proves the respondents to be owners of remaining part of the property, apart from 3/4th share already owned by him.

30. To my mind, the appellants are trying to take unnecessary advantage of the mis-description of the property. The description otherwise when compared with the other documents on record, clearly establishes that as a matter of fact there were only two shops i.e. shop No. 72 and 72/1, whereas shop No. 72/2 was never in existence. It is established by oral and documentary evidence on record that 1/4th share in the suit property and adjoining shop No. 72/1 originally belonged to Sh.Thiku Mal, S/o Sh. Mukadi Mal and Sh.Khusi Lal S/o Sh. Hira Lal Sood, who vide sale deed dated 15th February, 1926 sold their 1/4th share in the said properties i.e. 72 and 72/1 in favour of Dr.Mukand Lal S/o Bhandari Mal and Sh.Sansar Chand, S/o Sh. Shiv Dayal. This deed was duly registered in the office of Sub Registrar, Shimla. Dr. Mukand Lal thereafter sold his 1/8th share as mentioned above in favour of Sh.Kedar Nath vide sale deed dated 8.12.1977, which was duly registered with the Sub Registrar, Shimla.

31. Obviously, the discrepancy which found its way in the sale deed would form the basis of entry in all the subsequent records kept for this purpose. Later this mistake was also reflected in the municipal records. It would further be seen that in the sale deed of 1926 and the subsequent sale deed of December, 1977, the two shops have been properly identified by permanent boundaries, which fact is also mentioned in the sale certificate of Sh.Himat Singh issued by the Custodian Department, namely, on the North Alley and passage, on the South Lower Bazar, on the East Alley No. 9 and on the West house of Bhedu Mal Mohinder Chand. Not only this, the dimensions of the property on the East are 21 feet, on the West 25 feet, on the South 29 feet and on the north 28 feet, meaning thereby the shops were comprised over a total area of 644 Sq. feet.

32. In such situation, it was incumbent upon the appellants to have proved that the dimensions as mentioned in the sale certificate and the sale deeds are different from those existing on the spot. On failure to do so, the necessary inference and rather the only conclusion which this Court can draw is that there appears to be a mistake in the sale deed of 1926, whereby shop No. 72 by mistake has been referred to as 72/2.

33. Sh.G.C. Gupta, learned Senior counsel for the appellant would then argue that an adverse inference ought to be drawn against the respondents for not examining Dr.Mukand Lal as a witness, though he was cited as a witness and given up. This contention is without any force. The record reveals that apart from the plaintiffs, even the

defendants have summoned Dr.Mukand Lal and the learned counsel for the appellant vide statement dated 29.8.1991 has stated before the learned trial Court as follows:-

> *"I give up Dr.Mukand Lal and Uttam Singh present, as not required to be examined, since they are won over."*

34. The learned counsel for the appellants has vehemently contended that the map Ex. P-4 has not been properly considered by the learned Courts below, which otherwise clearly proves that there exists three shops on the spot and subsequently third shop was merged in Shop No. 72/1 by the predecessor-in-interest of the respondents. I have perused the map Ex. P-4 and find that the contention of the appellants is not factually correct.

35. The map does not in any manner depict three shops, rather it appears to be the area where the window was to be placed. The mere fact that the shops as also the space has been shown in blocks and in contiguity would not if-so-facto prove that this block depicts the third shop.

36. The record reveals that defendant No. 1 in the suit did not appear in the witness box and state his own case on oath and did not offer himself for cross-examine by other side. Therefore, in such situation a presumption would arise that the case set up by him was not correct.

37. In ***Man Kaur (dead) by LRs. Vs. Hartar Singh Sangha,*** *(2010) 10 SCC 512*, the Hon'ble Supreme Court has summarized the legal position as to who should give evidence in regard the matters involving personal knowledge and it was held as follows:-

> *"**18**. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:*
>
> *(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.*
>
> *(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.*
>
> *(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.*
>
> *(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.*
>
> *(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney*

holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his "bona fide" need and a purchaser seeking specific performance who has to show his "readiness and willingness" fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or "readiness and willingness". Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

38. The judgment rendered by the learned lower Appellate Court would reveal that though while concurring with the judgment of the learned trial Court, it was not required to re-state the effect of the evidence and even expression of general agreement with reasons given by the learned trial Court would have ordinarily sufficed yet the learned First Appellate Court has given a more elaborate and detailed finding, whereby he had not only discussed the pleadings thread bare, but has also discussed the evidence in its right perspective. The appellants have failed to prove any perversity in the impugned judgments.

Having observed so, I find no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their costs.

****

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

Satya Devi and another ……Appellants.
Vs.
Kartar Chand and others …..Respondents.

RSA No. 278 of 2005
Reserved on: 18.05.2015
Date of decision: 28.05.2015

Transfer of Property Act, 1882- Section 123 - Plaintiff claimed that he is owner in possession of the suit land- he had executed gift deed of the suit land in favour of his wife- gift was presented for registration before Sub Registrar but Registrar asked him to come on some other day as he was busy- defendant No. 1 came to the plaintiff and told that he could get the gift deed registered- signatures of the plaintiff were obtained on some documents which were presented for registration – plaintiff was told that documents had been

registered- plaintiff subsequently came to know that sale deed and Special Power of Attorney were got executed from him- it was proved that plaintiff had no other land and, therefore, he had no justification to sell the only piece of land- gift deed was executed earlier in time and the sale deed was executed subsequently- mere non-registration of the gift is not sufficient- since, plaintiff had already executed a gift in favour of his wife, therefore, he could not have intended to sell the same land to some other person. (Para-19 to 24)

Cases referred:
Chennupati Venkatasubbamma Vs. Nelluri Narayanaswami, AIR 1954 Madras 215
Vidhyadhar Vs. Mankikrao, AIR 1999 Supreme Court 1441

For the appellants : Mr. Ajay Sharma, Advocate.
For the respondents: Mr. N.K. Thakur, Senior Advocate, with Mr. Rohit Bharol, Advocate, for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Rajiv Sharma, J. (Oral):

This Regular Second Appeal is directed against the judgment and decree, dated 30.04.2005, passed by the learned Additional District Judge, Una, District Una, H.P. in Civil Appeal No. 6/2001.

2. Key facts necessary for the adjudication of this Regular Second Appeal are that predecessor-in-interest of the appellant-plaintiff, Dalipa (hereinafter referred to as 'the plaintiff' for the sake of convenience), instituted a suit against the respondents-defendants (hereinafter referred to as 'the defendants' for the sake of convenience), stating therein that the land measuring 10 Kanals, 5 marlas, bearing Khewat No. 248, Khatauni No. 383, Khasra Nos. 4667, 4906, 4911, 4922, 4913, 4942, 4947, 4948, 4961, 4962, 5157, as entered in the Jamabandi for the year 1987-1988, situated in Village Rora Baliwal, Sub Tehsil Haroli, District Una (hereinafter referred to as 'the suit land' for the sake of convenience) was owned and possessed by Dalipa. The appellant No. 2, Sarasti Devi, is the wife of Dalipa. Dalipa has executed a gift deed of the suit land on 02.01.1991 at Haroli in her favour. The gift deed was scribed by Ashok Kumar, deed writer. It was accepted by Sarasti Devi. The gift deed was presented before the Sub-Registrar for registration. The Sub-Registrar, Haroli told the plaintiff and his wife Sarasti in the presence of the marginal witnesses that they should present the gift deed for registration on some other date as he was busy in some other work. The fact of the matter is that the gift deed could not be registered on 02.01.1991. The defendant No. 1 was also present at the time of execution of the gift deed. He was familiar and close to defendant No. 4, Sh. Ashok Kumar. The defendant No. 4, deed writer was aware of the fact of the execution of the gift deed and its non-attestation on 02.01.1991. On 03.01.1991, the defendant No. 1 came to the plaintiff in his house while other family members were away and told the plaintiff that Sub Registrar, Haroli is known to him and he could help him in getting the gift deed attested and registered by the Sub Registrar, Haroli. The plaintiff accompanied the defendant No. 1 to Haroli with gift deed. The defendants No. 1 to 4 were aware about the execution of the gift deed. They asked the plaintiff to sit nearby and got some writing from the plaintiff and produced the plaintiff before the Sub Registrar, Haroli, where the plaintiff was told by the Sub Registrar, Haroli that the document is registered. On 03.01.1991, the sale deed and a special power of attorney was got executed by the defendant No. 4. The defendants No. 1 to 4 mis-represented and defrauded the plaintiff to procure the alleged sale deed regarding the suit

land and special power of attorney collusively with concealment of the fact of execution of the gift deed in favour of Sarasti wife of the plaintiff. On 07.01.1991, the plaintiff went to Haroli in the office of Sub-Registrar to get the gift deed, but the Clerk of the Sub Registrar returned the gift deed to the plaintiff on the ground that Sub-Registrar has refused to register it as the plaintiff has already sold the land in question to Kartar Chand, the defendant No. 1 by executing the sale deed. Plaintiff thereafter enquired from the defendant No. 4, deed writer about the alleged sale as well as from the office of Sub Registrar and then came to know about the execution and registration of sale deed in favour of defendant No. 1 and special power of attorney in favour of defendant No. 2. The plaintiff never executed any sale deed and special power of attorney and never received any consideration from the defendant No. 1.

3. The suit was contested by the defendants No. 1 to 4 by filing written statement. On merits, it was admitted that Dalipa was the owner of the suit land, but after the execution of the sale deed, dated 03.01.1991, the defendant No. 1 has become absolute owner in possession of the suit land and the plaintiff was out of possession. It was alleged that the plaintiff executed the sale deed with his free consent and in sound disposing mind and full amount of consideration was received by Dalipa and the same fact was also admitted before the Sub Registrar.

4. Replication was filed by the plaintiff. The issues were framed by the learned Trial Court on 23.12.1998. The suit was dismissed by the learned Sub Judge (II), Una, District Una, H.P. on 19.12.2000.

5. Plaintiff Dalipa died on 01.08.1991 and his daughter Smt. Satya Devi was brought on record. Proforma defendant No. 5 Smt. Sarasti Devi was also added as plaintiff. Sarasti has already filed the written statement admitting the case of the plaintiff (Dalipa).

6. Plaintiffs filed an appeal before the learned Additional District Judge, Una, District Una, H.P. He dismissed the same on 30.04.2005. Hence, this Regular Second Appeal.

7. This Regular Second Appeal was admitted on the following substantial question of law on 18.05.2015

> *"Whether in view of the execution of Ex.P-1, execution of D-1 at later point of time will not convey any title in law to defendants but courts below having over looked the said aspect of the matter vitiated the impugned judgment and decrees?"*

8. Mr. Ajay Sharma, learned counsel for the plaintiffs has vehemently argued that Ex.-D1, sale deed, dated 03.01.1991, is sham transaction. He then contended that Dilapa, predecessor-in-interest of the plaintiffs had already executed a gift deed, dated 02.01.1991, in favour of plaintiff No. 2, Sarasti Devi, thus, there was no occasion for him to sell the suit land by way of Ex.-D1. He lastly contended that the execution of sale deed was the result of fraud played upon his clients.

9. Mr. N.K. Thakur, learned Senior Advocate, for respondents No. 1 and 2 supported the judgments and decrees passed by both the Courts below.

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

11. PW-1, Kashmiri Lal, has deposed that he knew Dalipa. Sarasti Devi is his widow. He has only one daughter, Satya. He further deposed that Dalipa has taken him and

Balwan, Lambardar to Haroli for the registration of gift in favour of his wife. His wife was also with him. It was in the month of January, 1991 that the gift deed Ex. P1 was scribed by deed writer, Ashok Kumar. The contents of the same were read over and explained to Dalipa. Dalipa has put his thumb impression on the gift deed and thereafter, he and Balwan Singh put their signatures on the same. Sarasti also accepted the same and put her thumb impression on the document. He alongwith Sarasti and Balwan Singh went to the office of Sub Registrar for registration of the same. However, the Sub Registrar told them that it was not the day meant for registration and he was going out of station. He told that them to come on monday. Dalipa presented the gift before the Sub Registrar, but the Sub Registrar told them that due to subsequent development, the gift deed could not be registered. He also deposed that the land was in possession of Sarasti and it never came in possession of Kartar Chand. In his cross-examination, he has categorically deposed that the relationship of Satya Devi with her parents was cordial. He did not know why the Will was not executed, volunteered that he wanted to execute a gift deed to avoid that his son-in-law may not sell the same.

12. PW-2, Balwan Singh, has corroborated the statement of PW-1. He has signed the gift deed as a marginal witness. The same was presented before the Sub Registrar. The Tehsildar was moving out and told them that they should come on any other date. Thereafter, on monday, he alongwith Dalipa, Sarsati and Kashmiri Lal, went to the office Sub Regisatrar. The Sub Registrar told them that the registry was already effected and, thus, the gift deed could not be executed. Dalipa told him that he had not got any registry executed. In his cross-examination, he deposed that Ashok Kumar was the deed writer of the gift deed.

13. PW-3, Sarasti Devi has deposed that she alongwith marginal witnesses Kashmiri and Balwan, Lamberdar, went to Haroli for the purpose of execution of gift deed. The gift deed was got scribed from the deed writer. The Officer told them that they should come on monday. They went on monday alongwith Kashmiri Lal. However, they came to know that Kartara had already got something executed. No consideration was accepted from Kartara. She was in possession of the suit land. In her cross-examination, she has deposed that Dalipa was in his senses. He has never sold any land in his life.

14. PW-4, Ashok Kumar has admitted that he has scribed the Will in favour of Sarasti Devi in the presence of Sh. Balwan Singh and Kashmiri Lal. The contents of the same were read over and explained to Dalipa. He accepted the same and thereafter put his thumb impression on the same. Sarasti Devi also accepted the same by putting her thumb impression. He has prepared two copies of the Will. One of the copy remained in the office of Sub Registrar.

15. PW-5, Hari Das deposed that the Naib Tehsildar, Haroli has powers of Sub Registrar. PW-6 Kapil Dev has deposed that Dalipa has no land other than the land mentioned in Jamabandis for the years 1987-88 and 1997-98.

16. Ashok Kumar has again appeared as DW-1. He deposed that the sale deed, Ex.D1 was scribed by him on 03.01.1991 at the instance of Dalipa. He has signed the same after admitting the contents of the same to be true and correct. He has identified Ex. D1.

17. DW-2, Rachhpal Singh deposed that he has put his signatures on Ex. D1 as a marginal witness. DW-3 Uttam Chand has signed Ex. D1 as a marginal witness. DW-4, Kartar Chand deposed that he has purchased an area of land measuring 10 Kanals 5 Marlas for a consideration of Rs.11000/- from Dalipa. The sale deed Ex.D1 was signed by the marginal witnesses. Dalipa has also put his thumb impression on the same. The sale deed was produced before the Sub Registrar. The contents of the same were read over and explained by the Sub Registrar to Dalipa and he after admitting the same to be true, has put his thumb

impression on the same. According to him, Dalipa has also executed a power of attorney in favour of Uttam Chand Ex. DW2/A. In his cross-examination, he has admitted that Dalipa was an agriculturist and he has no other source of income.

18. What emerges from the analysis of the statements is that Dalipa has executed a gift deed, dated 02.01.1991. It was scribed by PW-4 Ashok Kumar. PW-1 Kashmiri Lal and PW-2 Balwan Singh have signed the same as a marginal witnesses. The gift deed was also accepted by the wife of Dalipa. It was presented before the Sub Registrar. The Sub Registrar told them that he was going out of station and they should come on monday. They went on monday to the office of Sub Registrar, Haroli. He told them that the same could not be registered, since a sale deed has already been registered in the name of Kartar Chand.

19. Mr. Ajay Sharma, learned counsel for the appellants has vehemently argued that Ex. D1, sale deed, dated 03.01.1991, is an out come of fraud. According to him, his client has never sold the land vide Ex. D1. According to him, fraud has been played upon Dalipa, who was an illiterate person by making him to understand that the document which was presented before the Sub Registrar, was a gift deed only.

20. The sale deed Ex. D-1 was also scribed by PW-4 Ashok Kumar. DW-2, Rachhpal Singh and DW-3, Uttam Chand are the marginal witnesses. The power of attorney was also executed in favour of Uttan Chand vide Ex. DW2/A. The sale deed Ex. D1 was presented before the office of Sub Registrar and accordingly registered. Dalipa has only one daughter, Satya Devi. He was not owner of any land other than the land as per the details given in Jamabandis for the years 1987-88 and 1997-98. Even, DW-1 Ashok Kumar has admitted in his cross-examination that Dalipa has no other source of income. The relationship between Satya Devi and her parents were cordial. The plaintiff has, in fact, gone to Haroli on 02.01.1991 for the registration of gift deed, but he was apprised by the Sub Registrar that the same could not be done and they should come by monday, but by that time the sale deed vide Ex. D1 was already registered. There was no occasion for the plaintiff to sell the only piece of land available with him to defendant No. 1. The only source of livelihood for him and his wife was the land which was alleged to have been sold to defendant No. 1 for consideration of Rs.11000/-.

21. Mr. N.K. Thakur, learned Senior Advocate, has vehemently argued that the plaintiff Dalipa never wanted the land to go in the hands of his son-in-law. Satya Devi is the only daughter of plaintiff and after the death of the plaintiff and her mother, the land was bound to come to her, as legal heir. Once the plaintiff has gone to Haroli for the registration of gift deed, which was scribed by PW-4 Ashok Kumar in the presence of PW-1 Kashmiri Lal and PW-2 Balwan Singh, then where was the occasion for him to sell the land on 03.01.1991 to defendant No. 1. There is considerable force in the contention of Mr. Ajay Sharma, learned counsel for the appellants that in fact his client has been mislead by making him to believe that the documents which were presented before the Sub Registrar were qua the gift deed and not with respect to the sale deed. The relations between Satya Devi and her parents were cordial as per the statement of PW-1 Kashmiri Lal. It has also come on record the Sarasti Devi remained in possession of the suit land. Moreover, the gift deed is prior in time and the sale deed is latter in time. The execution of the Special Power of Attorney, dated 03.01.1991 and sale deed, dated 03.01.1991, Ex. D1, have been procured by defendant No. 1 by playing fraud and mis-representation upon the plaintiff by defendants.

22. In **Chennupati Venkatasubbamma** Vs. **Nelluri Narayanaswami,** AIR 1954 Madras 215, it has been held that what the law requires is acceptance of the gift after its execution though the deed may not be registered. The learned Single Judge has held as under:

"9. This finding is enough to dispose of this second appeal. But even on the other question of fraud and misrepresentation the finding of the learned Judge cannot be said to be justified in law. He seems to think that the evidence of D.Ws. 4, 8 and 9 which they speak to the complaint of Ramachandraiah immediately the documents was received from the post office and was read over to him was inadmissible in evidence as a statement of a deceased person which could not be brought under S.32, Evidence Act. What is sought to be established by the oral evidence is that immediately after the document was received Ramachandriah complained to these people that he was deceived or defrauded by Subbaiah. It affords evidence of his conduct immediately after receipt of the document. The statements are not attempted to be proved as statements made by Ramachandriah but only to establish the conduct of Ramachandriah. I do not see any legal object for the admission of these statements in evidence and there is no reason to eschew the evidence of D. Ws. 4, 8 and 9 on that account.

The learned Judge was also of the opinion that there was no definite pleading regarding the fraud that was complained of by the defendants. The fraud was categorically and clearly stated by Ramachandriah himself in Ex. B, and that is the case which the defendants attempted to prove in the trial Court and which was accepted by it. These defects would undoubtedly warrant a reconsideration of the evidence by the lower appellate Court. It is no doubt true that the learned Judge recorded an alternative finding even on the assumption that the evidence of D.Ws. 4,8 and 9 was admissible. But, it is rather difficult to separate how much of his finding was coloured by the fact that his evidence was in admissible and that the pleading was inadequate or insufficient. However, it is unnecessary to adopt that course, as in my opinion the finding on the first point is sufficient to dispose of this second appeal.

PW-3 Sarsati Devi has already accepted the gift deed and put her thumb impression on the gift deed Ex. P1. It was attested by two witnesses, namely, Kashmiri Lal (PW-1) and Balwan Singh (PW-2)."

23. Their Lordships of the Hon'ble Supreme Court in **Vidhyadhar** Vs. **Mankikrao**, AIR 1999 Supreme Court 1441, has held that in order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in present or in future. The intention is to be gathered from the recital in the sale deed, conduct of the parties and the evidence on record.

"37. The real test is the intention of the parties. In order to constitute a "sale", the parties must intendd to transfer the ownership of the property and they must also intend that the price would be paid either in praesennti or in future. The intention is to be gathered from the recital in the sale deed, conduct of the parties and the evidence of record.

38. Applying these principles to the instant case, it will be seen that defendant No. 2 executed a sale deed in favour of the plaintiff, presented it for registration, admitted its execution before the Sub-Registrar before whom remaining part of the sale consideration was paid and, thereafter, the document was registered. The additional circumstances are that when the plaintiff instituted a suit on the basis of his title based on the aforesaid sale deed, defendant No. 2, who was the vendor, admitted in his written statement, the whole case set out by the plaintiff and further ad mitted in the witness box that he had executed a sale deed in favour of the plaintiff and had also received full amount of consideration. These facts clearly establish that a complete and

formidable sale deed was executed by defendant No. 2 in favour of the plaintiff and the title in the property passed to plaintiff. The findings recorded by the High Court on this question cannot, therefore, be up held.

39. The judgment of the High Court on this point is also erroneous for the reason that it totally ignored the provisions contained in Section 55(4) of the Transfer of Property Act which are set out below:-

"55. In the absence of the contract to the contrary the buyer and seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such as are applicable to the property sole:

(1) to (3)……………

(4) The seller is entitled-

(a) ………………………….

(b) Where the ownership of the property has passed dto the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of non-payment, for the amount of the purchase-money, or nay part thereof remaining unpaid, and for interest on such amount or part from th the date on which possession has been delivered.

(5) *to (6)…………."*

In the instant case, since the plaintiff Dalipa has already executed the gift in favour of his wife, the intention cannot be inferred for the sale of the same property vide Ex. D1, moreover, when he would have been rendered landless.

24. Accordingly, the Courts below have not correctly appreciated the oral as well as documentary evidence. It is reiterated that there was no occasion for the plaintiff to sell the land once the gift deed Ex. P1, dated 02.01.1991, was scribed.

25. Accordingly, the Regular Second Appeal is allowed and the judgments and decrees passed by both the Courts below are set aside. Consequently, the Civil Suit No. 80/1991 is decreed and the sale deed Ex. D1, dated 03.01.1991, is declared null and void and the defendant No. 1 is restrained from interfering in the possession of the plaintiff Sarasti Devi. The miscellaneous application(s), if any, also stand(s), disposed of. No costs.

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

Smt. Dev Sundri and others …Appellants/Plaintiffs.
Versus
State of H.P. and others …Respondents/Defendants

R.S.A. No. 551 of 2004
Date of decision: 29th May, 2015

Specific Relief Act, 1963- Section 38- Plaintiff claimed that defendants/State had constructed a road in which proper drainage was not provided- flow of water from the road causes damage to the house and orchard of the plaintiff- defendant claimed that proper drainage system was provided and no damage was being caused- version of the plaintiff was proved by his evidence as well as by the inspection made by the Court- suit was decreed but

the decree was reversed on the ground that suit was decreed without impleading 'B', a co-owner of the property- held, that plaintiff had sought relief against the officials of the State who were under obligation to protect the life and properties of its citizens and had failed to abide by their duties- Officers of the State are liable to compensate a person for the loss sustained by him- suit could not have been dismissed on the ground that co-owner was not impleaded in the suit- defendant directed to provide drainage system to ensure that property of the plaintiff and 'B' is not damaged from flow of water. (Para-17 to 24)

For the Appellants	:	Mr. V.D. Khidtta, Advocate.
For the Respondents	:	Mr. V.K.Verma, Ms. Meenakshi Sharma and Mr. Rupinder Singh, Addl. A.Gs., for respondents No. 1 and 2. Respondent No.3, Bhim Singh, in person.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

The appellants are the plaintiffs, who are aggrieved by the judgment and decree dated 16.9.2004 passed by learned District Judge, Shimla in Civil Appeal No. 41-S/13 of 2000 whereby he reversed the judgment and decree dated 23.12.1999 passed by learned Sub Judge, Jubbal, District Shimla, in Civil Suit No. 36/1 of 99/98

2. The facts, in brief, are that the predecessor-in-interest of the appellants/plaintiffs namely Durga Dutt Sharma alongwith proforma defendants No. 3 to 9 claimed themselves to be the owner of the land measuring 14-04 bighas, comprising of Khata Khatauni No. 42 min/108, Khasra Nos. 361, 372, 373, 374, 375, 376, 377 and 378 situated in Chak Anu, Tehsil Jubbal, District Shimla. The plaintiff claimed to be in exclusive possession of this land under some family arrangement. The plaintiff also alleged to have constructed a double storeyed house on the aforesaid land. The plaintiff also claimed to have raised an orchard on his aforesaid land about 20 years before the filing of the suit.

3. The defendant/State of Himachal Pradesh, respondents No. 1 and 2 herein, has constructed a road known as "Anti-Rajpuri Road", which is situated at a higher level than the house and the orchard of the plaintiff. The construction of this road was started in the year 1974-75 and the road became as motorable in the year 1980-81.

4. The precise allegation of the plaintiff in the suit was that at the time of construction of the road, the defendant/State of Himachal Pradesh has not made proper arrangement for the drainage of the water being accumulated on the road.

5. It was averred that no culvert or drainage system was provided and resultantly, the water of a distance of one kilometer was accumulating on the road side and was flowing towards the house and the orchard of the plaintiff, which was situated on a lower level. The flowing of this water from the road towards the house of the plaintiff was said to have damaged the house and the orchard of the plaintiff every year more especially in the rainy season.

6. The plaintiff further claimed that he had earlier also filed a suit against the defendant for seeking the defendant/State of Himachal Pradesh to create proper drainage system on the road so as to check and provide the water from the road towards the house of the plaintiff and it was alleged that in the earlier suit filed by the plaintiff, the Divisional Officer, H.P. Public Works Department had given an undertaking on 21.6.1992 before the Lok Adalat that the dimensions of the culvert of the road over the house of Bhim Shall be

increased so as to control the flow of the water over the land and the house of the plaintiff. On the basis of such undertaking, the earlier suit filed by the plaintiff was said to have been compromised on 21st June, 1992. However, the defendants had not honoured or complied with the undertaking given by the Sub Divisional Officer, Public Works Department on 21st June, 1992 and resultantly, the plaintiff had to file an application under Order 21 Rule 32 of CPC against the defendant/State of Himachal Pradesh. This application was dismissed by learned Sub Judge by holding that the earlier suit of the plaintiff had been dismissed and the proceedings initiated by the plaintiff before the High Court of H.P. under Article 227 of the Constitution of India were also dismissed. Resultantly, the plaintiff filed the suit for seeking the relief of mandatory injunction and damages against the defendants.

7. It was claimed that in the year 1997, 22 apple plants of the plaintiff were got totally damaged and the house of the plaintiff had also been damaged and suffered a loss of Rs.2,00,000/- which amount was claimed by the plaintiff against the defendants by way of damages.

8. The plaintiff also claimed that the water flowing from the road towards the house of the plaintiff was causing damage to the house and orchard of the plaintiff every year and he prayed that defendants be directed to control the flow of water from the road side and also to increase the dia of the culvert so that the water may be properly regulated.

9. During the pendency of the appeal before the learned lower Appellate Court, the original plaintiff died and his legal representatives were brought on records, who are the appellants in this appeal.

10. The suit was contested by the defendants/respondents No.1 and 2 by raising preliminary objections regarding limitation, maintainability, valuation, estoppel and non-joinder of necessary parties. On merits, it was denied that any water from the road side was flowing towards the house of the plaintiff. It was contended that at the time of the construction of the road, which was constructed in the year 1974-75 to 1980-81, the proper drainage system was provided and no water was flowing from the road towards the house of the plaintiff. With regard to the undertaking allegedly given by the Sub Divisional Officer in earlier suit on 21st June, 1992, the defendant contended that all the terms of the undertaking had already been complied with and only the dia of the culvert could not be increased from 9 inches to 3 feet, as the same was objected to by Sh. Bhim Singh, respondent No.3 herein, who was having an orchard below the culvert in question.

11. On 20.4.1999, the learned trial Court framed the following issues:

1. Whether the plaintiff is entitled to mandatory injunction as prayed for? OPP
2. Whether the plaintiff is entitled to damages as claimed? OPP
3. Whether the suit is within limitation? OPP
4. Whether the suit is properly valued for the purpose of court fee and jurisdiction? OPP
5. Whether the plaintiff is estopped from filing the present suit by his act, deeds and conduct? OPD
6. Whether the suit is bad for non-joinder of necessary parties? OPD
7. Relief.

12. The learned trial Court after recording the evidence was pleased to decree the suit for mandatory injunction thereby directed the respondents No. 1 and 2 to provide culvert for a dia of 1½ feet after replacing or nearby the present existing pipe/culvert about 9 inch alongwith proper catchment pit and also to put cause dip/water breaker nearby

alleged spot towards Nandpur road in such a way as to reduce the flow of rain water towards the main catchment pit and also the site map Ex.PW-4/A be also read as part and parcel of the decree for providing the points at spot as per its note 1 and 2.

13. Aggrieved by the judgment and decree dated 23.12.1999 passed by the learned trial Court, the defendant/State of H.P. preferred an appeal before the learned lower Appellate Court, who vide its judgment and decree dated 16.9.2004 has been pleased to set-aside the judgment and decree of the learned trial Court. This is how the plaintiffs are now in appeal before this Court against the judgment and decree passed by the learned lower Appellate Court.

14. On 10.12.2004, this Court admitted the appeal on following substantial questions of law:

> *"1. Whether the learned first Appellate Court has mis-construed and mis-interpreted the oral as well as documentary evidence specially the evidence Ex.PW-1/B, Ext.PW-1/C and also the statement of PW-4 and Ext.PW-4/A?*
>
> *2. Whether the learned first Appellate Court could have dismissed the suit of the plaintiffs on the ground of non-joinder of necessary parties without the objection of the respondents/State and the PWD Department who are the main contestant against whom relief has been sought."*

15. I have heard learned counsel for the respondent and have also gone through the records carefully.

16. Since both the substantial questions of law are inter-connected and interrelated, I proceed to answer them collectively.

17. It has come on record that the house of the appellants is situate below the road and on account of the official respondents having not put in place the proper drainage the same has resulted in water logging and the same thereafter is flowing towards the house of the appellants thereby causing damage to their property. The appellants in order to prove their case had tendered in evidence the previous copy of order Ext. PW-1/B, statement of Sh. B.N. Vaidya, the then SDO Ext.PW-1/C. Perusal of these two documents reveals that before the Lok Adalat, the respondents had admitted the claim of the plaintiffs and agreed to install a culvert nearby the land of respondent No.3 after putting the catchment pit by which the rain water had to be diverted and the proper drainage was to be provided. The plaintiff had examined one Manoj as PW-4, who tendered in evidence copy of site map Ex.PW-4/A which depicted the manner in which the proper drainage could be provided. He deposed that by not providing the proper drainage, the damage is being caused to the land and house of the appellants.

18. Not only this, the learned trial Judge himself had visited the spot alongwith the counsels for the parties and a detailed report to the following terms had been prepared:

> *"Today on 2.12.99, I alongwith plaintiff counsel Sh. Mohan Kalta and Ld. ADA have inspected the spot as provided under Section 18 Rule 18 CPC. The following observations have been gathered after seeing the spot:*
>
> *When we reached the spot at Village Bhajanu, plaintiff showed me that nearby the land of one Sh. Bhim Singh one culbert/pipe has been installed under the road. Plaintiff appraised the site which is sloppy one and he bring to my notice that all the rain water from the different side of the hill has been gathered upon the road during the rain season and thereafter the same moved in the downward direction. He bring to my notice the culbert/pipe about 9", the same has been installed in order to cover the drainage as well as*

the rain fall. Nearby the aforesaid pipe, there was one pipe which is stated to be installed for the irrigation scheme stated to be now a days become defunct. The pipe which is installed by the PWD Deptt. at its one side there is a little hole in order to collect the water and the second end of the same has been affixed in the tank which is stated to be upon the land of Bhim Singh, used for the irrigation scheme which already become obsolete. Plaintiff and his counsel bring to my notice that prior to the alleged road, the complete portion is sloppy and there is one Naala through which the water of the rain have been diverted/carried from the hill. I have seen the actual spot on the side of the alleged pipe, there is stated as the land of one Sh. Bhim Singh having an apple orchard. Below the land of Bhim Singh, there is stated to be the land of one Sh. Pratap.

After passing the land of aforesaid two persons, there are existing sign of Naala stated to be old one.

Now by seeing the aforesaid site, to my mind it appears to be dangerous in case a culbert about 3 feet has been installed on the alleged site. Because if in case the culbert about the dia of 3 ft. has been installed, the same will effect the land of Bhim Singh as well as Pratap Singh. Keeping the reason that the flow of water when the culbert is about 3ft in dia, volume of water becomes so high, it may cause loss to the orchard of the aforesaid person. The aforesaid naala has been stated to be fallen on the road side nearby place known as Annu. From seeing the site, it can be concluded that there are many orchards of different persons lying between the land of one BhimSingh and the said end of Nallah at village Annu. Thus by putting the culbert as proposed by the plaintiff about 3 ft. in dia, the same will effect the lands of many persons those have not represented in the case and it become dangerous. Though, as per the site, there is a slope towards the land of Bhim Singh as well as there after the orchard of plaintiff side by side road. By seeing the site it can observe that the flow of rain has become less effective as the same was scattered but by putting the culbert about 3 ft. the same become more dangerous as to the natural flow.

However, at the site if the pipe of stated to be 9" is replaced by some big pipe having a dia about less than 1 ½ feet, it will not effect the fields of the other persons because in that event the volume of water remain less. By seeing the spot it can also be assessed that the flow of water can be reduced at the site of occurrence by putting a different small culbert/pipe under neath the road at different place by which the flow of water can be reduced.

These are my observations as narrated above, the same has been after seeing the site, be considered at the time of argument."

It was after taking into consideration all the facts cumulatively that the learned trial Court had decreed the suit.

19. The learned lower Appellate Court has reversed these findings only on the ground that the suit of the plaintiff could not have been decreed without impleading Bhim Singh as a necessary party. While as a matter of fact, Bhim Singh already stood impleaded as a party respondent before the appellate Court. If that was so, the suit to say the least could not have been dismissed that too only on the ground that in case there was an enhancement of the diameter of the culvert, the same was likely to affect the land and orchard of Bhim Singh, who was not party to the suit and had a right to oppose the prayer.

20. The learned lower Appellate Court appears to be totally oblivious of the fact that the relief claimed by the appellants was directed only against the officials of the State and in case while protecting the interest of the appellants, the action of State would result in causing damage to the property of Bhim Singh, respondent No.3, then it was the duty of the State to protect even the property of Bhim Singh.

21. It is more than settled that the State has a duty to protect the lives and properties of its citizens. It was only on account of the construction of the road that the problem of water logging has arisen. Under such circumstances, the State owes more than a verbal assurance, a duty to compensate the affected person(s) and they cannot be left in the lurch without there being any relief granted to them by the State. The Constitutional right guaranteed to the citizens to protect their lives and properties cannot be whittled down at any cost much less at the cost of the State.

22. The officers of the State are ordained with duty to protect the life and property of its citizens and in case of failure, the same amounts to dereliction of duty and the State would be liable to make good this loss. Such liability can be enforced through public law remedy or common law remedy. If damage is caused to a person on account of the lapse of the officials of the State, the same would be treated as culpable negligence on the part of these officials.

23. The responsibility to make good the loss cannot be brushed aside in a manner as done by the learned lower Appellate Court where he reversed the findings of the learned trial Court by observing that the flowing of water from higher level towards lower level, more especially during the rainy water, was a natural phenomena in hilly terrain. This reflects a total lack of sensitivity on the part of the learned lower Appellate Court.

24. In view of the aforesaid discussion, it can safely be concluded that the judgment passed by the learned lower Appellate Court is not at all sustainable and is accordingly set-aside. However, in order to do the complete justice to the parties, even the judgment passed by the learned trial Court is required to be modified and is accordingly modified and a decree for mandatory injunction directing the respondents No. 1 and 2 to provide a drainage system by providing culverts of appropriate size and dia so as to ensure that the property of not only the appellants but even the respondent No.3 is protected from the flow of water. The respondents No. 1 and 2 are further directed to put cause dip/water breaker on the road in question in such a way so as to reduce the flow of rain water towards the main catchment pit. The site map Ex.PW-4/A would form part and parcel of the decree.

25. Consequently, the appeal is allowed and the judgment and decree dated 16.9.2004 passed by the learned lower Appellate Court in Civil Appeal No. 41-S/13 of 2000 is set aside and the judgment and decree dated 23.12.1999 passed by the learned trial Court is modified as above, leaving the parties to bear their own costs.

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

Divisional Engineer Telecom Project (BSNL) & another …Appellants

Versus

Shri Chet Ram & another …Respondents

FAO No. 274 of 2008

Date of decision: 29.05.2015

Motor Vehicle Act, 1988- Section 166- Mere acquittal in a criminal case is not a ground to defeat the rights of the claimant- the findings recorded by Criminal Court will have no bearing whatsoever in the proceedings pending before MACT. (Para-13 to 21)

Cases referred:

Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81
N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354
Vinobabai and others versus K.S.R.T.C. and another, 1979 ACJ 282
Himachal Road Transport Corporation and another versus Jarnail Singh and others, reported in Latest HLJ 2009 (HP) 174
R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771

For the appellants : Mr. Ashok Sharma, Advocate.
For the respondents: Mr. O.C. Sharma, vice Mr. Ravinder Thakur, Advocate, for respondent No. 1.
Ms. Leena Guleria, vice Mr. G.R. Palsra, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 20th February, 2008, passed by the Motor Accident Claims Tribunal, Mandi, H.P. (hereinafter referred to as "the Tribunal") in MAC Petition No. 54 of 2004, whereby compensation to the tune of Rs.1,91,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimant-respondent No. 1, herein and against the respondents-appellants, herein (for short, the "impugned award"), on the grounds taken in the memo of appeal.

2. The claimant and the driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The Department has questioned the impugned award on the grounds that it is not liable to satisfy the award and the award amount is not just and appropriate.

Brief Facts:

4. Chet Ram injured was on his way from Shimla to his native place at Village Nayali, Tehsil Sundernagar, District Mandi, H.P., on 15th January, 2000, on Motor Cycle bearing registration No. HP-07-1600, was hit by vehicle-Gypsy bearing registration No. HP-06-1514, near Nehru Park Bhojpur, Sundernager, at about 7.45 p.m., which was being driven Gurbachan Singh, driver of respondents No. 1 & 3 in the claim petition-appellants herein, rashly and negligently. He sustained injuries, was taken to the hospital at Sundernagar and referred to Indira Gandhi Medical College, Shimla. He has suffered 30%

disability of the right leg. FIR No. 19 of 2000, under Sections 279 & 337 of the Indian Penal Code was registered in Police Station, Sundernagar.

5. The claimant claimed compensation to the tune of Rs.15,00,000/-, as per the break-ups given in the claim petition.

6. The claim petition was resisted by the respondents on the grounds taken in their memo of objections.

7. Following issues came to be framed by the Tribunal:

"*1. Whether the respondent No. 2 was driving the vehicle bearing No. HP-06-1514 on 15.1.2000, at 7.45, near Nehru Park Bhojpur, Tehsil Sundernagar, District Mandi, H.P., in a rash and negligent manner resulting in injuries to the petitioner Chet Ram as alleged? ...OPP*

2. If issue No. 1 is proved, whether the petitioner is entitled for compensation, if so, as to what amount and from whom? ..OPP

3. Whether the petition is bad for mis-joinder of necessary parties as alleged? ...OPR(1)

4. Whether the petition is barred by Order 2 Rule 2 C.P.C. as alleged? ...OPR(1)

5. Whether the petitioner is estopped by his own acts and conduct to file the present petition? ....OPR

6. Relief."

8. The claimant has examined Dr. P.R. Chauhan (PW-1), Suresh Kumar (PW-2) and Dr. Pawan Kumar (PW-3). Claimant also appeared in the witness box as PW-4. The Department has examined Bidhi Chand, Division Engineer as RW-1 and driver Gurbachan Singh appeared in the witness box as RW-2. The parties have also placed on record documents, the details of which are given in the impugned award.

9. The Tribunal, after scanning the evidence, oral as well as documentary, has held that the driver has driven the offending vehicle, rashly and negligently and caused the accident, in which the claimant sustained injuries and awarded compensation to the tune of Rs.1,91,000/-, the details of which are given in para-29 of the impugned award.

10. I have perused the impugned award and gone through the record.

<u>Issue No. 1.</u>

11. The claimant has proved by leading evidence, oral as well as documentary that driver, namely Gurbachan Singh, had driven the offending vehicle, rashly and negligently, on 15.1.2000, at 7.45 p.m., near Nehru Park Bhojpur, in which Chet Ram sustained injuries.

12. The learned Counsel for the appellant argued that FIR No. 19 of 2000 was registered against the driver, which has resulted into acquittal.

13. I have gone through the judgment Ext. RW-1/C passed by the Court of competent jurisdiction. The prosecution case was shrouded in doubts and accordingly, the accused came to be acquitted.

14. The moot question is – whether acquittal in the said case can be a ground to deny compensation? The answer is in the negative for the following reasons.

15. It is beaten law of land that granting of compensation is a welfare legislation and the hyper- technicalities, mystic maybes, procedural wrangles and tangles have no role to play and cannot be made ground to defeat the claim petitions and to defeat the social purpose of granting compensation.

16. The Jammu and Kashmir High Court in the case titled as **Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81,** held that the MV Act is Social Welfare Legislation and the procedural technicalities cannot be allowed to defeat the purpose of the Act. It is profitable to reproduce para 20 of the judgment herein:

> *"20. Before concluding, it is also observed that it is a social welfare legislation under which the compensation is provided by way of Award to the people who sustain bodily injuries or get killed in the vehicular accident. These people who sustain injuries or whose kith and kins are killed, are necessarily to be provided such relief in a short span of time and the procedural technicalities cannot be allowed to defeat the just purpose of the Act, under which such compensation is to be paid to such claimants."*

17. The findings recorded by the said Court in acquittal cannot be a ground to defeat the rights of the claimants. Even, if the driver is acquitted in the criminal proceedings, that may not be a ground for dismissal of the claim petitions.

18. My this view is fortified by the judgment rendered by the Apex Court in **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354** wherein a bus hit an over-hanging high tension wire resulting in 26 casualties. The driver earned acquittal in the criminal case on the score that the tragedy that happened was an act of God. The Apex Court held that the plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rightly rejected by the Tribunal. It is apt to reproduce para 2 of the judgment herein:

> *"2. The Facts: A stage carriage belonging to the petitioner was on a trip when, after nightfall, the bus hit an over-hanging high tension wire resulting in 26 casualties of which 8 proved instantaneously fatal. A criminal case ensued but the accused-driver was acquitted on the score that the tragedy that happened was an act of God. The Accidents Claims Tribunal which tried the claims for compensation under the Motor Vehicles Act, came to the conclusion, affirmed by the High Court, that, despite the screams of the passengers about the dangerous overhanging wire ahead, the rash driver sped towards the lethal spot. Some lost their lives instantly; several lost their limbs likewise. The High Court, after examining the materials, concluded:*
>
> > *"We therefore sustain the finding of the Tribunal that the accident had taken place due to the rashness and negligence of R. W. 1 (driver) and consequently the appellant is vicariously liable to pay compensation to the claimant."*
> >
> > *The plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rejected and rightly. The requirements of culpable rashness under Section 304A, I.P.C. is more drastic than negligence sufficient under the law of tort to create liability. The quantum of compensation was moderately fixed and*

although there was, perhaps, a case for enhancement, the High Court dismissed the cross-claims also. Being questions of fact, we are obviously unwilling to re-open the holdings on culpability and compensation."

19. It is also profitable to reproduce relevant portion of para 8 of the judgment rendered by the High Court of Karnataka in a case titled **Vinobabai and others versus K.S.R.T.C. and another,** reported in **1979 ACJ 282:**

" 8. .... Thus, the law is settled that when the driver is convicted in a regular trial before the Criminal Court, the fact that he is convicted becomes admissible in evidence in a civil proceeding and it becomes prima facie evidence that the driver was culpably negligent in causing the accident. The converse is not true; because the driver is acquitted in a criminal case arising out of the accident, it is not established even prima facie that the driver is not negligent, as a higher degree of culpability is required to bring home an offence."

20. Reliance is also placed on the judgment made by this Court in **Himachal Road Transport Corporation and another versus Jarnail Singh and others,** reported in **Latest HLJ 2009 (HP) 174,** wherein it has been held that acquittal of the driver in the criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims Tribunal whether the driver was negligent or not in causing the accident. It is apt to reproduce relevant portion of para 15 of the judgment herein:

"15. In view of the definitive law laid down by their Lordships of the Hon'ble Supreme Court and the judgments cited hereinabove, it is now well settled law that the acquittal of the driver in the criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims Tribunal whether the driver was negligence or not in causing the accident. ...."

21. Having said so, I am of the considered view that the Tribunal has rightly recorded findings on Issue No. 1. Accordingly, the findings recorded on Issue No. 1 are upheld.

22. Before dealing with issue No. 2, I deem it proper to deal with issues No. 3 to 5.

Issues No. 3 to 5.

23. The onus to prove issues No. 3 to 5 was upon the respondents No. 1 to 3 in the claim petition-appellants herein, which they have failed to discharge. The Tribunal has rightly made discussions relating to these issues in the impugned award right from paras 30 to 37. Thus, no interference is required.

Issue No. 2.

24. Now, the question is whether the award amount is excessive.

25. The Tribunal while awarding compensation in injury cases has to award compensation under the heads- pecuniary and non-pecuniary damages.

26. The Apex Court in case titled as **R.D. Hattangadi** versus **M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** had discussed all aspects and laid down guidelines how a guess work is to be done and how compensation is to be awarded under various heads.

27. The Apex Court in case titled as **Arvind Kumar Mishra** versus **New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085** in para-7 of the judgment has held as under:

> *"7. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases - and that is now recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand."*

28. The Apex Court in case titled as **Ramchandrappa** versus **The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787** also laid down guidelines for granting compensation in injury cases. It is apt to reproduce paras 8 & 9 of the judgment hereinbelow:

> *"8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.*
>
> *9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."*

29. The Apex Court in case titled as **Kavita** versus **Deepak and others**, reported in **2012 AIR SCW 4771** also discussed the entire law and laid down the guidelines how to grant compensation.

30. The Tribunal has awarded Rs.25,000/- under the head 'cost of medicines', Rs.20,000/-under the head 'pain and sufferings', Rs.10,000/- under the head 'loss of

amenities of life, Rs.10,000/- under the head 'loss of expectation of life', Rs.2,000/- under the head 'taxi charges', Rs.24,000/- under the head 'loss of income for one year and Rs.1,00,000/- under the head 'future loss of income', total compensation amounting to Rs.1,91,000/-. The Tribunal while making the assessment has made discussion right from paras 16 to 29 in the impugned award.

31. Having said so, it is held that the Tribunal has awarded just and appropriate compensation to the claimant. Accordingly, the findings returned by the Tribunal on Issue No. 2 are upheld.

32. Accordingly, the appeal is dismissed and the impugned award is upheld.

33. The Registry is directed to release the awarded amount in favour of claimant, strictly as per the terms and conditions, contained in the impugned award.

34. Send down the records after placing a copy of the judgment on the file of the claim petition.

****

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

FAO No. 224 of 2008 a/w
FAOs No. 225 to 231 of 2008, and
CO No. 604, 611, 612 & 674 of 2008
Reserved on: 22.05.2015
Decided on: 29.05.2015

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1. FAO No. 224 of 2008

Hem Ram & another …Appellants.
Versus
Krishan Chand & another …Respondents.

2. FAO No. 225 of 2008

Hem Ram & another …Appellants.
Versus
Asha Ram & others …Respondents.

3. FAO No. 226 of 2008

Hem Ram & another …Appellants.
Versus
Smt. Sita Devi & others …Respondents.

4. FAO No. 227 of 2008

Hem Ram & another …Appellants.
Versus
Sh. Inder Parkash & others …Respondents.

5. FAO No. 228 of 2008

Hem Ram & another …Appellants.
Versus
Partap Singh & another …Respondents.

6. FAO No. 229 of 2008

Hem Ram & another …Appellants.
Versus
Smt. Kanta Devi & others …Respondents.

7. FAO No. 230 of 2008

Hem Ram & another ...Appellants.

Versus

Laxmi Singh & another ...Respondents.

8. FAO No. 231 of 2008

Hem Ram & another ...Appellants.

Versus

Jaimanti & others ...Respondents.

Motor Vehicle Act, 1988- Section 149- Mahindra Utility met with an accident in which five persons died- claimants pleaded that deceased were travelling in the vehicle along with goods/articles - the owner and driver did not deny this fact specifically but had denied it evasively- Insurer had not produced the copies of the registration certificate and the route permit- the risk of '1 + 3' is covered in terms of the insurance contract- therefore, insurer is to be saddled with liability to pay compensation in respect of three person- held, that in these circumstances Insurance Company was wrongly absolved of the liability and the owner was wrongly held liable to pay compensation. (Para-22 to 53)

Cases referred:

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354

Vinobabai and others versus K.S.R.T.C. and another, 1979 ACJ 282

Himachal Road Transport Corporation and another versus Jarnail Singh and others, Latest HLJ 2009 (HP) 174

Oriental Insurance Co. versus Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81

Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627

United India Insurance Company Limited versus K.M. Poonam & others, 2011 ACJ 917

National Insurance Company Limited versus Anjana Shyam & others, n 2007 AIR SCW 5237

National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others, ILR-2015 Vol.XLV-II, Page 825

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787

Kavita versus Deepak and others, 2012 AIR SCW 4771

United India Insurance Company Ltd. versus Smt. Kulwant Kaur, Latest HLJ 2014 (HP) 174

Nagappa versus Gurudayal Singh and others, AIR 2003 Supreme Court 674

State of Haryana and another versus Jasbir Kaur and others, AIR 2003 SCC 3696

The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another, AIR 2003 Supreme Court 4172

A.P.S.R.T.C. & another versus M. Ramadevi & others, 2008 AIR SCW 1213

Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr., 2009 AIR SCW 3717

Ningamma & another versus United India Insurance Co. Ltd., n 2009 AIR SCW 4916,

Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service, 2013 AIR SCW 5800

Savita versus Bindar Singh & others, n 2014 AIR SCW 2053

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellants:	Ms. Jyotsna Rewal Dua, Advocate.
For the respondents:	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate, for respondent-insurer in all the appeals. Mr. Anil God, Advocate, for respondents-claimants in FAO No. 225 of 2008. Mr. Deepak Kaushal, Advocate, for respondents-claimants in FAO No. 227 of 2008. Mr. Rupinder Singh & Ms. Shashi Kiran, Advocates, for respondents-claimants in FAOs No. 228 to 231 of 2008 and for cross-objectors in Cross Objections No. 604, 611, 612 & 674 of 2008.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

A vehicular traffic accident has given birth to eight appeals and four cross objections in hand, thus, I deem it proper to determine all these appeals and cross objections by this judgment.

2. The owner-insured and the driver of the offending vehicle are the appellants in all the eight appeals have called in question the award, dated 20.07.2007, made by the Motor Accident Claims Tribunal-II, Sirmaur District at Nahan, H.P. (for short "the Tribunal") in a batch of eight claim petitions, whereby compensation stood awarded in favour of the claimants and the owner-insured and the driver came to be saddled with liability (for short "the impugned award").

3. Some of the claimants/victims, by the medium of the cross-objections, have questioned the impugned award on the ground of adequacy of compensation.

4. The insurer and some of the claimants/victims have not questioned the impugned award on any ground.

5. In view of the above, the following questions are to be determined in these appeals and cross-objections:

(i) Whether the Tribunal has rightly saddled the owner-insured and the driver of the offending vehicle with liability and exonerated the insurer?

(ii) Whether the amount awarded is just and appropriate?

6. In order to determine the said questions, it is necessary to give brief resume of the case, the womb of which has given birth to these appeals and the cross-objections.

7. The claimants in five claim petitions, i.e. MAC Petitions No. 37-N/2 of 2002, 41-N/2 of 2002, 43-N/2 of 2002, 59-N/2 of 2002 and 33-N/2 of 2003 (subject matters of FAO No. 229 of 2008 & CO No. 611 of 2008, FAOs No. 226, 227, 225 of 2008 and FAO No. 231 of 2008 & CO No. 674 of 2008, respectively), are the dependents of the deceased who have lost their lives in the said traffic accident.

8. The claimants in three claim petitions, i.e. MAC Petitions No. 53-N/2 of 2002, 94-N/2 of 2002 and 35-N/2 of 2003 (i.e. subject matters of FAO No. 230 of 2008 &

CO No. 612 of 2008, FAO No. 224 of 2008 and FAO No. 228 of 2007 & CO No. 612 of 2008, respectively), are the victims, who have sustained injuries in the said accident.

9. In all the claim petitions, it is averred that the driver, namely Shri Vijender Singh, had driven the offending vehicle, i.e. Mahindra Utility, bearing registration No. HP-18A-0165, rashly and negligently, on 15.04.2002, at about 8.00 A.M., near Kanlog,Tehsil Pachhad, District Sirmaur, H.P. and caused the accident, in which five persons, namely Randeep Singh, Vikram Singh, Dinesh Kumar, Hoshiar Singh and Om Prakash, sustained injuries and succumbed to the injuries and three persons, namely Krishan Chand, Partap Singh and Laxmi Singh sustained injuries.

10. The claimants have claimed compensation, as per the break-ups given in the respective claim petitions.

11. The owner-insured and the driver of the offending vehicle have filed joint replies in all the eight claim petitions. The insurer has also contested the claim petitions by the medium of the replies.

12. The Tribunal, after noticing the facts of the cases read with the fact that the five claim petitions are outcome of one accident and similar evidence is to be led in all the five claim petitions, clubbed the petitions, being MAC Petitions No. 37-N/2 of 2002, 41-N/2 of 2002, 43-N/2 of 2002, 53-N/2 of 2002 and 94-N/2 of 2002 and framed the following issues on 04.12.2002 in the lead case being MAC Petition No. 37-N/2 of 2002:

> *"1) Whether Randeep Singh Son of late Sunder Singh, Vikram Singh son of Sardar Singh and Dinesh Kumar son of Inder Prakash died in a motor accident caused by rash and negligent driving of a Mahindra Utility (No. HP-18 A-0165) by its driver Respondent 2, Vijender Singh, at Kanlog (Beuri) Village in Tehsil Pachhad, on April 15, 2002? ...OPP*
>
> *2) Whether petitioners Laxmi Singh and Krishan Chand sustained grievous injuries in a motor accident caused by rash and negligent driving of a Mahindra Utility (No. HP-18 A-0165) by its driver respondent 2, Vijender Singh at Kanlog (Beuri) village in Tehsil Pachhad, on April 15, 2002? ...OPP*
>
> *3) If above issues are proved, whether the petitioners are entitled to compensation? If so, to what amount and from whom? ...OPP*
>
> *4) Whether the deceased and injured were unauthorised passengers and the Mahindra Utility was being plied in violation of the terms and conditions of the insurance policy. If so, what effect? ...OPR*
>
> *5) Whether the driver of the Mahindra Utility did not possess a valid and effective driving licence at the time of the accident. If so, to what effect? ...OPR*
>
> *6) Relief."*

13. Following issues came to be famed in MAC Petition No. 59-N/2 of 2002 on 4.12.2002:

> *"1) Whether Om Parkash, son of Asha Ram died in a motor accident caused by a Mahindra Utility (No. HP-18-A-0165) at a place known as Kanlog in Tehsil Pachhad, on April 15, 2002 at about 8.00 A.M.? ...OPP*

2) If above issue is proved, whether the petitioners are entitled to compensation? If so, to what amount and from whom? ...OPP

3) Whether the driver of the Mahindra Utility did not possess a valid and effective driving licence at the time of the accident. If so, to what effect? ...OPR-3

4) Whether the vehicle in question was being plied in violation of the terms and conditions of the Insurance Policy?...OPR-3

5) Relief."

14. Similar set of issues were framed by the Tribunal in MAC Petitions No. 33-N/2 of 2003 and 35-N/2 of 2003 on 26.08.2003. I deem it proper to reproduce the issues framed in one of the claim petitions, i.e. MAC Petition No. 33-N/2 of 2003 herein:

"1) Whether Hoshiar Singh died in a motor accident caused by rash and negligent driving of a Mohindra Utility (No. HP-18-A-0165) by respondent 2, Vijender Singh near Kanlog village in Pachhad Tehsil on April 15, 2002? ...OPP

2) If issue 1 is proved, what amount the petitioners are entitled to receive as compensation and from whom? ...OPP

3) Whether the driver of the vehicle in question did not have any valid and effective driving licence at the time of the accident. If so, to what effect? ...OPR-3

4) Whether the vehicle involved in an accident was being plied in violation of the terms and conditions of the insurance policy at the material time. If so, its effect? ...OPR-3

5) Whether the deceased was an unauthorised passenger in the vehicle in question. If so, what effect? ...OPR-3

6) Relief."

15. It is apt to record herein that MAC Petitions No. 33-N/2 of 2003 and 35-N/2 of 2003 were clubbed with MAC Petition No. 37-N/2 of 2002 vide orders, dated 26.11.2003.

16. The claimants in all the claim petitions, except MAC Petition No. 59-N/2 of 2002, led evidence in MAC Petition No. 37-N/2 of 2002 and examined Kanta Devi as PW-1, Sher Singh as PW-2, Laxmi Singh as PW-3, Sardar Singh as PW-4, Surinder Kumar as PW-5, Dr. Sandeep Sharma as PW-6, Jaimanti as PW-7, Inder parkash as PW-8, Kishan Chand as PW-9, Rattan Singh as PW-10 and Partap Singh as PW-11. The respondents have not examined any witness, however, owner-insured-Hem Ram and the driver-Vijender Singh appeared in the witness box as RW-3 and RW-4, respectively.

17. The claimants in MAC Petition No. 59-N/2 of 2002, one of the claimants, namely Asha Ram, appeared in the witness box as PW-1 and examined Kesar Singh as PW-2. The insurer examined Bhim Singh, Criminal Ahlmad of the Court of Sub Judge, Rajgarh as RW-1 and Bishan Thakur, the Investigating Officer, as RW-2.

18. Parties have also produced documents/copies of the documents, which stand exhibited, details of which have been given separately in the prescribed proforma - Form-A and Form-B annexed with the impugned award.

19. It appears that the Tribunal has scanned and discussed the entire evidence together and returned the findings on all issues except assessment of the compensation. The Tribunal has assessed the compensation in each of the claim petitions separately.

20. The claimants in Claim Petitions No. 37-N/2 of 2002, 41-N/2 of 2002, 43-N/2 of 2002, 33-N/2 of 2003 and 35-N/2 of 2003 have specifically pleaded that the deceased/injured were travelling in the offending vehicle alongwith goods/articles. It is apt to record herein that in Claim Petition No. 37-N/2 of 2002, it has been pleaded that the deceased had gone to Thakar Dawara Jee in connection with marriage work, had to come back alongwith his articles, hired the vehicle for Rs.100/-, which were paid to the driver of the offending vehicle. In Claim Petitions No. 53-N/2 of 2002, 59-N/2 of 2002 and 94-N/2 of 2002, it has been pleaded that the deceased/injured were walking on the road as pedestrian when the offending vehicle hit them.

21. The owner-insured and the driver of the offending vehicle have not specifically denied the said factum, however, they have made evasively denial. They have admitted that accident has taken place but have stated that the claimants are not entitled to any compensation as the accident was outcome of mechanical defect. Their replies are evasive, which can be said to be admission in terms of the mandate of Order VIII of the Code of Civil Procedure, 1908 (for short "CPC").

22. It was for the insurer to plead and prove that the owner-insured has committed breach by using the vehicle for which route permit and registration was not granted. The insurer has neither produced the copies of the registration certificate and the route permit nor has taken steps to ask the driver and owner-insured for the production of the said documents, not to speak of making request to the Tribunal for summoning the said record from the Registration Authority.

23. The insurer has examined two witnesses in support of its defence. One is the Criminal Ahlmad from the Court of Sub Judge, Rajgarh, who was dealing with the file in criminal case and the another is the Investigating Officer, who had conducted the investigation and presented the charge sheet/final report in terms of the mandate of Section 173 (2) of the Code of Criminal Procedure (for short "CrPC") before the said Court (for short "the Magistrate").

24. On the other hand, the claimants in all the claim petitions have led evidence and all the witnesses have stated that the deceased/injured were travelling in the offending vehicle as owner of goods/articles and some of them were pedestrians.

25. The Magistrate has dismissed the criminal case registered against the driver of the offending vehicle while holding that the prosecution has failed to prove the case beyond reasonable doubt. The Magistrate, while recording the judgment, in paras 14, 15 and 17 held that the evidence is contradictory and prosecution case is shrouded in doubts. It is apt to reproduce paras 18 and 19 of the judgment rendered by the Magistrate, Ext. RW-4/A, herein:

> *"18. The aforesaid evidence as well as law cited shows that death and receiving injuries are not sufficient to hold the accused guilty for the offences for which he is charged. There should must be direct nexus between rashness or negligence between driving and occurrence of accident. In the prosecution case prosecution witnesses have deposed two different versions which has causes doubt in the prosecution case. In view of the same, I have no option*

> *accept to inferred that the insufficient evidence of the prosecution has causes doubt, in the prosecution case. Accordingly, in my opinion, the accused is entitled for benefit of doubt. hence, the points are decided in negatives.*
>
> *19. In view of my aforesaid discussions and findings, the accused is acquitted after giving him benefit of doubt u/ss 279, 337, 338 and 304-A IPC. His bail bonds are discharged. The file after needful be consigned to records room."*

26. The Magistrate has made the foundation of the dismissal order in view of the contradictory evidence brought by the prosecution on record. One set of evidence on record is that all the deceased/injured were travelling in the vehicle and another set is that some were travelling in the vehicle and some of them were walking on the road. There is also evidence on the file that some of the persons were travelling in the vehicle alongwith articles. Even, the Magistrate has held that the evidence of the Investigating Officer is not worth credence, hence, unbelievable.

27. Thus, the prosecution has failed to prove whether the said persons were travelling in the vehicle with articles or without articles or whether some of them were walking on the road. Moreover, that cannot be a ground to show door to the claimants read with the fact, at the cost of repetition, that the owner-insured has made evasive denial, as discussed hereinabove.

28. The question is - whether the findings recorded by the Criminal Court can be made basis for holding that the driver has not driven the vehicle rashly and negligently and the deceased/injured were gratuitous passengers?

29. It is beaten law of land that if conviction is recorded by the Criminal Court, that is the best ground to hold that the driver had driven the vehicle rashly and negligently, but, if the driver earns acquittal, that cannot be a ground for dismissal of the claim petitions.

30. My this view is fortified by the judgment rendered by the Apex Court in **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354** wherein a bus hit an over-hanging high tension wire resulting in 26 casualties. The driver earned acquittal in the criminal case on the score that the tragedy that happened was an act of God. The Apex Court held that the plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rightly rejected by the Tribunal. It is apt to reproduce para 2 of the judgment herein:

> *"2. The Facts: A stage carriage belonging to the petitioner was on a trip when, after nightfall, the bus hit an over-hanging high tension wire resulting in 26 casualties of which 8 proved instantaneously fatal. A criminal case ensued but the accused-driver was acquitted on the score that the tragedy that happened was an act of God. The Accidents Claims Tribunal which tried the claims for compensation under the Motor Vehicles Act, came to the conclusion, affirmed by the High Court, that, despite the screams of the passengers about the dangerous overhanging wire ahead, the rash driver sped towards the lethal spot. Some lost their*

lives instantly; several lost their limbs likewise. The High Court, after examining the materials, concluded:

> *"We therefore sustain the finding of the Tribunal that the accident had taken place due to the rashness and negligence of R. W. 1 (driver) and consequently the appellant is vicariously liable to pay compensation to the claimant."*

The plea that the criminal case had ended in acquittal and that, therefore, the civil suit must follow suit, was rejected and rightly. The requirements of culpable rashness under Section 304A, I.P.C. is more drastic than negligence sufficient under the law of tort to create liability. The quantum of compensation was moderately fixed and although there was, perhaps, a case for enhancement, the High Court dismissed the cross-claims also. Being questions of fact, we are obviously unwilling to re-open the holdings on culpability and compensation."

31. It is also profitable to reproduce relevant portion of para 8 of the judgment rendered by the High Court of Karnataka in a case titled **Vinobabai and others versus K.S.R.T.C. and another,** reported in **1979 ACJ 282:**

> *" 8. .... Thus, the law is settled that when the driver is convicted in a regular trial before the Criminal Court, the fact that he is convicted becomes admissible in evidence in a civil proceeding and it becomes prima facie evidence that the driver was culpably negligent in causing the accident. The converse is not true ; because the driver is acquitted in a criminal case arising out of the accident, it is not established even prima facie that the driver is not negligent, as a higher degree of culpability is required to bring home an offence."*

32. Reliance is also placed on the judgment made by this Court in **Himachal Road Transport Corporation and another versus Jarnail Singh and others,** reported in **Latest HLJ 2009 (HP) 174,** wherein it has been held that acquittal of the driver in the criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims Tribunal whether the driver was negligent or not in causing the accident. It is apt to reproduce relevant portion of para 15 of the judgment herein:

> *"15. In view of the definitive law laid down by their Lordships of the Hon'ble Supreme Court and the judgments cited hereinabove, it is now well settled law that the acquittal of the driver in the criminal trial will have no bearing on the findings to be recorded by the Motor Accident Claims Tribunal whether the driver was negligence or not in causing the accident. ...."*

33. Having said so, the Tribunal as well as the Appellate Court have to scan the evidence and return findings while keeping in mind the aim and object of granting of the compensation.

34. It is well settled that aim, object and purpose of granting compensation is social one, it is a welfare legislation, is to be achieved as early as possible and cannot be defeated while invoking the hypertechnicalities, mystic maybes and niceties. Procedural

wrangles and tangles have no role to play and cannot be made ground to defeat the claim petitions.

35. My this view is fortified by the judgment of the Apex Court in **N.K.V. Bros.'s case (supra).** It is apt to reproduce relevant portion of para 3 of the judgment herein:

> *"3. Road accidents are one of the top killers in our country, specifically when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accident Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their "neighbour". Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practised by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Court should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard.*
>
> *Emphasis supplied"*

36. The Jammu and Kashmir High Court in the case titled as **Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81,** held that the MV Act is Social Welfare Legislation and the procedural technicalities cannot be allowed to defeat the purpose of the Act. It is profitable to reproduce para 20 of the judgment herein:

> *"20. Before concluding, it is also observed that it is a social welfare legislation under which the compensation is provided by way of Award to the people who sustain bodily injuries or get killed in the vehicular accident. These people who sustain injuries or whose kith and kins are killed, are*

necessarily to be provided such relief in a short span of time and the procedural technicalities cannot be allowed to defeat the just purpose of the Act, under which such compensation is to be paid to such claimants."

37. It is also apt to reproduce relevant portion of para 12 of the judgment of the Apex Court in the case titled as **Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627,** herein:

"12. ....While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."

38. While going through the pleadings, the evidence and the impugned award read with the judgment made by the Magistrate in the criminal case, *prima facie,* it appears that the claimants have proved that the deceased/injured in Claim Petitions No. 37-N/2 of 2002, 41-N/2 of 2002, 43-N/2 of 2002, 33-N/2 of 2003 and 35-N/2 of 2003 were travelling in the offending vehicle as owner of the goods/articles, which has not been denied by the other side, as discussed hereinabove.

39. Deriving support from the judgment in the criminal case, it can be safely said that the insurer has not dislodged the evidence led by the claimants because the insurer has examined only the investigating officer, who has been disbelieved by the Magistrate and his statement was made basis for dismissing the case. Thus, his statement cannot be relied in these proceedings also in the given circumstances.

40. The claimants in other three claim petitions, i.e. 53-N/2 of 2002, 59-N/2 of 2002 and 94-N/2 of 2002, it has been pleaded that the deceased/injured were walking on the road side, were hit by the offending vehicle, which has not been denied specifically.

41. There is evidence on the file and even evidence has come before the Magistrate to this effect, thus, it cannot be said that some of the deceased/injured were not walking on the road side or some of them were not travelling in the vehicle.

42. It was for the insurer to plead and prove that the deceased/injured were gratuitous passengers, which it has failed to do so and the owner-insured & the driver have given evasive replies to the pleadings of the claimants. Even, the driver has stated before the Tribunal, while appearing as RW-4, that none was travelling in the vehicle.

43. It is worthwhile to record herein that the driver of the offending vehicle, while appearing as RW-4, has admitted in his cross-examination that many persons were standing at the place of accident, who were dragged into the gorge alongwith the offending vehicle.

44. Having said so, all the claimants have proved that five persons, namely Randeep Singh, Vikram Singh, Dinesh Kumar, Hoshiar Singh and Partap Singh, were travelling in the offending vehicle alongwith goods/articles at the time of the accident, and three persons, namely Laxmi Singh, Om Prakash and Krishan Chand, were hit by the offending vehicle while walking on the road side.

45. The pedestrians, i.e. Laxmi Singh, Om Prakash and Krishan Chand, are the third parties. The factum of insurance is admitted and the insurer has not proved that the owner-insured has committed willful breach. Thus, the insurer is to be saddled with liability to satisfy the award in three claim petitions, i.e. Claim Petitions No. 53-N/2 of 2002, 59-N/2 of 2002 and 94-N/2 of 2002.

46. In Claim Petitions No. 37-N/2 of 2002, 41-N/2 of 2002, 43-N/2 of 2002, 33-N/2 of 2003 and 35-N/2 of 2003, it has been specifically pleaded that the deceased/injured were travelling in the offending vehicle alongwith goods/articles. The risk of '1 + 3' is covered in terms of the insurance contract, Ext. RW-3/A. Meaning thereby, the policy covers the risk of the driver and three passengers. Thus, the insurer is to be saddled with liability of three passengers.

47. My this view is fortified by the judgment of the Apex Court in the case titled as **United India Insurance Company Limited versus K.M. Poonam & others,** reported in **2011 ACJ 917.** It is apt to reproduce para 24 of the judgment herein:

> *"24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle."*

48. It is also apt to reproduce para 15 of the judgment of the Apex Court in the case titled as **National Insurance Company Limited versus Anjana Shyam & others,** reported in **2007 AIR SCW 5237,** herein:

"15. In spite of the relevant provisions of the statute, insurance still remains a contract between the owner and the insurer and the parties are governed by the terms of their contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner, and meet the claims of third parties subject to the exceptions provided in Section 149(2) of the Act. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. The High Court has considered only the aspect whether by overloading the vehicle, the owner had put the vehicle to a use not allowed by the permit under which the vehicle is used. This aspect is different from the aspect of determining the extent of the liability of the insurance company in respect of the passengers of a stage carriage insured in terms of Section 147(1)(b)(ii) of the Act. We are of the view that the insurance company can be made liable only in respect of the number of passengers for whom insurance can be taken under the Act and for whom insurance has been taken as a fact and not in respect of the other passengers involved in the accident in a case of overloading."

49. This Court in a batch of appeals, **FAO No. 257 of 2006,** titled as **National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others,** being the lead case, decided on 10.04.2015, has held that the insurer has to satisfy the awards which are on higher side.

50. In view of the judgments (supra), the insurer has to satisfy the award in three claim petitions, wherein compensation awarded is on higher side and the owner-insured has to satisfy the award in two claim petitions, wherein compensation awarded is on the lower side.

51. The insurer has pleaded in all the claim petitions that the driver of the offending vehicle was not having a valid and effective driving licence and the owner-insured has committed breach. The insurer has not led any evidence to prove that the driver was not having a valid and effective driving licence, however the Tribunal has recorded findings that the driver was having a valid and effective driving licence. The said findings have not been questioned by the insurer, have attained finality. However, I have gone through the record. The insurer has not led any evidence to prove the said issue, thus, has failed to discharge the onus.

52. As discussed hereinabove, the insurer has failed to prove that the offending vehicle was being driven in violation of the terms and conditions of the insurance policy and the owner-insured has committed willful breach in terms of the mandate of Section 149 of the Motor Vehicles Act, 1988 (for short "the MV Act"). Thus, the findings on the said issue is

recorded in favour of the claimants, the owner-insured and the driver and against the insurer.

53. Having said so, the Tribunal has fallen in an error in exonerating the insurer and saddling the owner-insured with liability in all the claim petitions.

Cross Objections No. 604 of 2008 in FAO No. 228 of 2008

54. Claimant-injured-Partap Singh has sought enhancement of compensation on the grounds taken in the cross objections read with the claim petition

55. I have gone through the claim petition and the assessment made by the Tribunal in para 85 of the impugned award and am of the considered view that the Tribunal has fallen in an error in assessing the just and appropriate compensation.

56. It is beaten law of land that while assessing compensation in injury cases, guess work is to be made and compensation is to be awarded under two heads : pecuniary damages and non-pecuniary damages, which has not been done in the present case.

57. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,** reported in **2011 AIR SCW 4787,** and **Kavita versus Deepak and others,** reported in **2012 AIR SCW 4771**.

58. It is proved and held that the claimant-injured remained admitted in PGI, Chandigarh w.e.f. 15.04.2002 to 20.04.2002, remained under treatment upto 18.06.2002. On perusal of the cash memos, Ext. PW-11/B to Ext. PW-11/K, amounting to Rs.2,959/- it can be safely said that the claimant-injured would have spent a huge amount for his treatment, special diet and transportation charges.

59. By guess work, it can be safely said that the claimant-injured would have spent at least Rs.30,000/- as treatment charges, special diet charges and transportation charges, also Rs.2,959/- for medicines, has not been able to earn for about two months, is to be granted, by guess work, at least Rs.10,000/- under the head 'loss of earning capacity for the said period'.

60. The Tribunal has awarded Rs.3,000/- under the head 'attendant charges', which is meager, because the claimant-injured remained under treatment for two months, was suffering for a pretty long time and had engaged an attendant, accordingly, Rs.10,000/- is awarded under the head 'attendant charges'.

61. The claimant-injured has sustained head injury with IIIrd, IVth and Vth Rib Fracture right side in terms of medical certificate, Ext. PW-6/C, thus, would have suffered pain and sufferings during the said period and has to undergo the same in future also. Accordingly, Rs. 50,000/- is awarded under both the heads 'pain and sufferings undergone and pain and sufferings in future'.

62. Accordingly, the compensation is enhanced and the claimant-injured is held entitled to compensation to the tune of Rs.30,000/- + Rs.2,959/- + Rs.10,000/- + Rs.10,000/- + Rs.50,000/- = Rs.1,02,959/- in Claim Petition No. 35-N/2 of 2003. The cross-objections are answered/allowed.

Cross Objections No. 611 of 2008 in FAO No. 229 of 2008

63. By the medium of cross-objections, the claimants/dependents of deceased Randeep Singh have sought enhancement of compensation.

64. I have gone through the assessment made. The Tribunal in paras 62 to 65 of the impugned award has made discussion and has arrived at the conclusion and awarded compensation to the tune of Rs.3,56,000/- in favour of the claimants.

65. I am of the considered view that the amount awarded can neither be said to be excessive nor meager, but is just and appropriate, and is accordingly upheld.

66. Viewed thus, cross objections are dismissed.

Cross Objections No. 612 of 2008 in FAO No. 230 of 2008

67. The Tribunal has made discussions in para 73 of the impugned award as to what amount of compensation the claimant-injured-Laxmi Singh was entitled to.

68. I have gone through the pleadings and para 73 of the impugned award and the evidence. Admittedly, the claimant-injured has suffered head injury and multiple injuries, was admitted in Civil Hospital, Sarahan, wherefrom he was referred to PGI Chandigarh, had to go to PGI for follow-up, was admitted there w.e.f. 13.05.2002 to 21.05.2002. The injured-claimant has also placed on record cash memos, Ext. P-18 to Ext. P-52, amounting to Rs.12,909/-.

69. Thus, it can be said that the claimant-injured was dependent on attendants, would have also spent a huge amount as treatment charges, the injuries have also affected his earning capacity for at least two months, had undergone pain and sufferings for the said period and has to undergo the same in future also.

70. Thus, by guess work, it is held that the claimant-injured is entitled to Rs.30,000/- under the head 'treatment charges' in addition to Rs.12,909/-, Rs.50,000/- under the heads 'pain & sufferings undergone and pain & sufferings in future', Rs. 10,000/- under the head 'loss of earning capacity for the said period', Rs.10,000/- under the head 'attendant charges and Rs.10,000/- under the head 'conveyance charges'; the total compensation to the tune of Rs.30,000/- + Rs.12,909/- + Rs.50,000/- + Rs. 10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.1,22,909/-.

71. Accordingly, the cross objections are allowed and the claimant-injured is held entitled to compensation to the tune of Rs.1,22,909/- in Claim Petition No. 53-N/2 of 2002.

Cross Objections No. 674 of 2008 in FAO No. 231 of 2008

72. Perused para 77 of the impugned award. The compensation awarded is just and appropriate, cannot be said to be meager or excessive. The cross-objections are not tenable.

FAO No. 227 of 2008

73. Mr. Deepak Kaushal, learned counsel for the claimants, argued that though the claimants have not filed cross-objections and have not applied for enhancement of compensation, but under law, are entitled to enhanced compensation and the Court can grant the same after considering the argument. Further argued that the Tribunal has fallen in an error in assessing the compensation and has drawn my attention to the assessment made by the Tribunal.

74. After considering para 71 of the impugned award, it is held that the Tribunal has fallen in an error in assessing the compensation.

75. The moot question is - whether the Tribunal or Appellate Court is/are within its/their jurisdiction to enhance the compensation without the prayer being made for the same?

76. It would be profitable to reproduce Section 168 (1) of the MV Act herein:

> "***168. Award of the Claims Tribunal. -*** *On receipt of an application for compensation made under section 166 , the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:*
> *....................."*

77. The mandate of Section 168 (1) (supra) is to 'determine the amount of compensation which appears to it to be just'.

78. Keeping in view the object of granting of compensation and the legislature's wisdom read with the amendment made in the MV Act in the year 1994, it is for the Tribunal or the Appellate Court to assess the just compensation and is within its powers to grant the compensation more than what is claimed and can enhance the same.

79. This Court in a case titled as **United India Insurance Company Ltd. versus Smt. Kulwant Kaur,** reported in **Latest HLJ 2014 (HP) 174,** held that the Tribunal as well as the Appellate Court is/are within the jurisdiction to enhance the compensation and grant more than what is claimed. It is apt to reproduce paras 41 to 45 of the judgment herein:

> "41. Before I determine what is the just and adequate compensation in the case in hand, it is also a moot question – whether the Appellate Court can enhance compensation, even though, not prayed by the medium of appeal or by cross-objection.
>
> 42. The Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") has gone through a sea change in the year 1994 and sub-section (6) has been added to Section 158 of the MV Act, which reads as under:
>
> > ***"158. Production of certain certificates, licence and permit in certain cases. -***
> > *..................................*
> > *(6) As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is*

> *completed by a police officer, the officer incharge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and Insurer."*

In terms of this provision, the report is to be submitted to the Tribunal having the jurisdiction.

43. Also, an amendment has been carried out in Section 166 of the MV Act and sub-section (4) stands added. It is apt to reproduce sub-section (4) of Section 166 of the MV Act herein:

> ***"166. Application for compensation. -***
>
> *......................................*
>
> *(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act."*

It mandates that a Tribunal has to treat report under Section 158 (6) (supra) of the MV Act as a claim petition. Thus, there is no handicap or restriction in granting compensation in excess of the amount claimed by the claimant in the claim petition.

44. Keeping in view the purpose and object of the said provisions read with the mandate of Section 173 of the MV Act, I am of the view that the Appellate Court is exercising the same powers, which the Tribunal is having. Also, sub-clause (2) of Section 107 of the Code of Civil Procedure (hereinafter referred to as "the CPC") mandates that the Appellate Court is having all those powers, which the trial Court is having. It is apt to reproduce Section 107 sub-clause (2) of the CPC herein:

> ***"107. Powers of Appellate Court. -***
>
> *................................*
>
> *(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein."*

45. Thus, in the given circumstances, the Tribunal as well as the Appellate Court is within the jurisdiction to enhance the compensation. "

80. The same view was taken by the Apex Court in the case of **Nagappa versus Gurudayal Singh and others,** reported in **AIR 2003 Supreme Court 674.** It is apt to reproduce paras 7, 9 and 10 of the judgment herein:

> *"7. Firstly, under the provisions of Motor Vehicles Act, 1988, (hereinafter referred to as "the MV Act") there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case where from the evidence brought on record if Tribunal/Court considers that claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. Only embargo is – it should be 'Just' compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the M.V. Act. Section 166 provides that an application for compensation arising out of an accident involving the death of or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both, could be made (a) by the person who has sustained the injury; or (b) by the owner of the property; (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be. Under the proviso to sub-section (1), all the legal representatives of the deceased who have not joined as the claimants are to be impleaded as respondents to the application for compensation. Other important part of the said Section is sub-section (4) which provides that "the Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act." Hence, Claims Tribunal in appropriate case can treat the report forwarded to it as an application for compensation even though no such claim is made or no specified amount is claimed.*
>
> *8. ....*
>
> *9. It appears that due importance is not given to sub-section (4) of Section 166 which provides that the Tribunal shall treat any report of the accidents forwarded to it under sub-section (6) of Section 158, as an application for compensation under this Act.*
>
> *10. Thereafter, Section 168 empowers the Claims Tribunal to "make an award determining the amount of compensation which appears to it to be just". Therefore, only requirement for determining the compensation is that it must be 'just'. There is no other limitation or restriction on its power for awarding just compensation."*

81. In the case titled as **State of Haryana and another versus Jasbir Kaur and others,** reported in **AIR 2003 Supreme Court 3696,** the Apex Court has discussed the expression 'just'. It is apt to reproduce para 7 of the judgment herein:

> *"7. It has to be kept in view that the Tribunal constituted under the Act as provided in S. 168 is required to make an award determining the amount of compensation which is to be in the real sense "damages" which in turn appears to it to be 'just and reasonable'. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate the compensation must be "just" and it cannot be a bonanza; nor a source of profit; but the same should not be a pittance. The Courts and Tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a wide discretion is vested on the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot be just. (See Helen C. Rebello v. Maharashtra State Road Transport Corporation (AIR 1998 SC 3191)."*

82. The same view has been taken by the Apex Court in a case titled as **The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another,** reported in **AIR 2003 Supreme Court 4172**.

83. The Apex Court in a case titled as **A.P.S.R.T.C. & another versus M. Ramadevi & others,** reported in **2008 AIR SCW 1213,** held that the Appellate Court was within its jurisdiction and powers in enhancing the compensation despite the fact that the claimants had not questioned the adequacy of the compensation.

84. The Apex Court in the case titled as **Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr.,** reported in **2009 AIR SCW 3717,** laid down the same principle while discussing, in para 27 of the judgment, the ratio laid down in the judgments rendered in the cases titled as *Nagappa v. Gurudayal Singh & Ors, (2003) 2 SCC 274; Devki Nandan Bangur and Ors. versus State of Haryana and Ors. 1995 ACJ 1288; Syed Basheer Ahmed & Ors. versus Mohd. Jameel & Anr., (2009) 2 SCC 225; National Insurance Co. Ltd. versus Laxmi Narain Dhut, (2007) 3 SCC 700; Punjab State Electricity Board Ltd. versus Zora Singh and*

Others (2005) 6 SCC 776; A.P. SRTC versus STAT and State of Haryana & Ors. versus Shakuntla Devi, 2008 (13) SCALE 621.

85. The Apex Court in another case titled as **Ningamma & another versus United India Insurance Co. Ltd.,** reported in **2009 AIR SCW 4916,** held that the Court is duty bound to award just compensation to which the claimants are entitled to. It is profitable to reproduce para 25 of the judgment herein:

> *"25. Undoubtedly, Section 166 of the MVA deals with "Just Compensation" and even if in the pleadings no specific claim was made under section 166 of the MVA, in our considered opinion a party should not be deprived from getting "Just Compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the Court is duty bound and entitled to award "Just Compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. However, whether or not the claimants would be governed with the terms and conditions of the insurance policy and whether or not the provisions of Section 147 of the MVA would be applicable in the present case and also whether or not there was rash and negligent driving on the part of the deceased, are essentially a matter of fact which was required to be considered and answered at least by the High Court."*

86. The Apex Court in a latest judgment in a case titled **Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service,** reported in **2013 AIR SCW 5800,** has specifically held that compensation can be enhanced while deciding the appeal, even though prayer for enhancing the compensation is not made by way of appeal or cross appeal/objections. It is apt to reproduce para 9 of the judgment herein:

> *"9. In view of the aforesaid decision of this Court, we are of the view that the legal representatives of the deceased are entitled to the compensation as mentioned under the various heads in the table as provided above in this judgment even though certain claims were not preferred by them as we are of the view that they are legally and legitimately entitled for the said claims. Accordingly we award the compensation, more than what was claimed by them as it is the statutory duty of the Tribunal and the appellate court to award just and reasonable compensation to the legal representatives of the deceased to mitigate their hardship and agony as held by this Court in a catena of cases. Therefore, this Court has awarded just and reasonable compensation in favour of the appellants as they filed application claiming compensation under Section 166 of the M.V. Act. Keeping in view the aforesaid relevant facts and legal evidence on record and in the absence of rebuttal evidence adduced by the respondent, we determine just and reasonable compensation by awarding a total sum of Rs. 16,96,000/- with interest @ 7.5% from the date of filing the claim petition till the date payment is made to the appellants."*

87. The Apex Court in a latest judgment in the case titled as **Smt. Savita versus Bindar Singh & others,** reported in **2014 AIR SCW 2053,** has laid down the same proposition of law and held that the Tribunal as well as the Appellate Court can ignore the claim made by the claimant in the application for compensation. It is apt to reproduce para 6 of the judgment herein:

> *"6. After considering the decisions of this Court in Santosh Devi as well as Rajesh v. Rajbir Singh (supra), we are of the opinion that it is the duty of the Court to fix a just compensation. At the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation."*

88. Having said so, the Tribunal/Appellate Court is within its powers to enhance the compensation.

89. Admittedly, the age of the deceased-Dinesh Kumar was 19 years at the time of the accident, was studying in 10th class, would have become earning hand after some time. By guess work, it can be safely said that even if he would have been working as a labourer, would have been earning not less than Rs.5,000/-, was the source of hope and help to the parents in their old age. Keeping in view the age of the parents and the deceased, multiplier of '12' is applicable.

90. It can be safely held that the claimants have lost their source of hope and help and dependency/income to the tune of Rs.2,500/- per month in view of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.** Thus, the claimants are held entitled to compensation to the tune of Rs. 2,500 x 12 x 12 = Rs. 3,60,000/- in Claim Petition No. 43-N/2 of 2002.

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91. While examining the claim petition and the record, it appears that the compensation awarded to the claimant-injured-Krishan Chand in Claim Petition No. 94-N/2 of 2002 is too meager.

92. The Tribunal has fallen in an error while making assessment in paras 74 to 76 of the impugned award. The disability certificate,Ext. PW-9/B, does disclose that the claimant-injured has suffered 25% disability.

93. The claimant-injured sustained grievous injuries, was taken to Civil Hospital, Sarahan, was referred to PGI, Chandigarh, where he remained admitted w.e.f. 15.04.2002 to 18.04.2002, would have spent a huge amount on his treatment, attendant charges, transportation charges, would have undergone pain and sufferings and has to undergo pain and sufferings in future.

94. Having said so, by exercising guess work, it can be safely held that the claimant-injured is entitled to Rs.20,000/- under the head 'treatment charges', Rs.25,000/- under the head 'pain and sufferings undergone', Rs.25,000/- under the head 'pain and sufferings in future', Rs.10,000/- under the head 'attendant charges, Rs.10,000/- under the head 'transportation charges'. The injury has also affected the earning capacity of the claimant-injured, his physical frame, thus, Rs. 30,000/- is awarded under the said head.

95. Accordingly, the claimant-injured is held entitled to total compensation to the tune of i.e. Rs. 20,000/- + Rs.25,000/- + Rs.25,000/- + Rs.10,000/- + Rs.10,000/- + Rs.30,000/- = Rs.1,20,000/- in Claim Petition No. 94-N/2 of 2002.

96. The Tribunal has awarded interest @ 7.5 % per annum in all the claim petitions, is maintained.

97. Having said so, the impugned award is modified and the insurer is directed to satisfy the award in Claim Petitions No. 53-N/2 of 2002, 59-N/2 of 2002, 94-N/2 of 2002, 43-N/2 of 2002, 37-N/2 of 2002 & 33-N/2 of 2003 and the owner-insured has to satisfy the award in Claim petitions No. 41-N/2 of 2002 & 35-N/2 of 2003.

98. The claimants have been driven because of the negligence of the driver of the offending vehicle right from the Tribunal to this Court read with the fact that the owner-insured and the driver have not taken the specific stand. Had they taken specific stand and not made evasive denial, they would not have been in a position as they are today. Thus, the actions and conduct of the owner-insured demand that he should be saddled with costs throughout. Accordingly, Rs.10,000/- is awarded in each claim petition as costs in favour of the claimants and the owner-insured is directed to satisfy the same in all the claim petitions.

99. The insurer and the owner-insured are directed to deposit the awarded amount within eight weeks before the Registry. On deposit of the amount, the same be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award.

100. Excess amount, if any deposited by the owner-insured be released in his favour through payee's account cheque.

101. Having said so, all the appeals and the cross-objections are disposed of and the impugned award is modified, as indicated hereinabove.

102. Send down the record after placing copy of the judgment on each of the Tribunal's files.

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

Kamal Bahadur Rana. …Appellant.
Versus
State of Himachal Pradesh …Respondent.

Cr.A. No. 109/2013
Reserved on: 28.5.2015
Decided on: 29.5.2015

N.D.P.S. Act, 1985- Section 20- Accused was found to be carrying a bag which was containing 1.800 grams of charas- police officials had not gone to the residence of any person to associate him with investigation, although, houses were located at a distance of 200 meters from the place where the accused was apprehended - there was no entry regarding taking out of the case property from the Malkhana for production in the Court- it is necessary to make entry when the case property is deposited in the Malkhana or is taken out from the same - non-making of the entry makes it doubtful whether the same property was produced before the Court or not- in these circumstances, accused is entitled to be acquitted. (Para-17 and 18)

For the appellant: Ms. Nishi Goel, Advocate.
For the Respondent: Mr. Ramesh Thakur, Asstt. A.G.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 23.1.2013 rendered by the Special Judge, Shimla in Case No. 3-S/7 of 2012, whereby the appellant-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offence punishable under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, he was further ordered to suffer rigorous imprisonment for a period of one year.

2. Case of the prosecution, in a nutshell, is that on 19.8.2011, police party headed by SI Kamal Chand consisting of HC Manoj Kumar, Constables Anil Kumar, Pawan and Sanjeev of SIU, Shimla was on patrol duty on Sanjauli-Dhalli bypass road. At about 12.30 P.M. they spotted a man coming from Dhalli side with a carry bag on his shoulder. On seeing the police party, he got perplexed and started running towards Batish Colony. The police officials over powered him. Option was given to him to be searched either by the Gazetted Officer or Magistrate. However, accused gave consent to be searched by SI Kamal Chand. The bag was searched. It contained 1.800 grams of charas. The recovered contraband was put into the same packets and the packets were sealed with 8 seals of seal impression 'Z'. SI Kamal Chand also filled in NCB forms in triplicate. The case property was produced before the officiating S.H.O. He re-sealed the same. He deposited the case property alongwith other documents with the M.H.C. The contraband was sent to F.S.L. Junga for chemical examination. The report of F.S.L. Junga was 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 9 witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He has denied the case of the prosecution in entirety. Learned trial Court convicted and sentenced the accused, as noticed hereinabove.

4. Ms. Nishi Goel, learned counsel for the accused has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. Ramesh Thakur, learned Assistant Advocate General has supported the judgment passed by the trial Court.

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

7. PW-1 Anil Kumar has deposed that on 19.8.2011, police party headed by SI Kamal Chand and other police officials went towards Dhalli from Sanjauli on patrol duty. When they were near Batish Colony at about 12.30 P.M., a person came from Dhalli side. He got confused. He ran towards stairs of Batish Colony. He was over powered. SI Kamal Chand told the accused that he was suspecting that he may be carrying incriminating material with him and he wanted to conduct his search. The accused was also told that it was his legal right to get himself searched in the presence of gazetted officer or the Magistrate. The accused stated that he would give his search to SI Kamal Chand. A consent memo Ex.PW-1/A was prepared. The bag was searched. One transparent plastic bag was taken out from the bag. On opening the plastic bag, two small plastic packets were taken out. The plastic packets were having the stick shaped black substance, which on inspection was found as Charas. It was weighed. The parcel was prepared and sealed with 8 seals of 'Z'. The NCB form was filled up in triplicate. The seals after use were given to HC Manoj Kumar. The case property was produced at the time of recording statement of PW-1. It was sealed with 5 seals of FSL-II, 4 seals of 'T' and 7 seals of 'Z'. It was produced by the learned Public Prosecutor. There were two other seals which were not legible. The seals were intact. On opening, one plastic bag Ex.P-2 was taken out and in that plastic bag, there were two plastic packets Ex.P-3 and P-4. In these plastic packets stick shaped charas Ex.P-5 was contained. Similarly, Ex.P-7 was also produced in the court. In his cross-examination, PW-1 Anil Kumar has admitted that the road was used by vehicles going towards Kufri. They did not go to the residence of any person for calling him to join the investigation.

8. PW-2 Pawan Kumar has also deposed the manner in which the accused was nabbed, search, seizure and sealing process was completed on the spot. He handed over rukka mark A to MHC, Police Station, Dhalli to record FIR. FIR was recorded. In his cross-examination, he has admitted that when they reached Batish Colony at about 12.30 P.M. they were in a vehicle when they spotted the accused. Volunteered that the vehicle was in a very slow speed. According to him, it was not a busy road and after lapse of many minutes, vehicle started crossing the road. Batish Colony was at a distance of 200 meters from the stairs where the accused was arrested. They did not call any person from Batish Colony.

9. Statement of PW-3 Salig Ram is formal in nature.

10. PW-4 Vinesh Kumar has taken the case property to F.S.L. Junga vide R.C. No. 142/2011.

11. PW-5 Vikas Kumar has brought the result of the chemical examination from F.S.L. Junga.

12. Statement of PW-6 Sant Ram is formal in nature.

13. PW-7 Shiv Kumar has deposed that on 19.8.2011, constable Pawan gave two sealed parcels containing 1.800 grams of charas, NCB forms and sample seal Z to ASI Parkash, who was officiating as S.H.O., Police Station, Dhalli. Thereafter, ASI Parkash Chand resealed the parcel containing Charas by putting five seals of 'T'. Separate sample of seal 'T' was taken by him. Ex.PW-7/A was prepared. On the same day, ASI Parkash Chand gave both the parcels to him alongwith NCB forms, sample seals of 'T' and 'Z'. He deposited the same in the Malkhana after making entries in the Malkhana register. The extract of Malkhana register is Ex.PW-7/B. The case property was sent on 20.8.2011 through constable Vinesh to F.S.L. Junga for chemical examination. He sent Constable Vikas Kumar to F.S.L. Junga for collecting the report. He also filled up NCB form.

14. PW-8 Parkash Chand has deposed that Constable Pawan Kumar had brought two sealed cloth parcels sealed with seal 'Z'. He gave him sealed parcels as well as NCB forms and sample of seal Z. He resealed both the parcels by affixing five seals of 'T' on each parcel and gave the parcels to MHC Shiv Kumar. He prepared resealing certificate Ex.PW-7/A. Specimen seal of 'T' was taken separately on cloth vide Ex.PW-8/C. Columns No. 9 to 11 were filled up by him.

15. PW-9 SI Kamal Chand has deposed the manner in which accused was apprehended, search and seizure process was undertaken and other formalities were completed on the spot. Rukka Ex.PW-9/A was prepared. It was sent to Police Station, Dhalli through Constable Pawan Kumar alongwith case property and NCB form for registration of FIR. He has also identified the case property. In his cross-examination, he has admitted that they were in a private vehicle, but he did not remember the number of the vehicle. He did not know who was the owner of the vehicle. He has admitted that they reached near Batish Colony at about 12.30 P.M. He has also admitted that long route buses as well as other vehicles go via Sanjauli bypass road to Dhalli. Many persons reside in Batish Colony.

16. What emerges from the evidence discussed hereinabove is that accused was apprehended at about 12.30 P.M. on 19.8.2011 at Dhalli bypass road. He gave his consent to be searched by the police officer. The bag on search was found to be contained 1.800 grams of charas. The contraband was sealed. Rukka was prepared. NCB forms were filled in. The rukka was taken to Police Station, Dhalli for the registration of FIR. The FIR was registered. Resealing process was undertaken and the case property was deposited with MHC. MHC sent the case property to F.S.L. Junga and the same was received back after analysis alongwith report.

17. Accused has been nabbed at Dhalli bypass road. It is a busy road. PW-1 Anil Kumar has admitted in his cross-examination that they did not go to the residence of any person for calling him to join the investigation, though the accused was nabbed on the stairs of Batish Colony. PW-2 Constable Pawan Kumar, in his cross-examination, has admitted that Batish Colony was at a distance of 200 meters from the stairs where the accused was arrested and they did not call any person from Batish Colony. PW-9 SI Kamal Chand is the Investigating Officer. He has also admitted in his cross-examination that they had reached near Batish Colony and long route buses as well as other vehicles go via Sanjauli bypass road to Dhalli. Many persons reside in Batish Colony. However, fact of the matter is that despite independent witnesses available, either in Batish Colony or on a busy road, no independent witnesses were associated at the time of search and seizure on the spot. Surprisingly, the police party had gone in a private vehicle but PW-9 Kamal Chand did not remember the number of the vehicle and he did not know who was the owner of the vehicle.

18. The case property, as noticed hereinabove, was produced by the learned Public Prosecutor at the time of recording statement of PW-1 Anil Kumar. There is an entry of the case property deposited with the MHC in Ex.PW-7/B and at the time of sending to F.S.L. Junga and received back from F.S.L. Junga. However, there is no entry when the case property was taken again from the Malkhana to be produced in the court. There is also no DDR. Again there is no entry when the case property was deposited in the Malkhana after the statement of PW-1 was recorded. There is no entry in the Malkhana register when the case property was produced again before the Court at the time of recording the statement of PW-9 Kamal Chand on 8.11.2012. Statement of PW-1 Constable Anil Kumar was recorded on 3.10.2012. It is necessary to make an entry when the case property is deposited in the Malkhana (store room) and taken out from the store room. The production of case property in the court is mandatory. However, in this case since no entry has been made in the Malkhana register when the case property was produced on 3.10.2012 and 8.11.2012, it casts doubt whether it was the same property, which was recovered from the accused and sent to F.S.L. and produced in the Court. It has caused serious prejudice to the accused.

19. Consequently, in view of analysis and discussion made hereinabove, the prosecution has failed to prove the case for offence under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 beyond reasonable doubt against the accused.

20. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 23.1.2013 rendered in Case No. 3-S/7 of 2012 is set aside. Accused is acquitted of the charge framed against him by giving him benefit of doubt. Fine amount, if already deposited, be refunded to the accused. 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 accused and send the same to the Superintendent of Jail concerned in conformity with this judgment forthwith.

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

New India Assurance Company Ltd. …Appellant.
Versus
Smt. Kamla Devi & others …Respondents.

FAO No. 243 of 2008
Reserved on: 22.05.2015
Decided on: 29.05.2015

Motor Vehicle Act, 1988- Section 149- Driver had a learner licence- held, that a person holding a learner licence is competent to drive motor vehicle for which the licence has been issued. (Para-14 to 22)

Cases referred:

Anuj Sirkek versus Neelma Devi and Ors., ILR 2015 H.P. XLIV-VI, Page 1145
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531

For the appellant: Mr. B.M. Chauhan, Advocate.
For the respondents: Mr. Bhuvnesh Sharma, advocate, for respondents No. 1 to 3.
Nemo for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Appellant-insurer has questioned the award, dated 08.01.2008, made by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala (H.P.) (for short "the Tribunal") in M.A.C.T. Petition No. 53-G/II/2005, titled as Smt. Kamla Devi and others versus Ex. Capt. Gian Chand and others, whereby compensation to the tune of Rs. 3,50,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its deposition came to be awarded in favour of the claimants, against the respondents and the appellant-insurer was to satisfy the award (for short "the impugned award").

2. The claimants, the driver and the owner-insured have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has questioned the impugned award on the grounds, details of which have been given in para 1 of the appeal.

4. The questions to be determined in this appeal are:

(i) Whether the impugned award is bad in law?

(ii) Whether the driver of the offending vehicle was not having a valid and effective driving licence?

(iii) Whether the owner-insured has committed any willful breach in terms of Section 149 of the Motor Vehicles Act, 1988 (for short "MV Act") read with the terms and the conditions of the insurance policy?

(iv) Whether the amount awarded is excessive?

5. In order to determine the said questions, it is necessary to give brief resume of the case, the womb of which has given birth to the appeal in hand.

6. Deceased-Mast Ram Rana became the victim of the vehicular accident, which was caused by driver, namely Shri Anurag Rana, while driving offending vehicle, motor cycle, bearing registration No. HP-36-8184, rashly and negligently on 11.11.2004, at about 11.00 A.M. at Adde-Di-Hattian, hit the deceased, who sustained injuries, was taken to Community Health Center, Jawalamukhi, was referred to Zonal Hospital, Dharamshala, was taken to Hoshiarpur wherefrom was referred to Jallandhar (Punjab), where he remained admitted in Intensive Care Unit in Vasal Hospital Private Limited, 37, Kapurthala, Chowk, Jallandhar, and succumbed to injuries at about 10.45 P.M.

7. It is averred in the claim petition that the deceased was 55 years of age at the time of the accident, was proprietor of Rana Rolling Shutter Industries and was earning Rs.15,000/- per month. Further averred that the claimants have spent Rs. 41,000/- as medical expenses and claimed compensation to the tune of Rs. 10,00,000/-, as per the break-ups given in the claim petition.

8. The respondents in the claim petition, i.e. the owner-insured, the driver and the insurer, have resisted the claim petition on the grounds taken in the respective memo of objections.

9. Following issues came to be framed by the Tribunal:

> *"1. Whether on 11.11.2004 the respondent No. 2 was driving the motor cycle No. HP-36-8184 rashly and negligently and hit Sh. Mast Ram who sustained injuries and lateron succumbed to the injuries, as alleged? OPP*
>
> *2. If Issue No. 1 is proved, what amount of compensation the petitioners are entitled to and from whom? OP Parties*
>
> *3. Whether respondent No. 2 was not holding a valid and effective driving licence, as alleged? OPR-2 & 3*
>
> *4. Whether the vehicle in question was not insured with respondent No. 3 at the time of alleged accident? OPR-1 & 3*
>
> *5. Relief."*

10. Parties led evidence. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation to the tune of Rs. 3,36,000/- with interest @ 7.5% per annum from the date of the claim petition till its deposition in favour of the claimants and the insurer came to be saddled with liability.

Issue No. 1:

11. The findings on issue No. 1 are not in dispute. However, I have gone through the record and scanned the evidence and am of the considered view that the claimants have proved by leading evidence, oral as well as documentary, that on 11.11.2004, driver-Anurag Rana had driven the offending vehicle rashly and negligently, hit the deceased, who sustained injuries and succumbed to the injuries. Therefore, the findings returned by the Tribunal on issue No. 1 are upheld.

12. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 & 4.

Issue No. 3:

13. Appellant-insurer had to discharge the onus to prove issue No. 3, which it has failed to do so, for the simple reason that it has not led any evidence. Thus, issue No. 3 was to be decided in favour of the claimants, driver and the owner-insured and against the insurer.

14. However, learned counsel for the appellant-insurer pleaded that the driver of the offending vehicle was having a learner's licence and was not competent to drive the same. The said fact has been discussed by the Tribunal in para 14 of the impugned award and the Tribunal rightly came to the conclusion that the driver was having learner's licence and was competent to drive the offending vehicle, i.e. the motor cycle, in terms of the driving licence, Ext. RW-1/A.

15. Section 2 (19) of the MV Act defines learner's licence. It provides that a person who is holding a learner's licence is authorized to drive a light motor vehicle or a motor vehicle of any specified class or description. It is apt to reproduce Section 2 (19) of the Act herein:

> *"2 ....*
> *(19) "learner's licence" means the licence issued by a competent authority under Chapter II authorising the person*

specified therein to drive as a learner, a motor vehicle or a motor vehicle of any specified class or description;"

16. While going through the said definition, one comes to an escapable conclusion that a person who is having a learner's licence is competent to drive the motor vehicle or a motor vehicle of any specified class or description, for which he has been given the licence.

17. A bare perusal of the driving licence Ext. RW-1/A does disclose that the licence was valid and effective at the time of accident and the driver was competent to drive the motor cycle, i.e., the offending vehicle. It is not the case, either of the claimants or of the insurer, that the driver was not having a learner's licence.

18. This Court has dealt with the issue in the cases titled as **Anuj Sirkek versus Neelma Devi and Ors.,** being **FAO No. 57 of 2014,** decided on 19.12.2014 and **Oriental Insurance Company Ltd. versus Sh. Krishan Dev and others,** being **FAO No. 476 of 2007,** decided on 22.05.2015.

19. It is profitable here to reproduce Section 10 of the MV Act, which reads as under:

"10. Form and contents of licences to drive. - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;

(b) motor cycle with gear;

(c) invalid carriage;

(d) light motor vehicle;

(e) transport vehicle;

(i) road-roller;

(j) motor vehicle of a specified description."

20. The mandate of Section 10 of the Act is that every learner is competent to drive the vehicle, description of which is contained in the driving licence, Ext. RW-1/A in the present case, mention of which is made hereinabove.

21. The issue as to whether a person, who is holding a learner's licence, is competent to drive light motor vehicle, came up for consideration in a case titled **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** and it was held that a person having learner's licence is deemed to have been holding a valid and effective driving licence. It apt to reproduce paras 88 to 90 of the said judgment herein:

"88. Motor Vehicles Act, 1988 provides for grant of learner's licence. [See Section 4(3), Section 7(2), Section 10(3) and Section 14]. A learner's licence is, thus, also a licence within the meaning of the provisions of the said Act. It cannot, therefore, be said that a vehicle when being driven by a learner subject to the conditions mentioned in the licence,

he would not be a person who is not duly licensed resulting in conferring a right on the insurer to avoid the claim of the third party. It cannot be said that a person holding a learner's licence is not entitled to drive the vehicle. Even if there exists a condition in the contract of insurance that the vehicle cannot be driven by a person holding a learner's licence, the same would run counter to the provision of Section 149 (2) of the said Act.

89. The provisions contained in the said Act provide also for grant of driving licence which is otherwise a learner's licence. Sections 3(2) and 6 of the Act provide for the restriction in the matter of grant of driving licence, Section 7 deals with such restrictions on granting of learner's licence. Sections 8 and 9 provide for the manner and conditions for grant of driving licence. Section 15 provides for renewal of driving licence. Learner's licences are granted under the rules farmed by the Central Government or the State Governments in exercise of their rule making power. Conditions are attached to the learner's licences granted in terms of the statute. A person holding learner's licence would, thus, also come within the purview of "duly licensed" as such a licence is also granted in terms of the provisions of the Act and the rules farmed thereunder. It is now a well-settled principle of law that rules validly framed become part of the statute. Such rules are, therefore, required to be read as a part of main enactment. It is also well-settled principle of law that for the interpretation of statute an attempt must be made to give effect to all provisions under the rule. No provision should be considered as surplusage.

90. Mandar Madhav Tambe's case (supra), whereupon the learned counsel placed reliance, has no application to the fact of the matter. There existed an exclusion clause in the insurance policy wherein it was made clear that the Insurance Company, in the event of an accident, would be liable only if the vehicle was being driven by a person holding a valid driving licence or a permanent driving licence "other than a learner's licence". The question as to whether such a clause would be valid or not did not arise for consideration before the Bench in the said case. The said decision was rendered in the peculiar fact situation obtaining therein. Therein it was stated that "a driving licence" as defined in the Act is different from a learner's licence issued under Rule 16 of the Vehicles Rules, 1939 having regard to the factual matrix involved therein."

22. Viewed thus, the Tribunal has rightly held that the driver of the offending vehicle was having a valid and effective driving licence. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

<u>Issue No. 4:</u>

23. It was for the appellant-insurer to prove that the offending vehicle was not insured with it. In one breath, the appellant-insurer has pleaded that the driver of the

offending vehicle was not having a valid and effective driving licence and the owner-insured has committed a willful breach of the terms and conditions of the insurance policy, and in second breath, it has pleaded that the offending vehicle was not insured with it.

24. While going through the record, more particularly, the insurance policy, Ext. R-X, one comes to an inescapable conclusion that the offending vehicle was insured with the appellant-insurer and the insurance policy was in force at the time of the accident. Accordingly, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No. 2:

25. The claimants have proved that the age of the deceased was 55 years at the time of the accident and was earning Rs.6,000/- per month. The Tribunal has discussed this issue in paras 17 to 20 of the impugned award. I am of the considered view that the Tribunal has rightly held that the deceased was earning Rs.6,000/- per month and the claimants have lost the source of income/dependency to the tune of Rs.4,000/- per month and applied the multiplier of '7' while keeping in view the age of the deceased.

26. Having said so, the amount awarded cannot be said to be excessive, though meager. However, the claimants have not questioned the same, is reluctantly upheld.

27. Having said so, all the four questions framed hereinabove are, accordingly, replied.

28. In view of the above, the impugned award merits to be upheld and the appeal is to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

29. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

30. Send down the record after placing copy of the judgment on Tribunal's file.

****

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

New India Assurance Co. Ltd. .....Appellant.
Versus
Smt. Sommaya Shaipy and others ...Respondents

FAO (WCA) No. 48 of 2013.
Judgment reserved on 22nd May,2015
Date of decision: 29th May, 2015.

Workmen Compensation Act, 1923- Section 3- Deceased was a workman- he slipped near the site of work and rolled down in the Nalla- Insurance Company pleaded that it is not liable to pay compensation and interest- no such plea was taken in the reply but this plea was taken for the first time in the appeal- terms and conditions of insurance contract were also not proved- held, that Insurance Company was rightly held liable to pay compensation with interest. (Para-11 to 14)

Case referred:

New India Assurance Co. Ltd. vs. Harshadbhai Amrutbhai Modhiya & Anr., 2006 AIR SCW 2352

For the appellant: Mr. B.M. Chauhan, Advocate.
For the respondents: Mr.V.B. Verma, Advocate, for respondents No. 1 to 3.
Mr. Bhupinder Thakur, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Subject matter of this appeal is award dated 29.11.2012, made by the Employees Compensation Commissioner (I), Palampur, District Kangra, H.P. in W.C. Petition RBT No. 17/11/2008, titled *Som Maya Shaipy and others versus The New India Assurance Co. Ltd. and another,* whereby compensation to the tune of Rs.3,94,120/-, was awarded in favour of the petitioners/claimants and insurer/appellant came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The claimants and owner have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The learned counsel for the insurer/appellant has argued that the Commissioner under the Workmen's Compensation Act, has fallen in an error in saddling the insurer with the interest liability and the amount awarded is not in accordance with the mandate of the Workmen's Compensation Act (for short "the Act").

4. In order to determine both these issues, it is necessary to give a flash-back of the case, the womb of which has given birth to the present appeal.

5. The deceased was a workman under the employment of respondent No.2. It is averred that on 3.4.2008, deceased slipped near the site of work at Avah Project, village Spadu PO Kandbari Tehsil Palampur District Kangra, H.P. where the Anubhav company was carrying out construction work of the Electric Power Project and rolled down in the *nullah,* sustained the injuries and succumbed to the injuries in the hospital. He was being paid Rs.100/- per day as wages and Rs.50/- per day as diet money by respondent No.2.

6. The claimants filed petition under the Workmen's Compensation Act, for the grant of compensation to the tune of Rs.5,00,000/-, as per the break-ups given in the petition.

7. The insurer contested the claim petition and owner-respondent No. 2 admitted the claim petition. It is apt to reproduce paras 6 and 7 of the reply filed to the claim petition, by respondent No. 2 herein:

> *"6.That the contents of para No. 6 of the petition are admitted to the extent that the deceased's death is the direct result of said accident and having taken place during the course of his employment and rest of the para is not admitted for want of knowledge. The petitioner has to prove the same.*
>
> *7.That the contents of para No.7 of the petition are admitted to the extent that the deceased was in receipt of Rs.100/- per day from the Opp. Party No.2 and Rs.50/- daily towards diet money, but the contents of rest of the para are wrong and hence denied in toto."*

8. Following issues came to be framed by the Commissioner:

(i) Whether deceased Nima Lamba was engaged as a mason by respondent No.2 at Avah Project, village Spadu, PO Kandbari Tehsil Palampur District Kangra, H.P. OPP

(ii) Whether Nima Lamba slipped near the site of work and rolled down into a deep nala and sustained injuries on his neck and head, as alleged? OPP

(iii) Whether Nima Lamba died on 7.4.2008 as a result of injuries sustained by him near the site of work, as alleged? OPP.

(iv) Whether Nima Lamba expired at the age of 35 years, as alleged ?OPP

(v) Whether the petitioners are entitled for the compensation as claimed? OPP.

(vi) Whether the petition is bad for non-joinder of necessary parties? OPR-1.

(vii) Whether respondent No. 2 has not entered into any agreement with the Anubhav Company? OPR-1

(viii) Whether the respondent No. 2 has violated the terms and conditions of the W.C. Policy, as alleged? OPR-1.

(ix) Whether Nima Lamba did not expire during the course of his employment?

(x) Relief.

9. The claimants led evidence, oral as well as documentary. The insurer and owner have not led any evidence. Thus; the evidence led by the claimants remained un-rebutted. The factum of insurance is admitted.

10. The insurer has not taken a defence in the reply that the insurer is not liable to pay interest but for the first time, it has been raised in the memo of appeal.

11. The question is whether the insurer has proved the terms and conditions of the insurance contract whereby interest liability is excluded. Neither such a plea was raised nor any evidence was led by the insurer to prove the said factum. Thus, it cannot lie in the mouth of the insurer that it is not liable to pay interest, as per insurance contract. To fortify his stand, the learned counsel for the insurer has placed reliance on the judgment delivered by the apex Court in case ***New India Assurance Co. Ltd. vs. Harshadbhai Amrutbhai Modhiya & Anr.***, reported in ***2006 AIR SCW 2352***. It is apt to reproduce paras 15 and 24 of the said judgment herein:

> *"15.The terms of a contract of insurance would depend upon the volition of the parties. A contract of insurance is governed by the provisions of the Insurance Act. In terms of the provisions of the Insurance Act, an insured is bound to pay premium which is to be calculated in the manner provided for therein. With a view to minimize his liability, an employer can contract out so as to make the insurer not liable as regards indemnifying him in relation to certain matters which do not strictly arise out of the mandatory provisions of any statute. Contracting out, as regards payment of interest by an employer, therefore, is not prohibited in law.*
>
> *16 to 23….. …………… …………….*

> *24. Section 17 of the Workmen's Compensation Act voids only a contract or agreement whereby a workman relinquishes any right of compensation from the employer for personal injury arising out of or in the course of the employment and insofar as it purports to remove or reduce the liability of any person to pay compensation under the Act. As my learned brother has noticed, in the Workmen's Compensation Act, there are no provisions corresponding to those in the Motor Vehicles Act, insisting on the insurer covering the entire liability arising out of an award towards compensation to a third party arising out of a motor accident. It is not brought to our notice that there is any other law enacted which stands in the way of an Insurance Company and the insured entering into a contract confining the obligation of the Insurance Company to indemnify to a particular head or to a particular amount when it relates to a claim for compensation to a third party arising under the Workmen's Compensation Act. In this situation, the obligation of the insurance company clearly stands limited and the relevant proviso providing for exclusion of liability for interest or penalty has to be given effect to. Unlike the scheme of the Motor Vehicles Act, the Workmen's Compensation Act, does not confer a right on the claimant for compensation under that Act to claim the payment of compensation in its entirety from the insurer himself. The entitlement of the claimant under the Workmen's Compensation Act is to claim the compensation from the employer. As between the employer and the insurer, the rights and obligations would depend upon the terms of the insurance contract. Construing the contract involved here, it is clear that the insurer has specifically excluded any liability for interest or penalty under the Workmen's Compensation Act and confined its liability to indemnify the employer only against the amount of compensation ordered to be paid under the Workmen's Compensation Act. The High Court, was therefore, not correct in holding that the appellant-Insurance Company, is also liable to pay the interest on the amount of compensation awarded by the Commissioner. The workman has to recover it from the employer."*

12. The judgment relied upon by the learned counsel for the appellant is not applicable to the facts of the present case for the reasons that neither the insurer has pleaded nor proved the terms and conditions contained in the insurance contract in order to claim that it is not liable to pay interest.

13. I have gone through the insurance policy Ext. R-1. No such condition is contained in the said policy.

14. Thus, the Tribunal has rightly directed the insurer to satisfy the award with interest.

15. The learned counsel for the insurer has argued that the amount awarded is excessive.

16. I have gone through the petition and the reply filed by the owner. The amount awarded cannot be said to be excessive and not in tune with the Act. Respondents have admitted the claim of the claimants and insurer has to indemnify the award.

17. Having said so, the appeal is dismissed. The Registry is directed to release the amount, if received in the Registry, in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payee's cheque account.

18. Send down the records, alongwith a copy of this judgment.

****

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

Oriental Insurance Company Ltd. …Appellant
Versus
Sharda Devi & others …Respondents

FAO No. 283 of 2008
Date of decision: 29.05.2015

Motor Vehicle Act, 1988- Section 149- A cover note showed that vehicle was insured at the time of accident- insurer had failed to prove that owner had committed any breach or the driver of the offending vehicle did not have a valid and effective license at the time of accident- held, that Insurance Company was rightly held liable to pay compensation.
(Para- 10 and 11)

For the appellant : Mr. G.D. Sharma, Advocate.
For the respondents: Mr. Ajay Dhiman, Advocate, for respondents No. 1 & 2.
Mr. Surinder Saklani, Advocate, for respondents No. 3 & 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Challenge in this appeal is to the award, dated 21st November, 2007, made by the Motor Accident Claims Tribunal-III, Kangra at Dharamshala, H.P. (hereinafter referred to as "the Tribunal") in MAC Petition No. 31-P/2003, whereby compensation to the tune of Rs.31,803/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants-respondents No. 1 & 2 herein and against the driver, owner and insurer (for short, the "impugned award"), on the grounds taken in the memo of appeal.

2. The claimants, driver and owner-insured have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The insurer-Oriental Insurance Company Limited has questioned the impugned award on the grounds that the driver was not having a valid and effective driving licence at the time of accident and the vehicle was not insured at the time of accident.

4. In order to determine the said issues, it is necessary to give brief resume of the case herein.

Brief Facts:

5. The claimants, being victims of the vehicular accident, had filed a claim petition before the Tribunal, for grant of compensation to the tune of Rs.47,000/-, as per the break-ups given in the claim petition, on the ground that driver, namely, Vijay Kumar, while driving vehicle-Tempo bearing registration No. HP-37-8712, rashly and negligently, on 13.12.2002, at about 11.30 p.m., in Nagrota Bagwan Bazar, struck his vehicle against van bearing registration No. DL-2C-C4200 and caused damage to said property, i.e. the van.

6. The claim petition was resisted by the respondents on the grounds taken in their memo of objections.

7. Following issues came to be framed by the Tribunal:

"*1. Whether the petitioner has suffered damages on account of rash and negligent driving of the respondent No. 1 resulting into the damages to the van of the petitioners? …OPP*

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

3. Whether the terms of the insurance policy were violated by the respondents No. 1, 2 and respondent 3 is not liable to pay the compensation? …OPR-3

4. Whether the vehicle involved in the accident was not insured by the respondent No. 3 ? …OPP

5. Relief."

7. The claimants have examined Lady Constable Raksha Devi (PW-1), Ashok Kumar (PW-3) and Narinder Kumar (PW-4). Claimant has also appeared in the witness box as PW-2. The owner and insurer have not led any evidence. However, the driver has appeared in the witness box as RW-1.

8. The Tribunal, after scanning the evidence, oral as well as documentary, has held that driver, namely, Vijay Kumar, has driven the offending vehicle, rashly and negligently, on 13.12.2002, at about 11.30 p.m., in Nagrota Bagwan Bazar and caused damage to van bearing registration No. DL-2C-C4200.

9. The said issue is not in dispute. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

Issues No. 3 & 4

10. It was for the insurer to prove issues No. 3 & 4. It has failed to lead any evidence. However, cover note Ext. R-X is placed on the record, which does disclose that the vehicle was insured at the time of accident. The insurer has failed to prove that the owner has committed any breach. Thus, the findings recorded by the Tribunal on Issues No. 3 & 4 are upheld.

11. The insurer has failed to prove that the driver was not having a valid and effective driving licence at the time of accident. Thus, the plea raised by the insurer in this appeal is without any force.

Issue No. 2.

12. The Tribunal has discussed the facts of the case, assessed the damage caused to the van and made discussion in paras 11 and 12 of the impugned award.

13. I am of the considered view that the Tribunal has rightly made the assessment and awarded the just and appropriate compensation to the claimants, which cannot be said to be excessive. Accordingly, the findings returned by the Tribunal on Issue No. 2 are upheld.

14. Having said so, the appeal is dismissed and the impugned award is upheld.

15. The Registry is directed to release the award amount in favour of claimants, strictly as per the terms and conditions, contained in the impugned award.

16. Send down the records after placing a copy of the judgment on the file of the claim petition.

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

Raghu Devi .....Appellant.

Versus

Dewan Chand (deceased)& others ...Respondents

FAO (MVA) No. 238 of 2008.

Date of decision: 29th May, 2015.

Motor Vehicle Act, 1988- Section 166- Deceased was working as a mason and his income can be taken as Rs. 6,000/- p.m.- he was aged 21 years and multiplier of '15' has to be applied- Claim Petition was filed by mother and loss of dependency has to be taken as Rs. 3,000/- p.m. - thus, claimant is entitled to compensation of Rs. 5,04,000/- + Rs. 30,000/- for loss of love and affection. (Para-9 to 12)

Cases referred:

Sarla Verma and Ors versus Delhi Transport Corporation and anr. AIR 2009 SC 3104

Reshma Kumari and others versus Madan Mohan and anr., 2013 AIR (SCW) 3120.

For the appellant: Mr. Shyam Chauhan, Advocate.

For the respondents: Mr. Dibender Ghosh, Advocate, for respondent No.1.
Mr. Vinay Thakur, Advocate, for respondent No.2.
Mr. Suneet Goel, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *Oral.*

Subject matter of this appeal is the judgment and award dated 29.8.2007, made by the Motor Accident Claims Tribunal, (III), Shimla, H.P. in MACT No. 67-S/2 of 2005/2004 titled *Smt. Raghu Devi versus Dewan Chand and others,* whereby compensation to the tune of Rs.2,10,000/- with 7.5% interest was awarded in favour of the claimant and insurer came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. Claimant Raghu Devi, mother has lost her son, namely Sanjeev, who was 21 years of age at the time of accident, which was caused by Gobind Singh, who had driven the

vehicle bearing Registration No. HP-06-2689 rashly and negligently on 14.9.2003 at Murthal (Haryana).

3. Mother of the deceased filed claim petition for the grant of compensation, as per the break-ups given in the claim petition.

4. Owner, driver and insurer have filed objections and following issues came to be framed by the Tribunal.

(i) Whether Sanjeev alias Malku died as a result of accident of vehicle No.HP-06-2689 on 14.9.2003 at Murthal-Sonepat which was being driven in a rash and negligent manner by respondent No.2? OPP.

(ii) Whether the vehicle in question was being driven in contravention of the terms and conditions of the Insurance Policy? OPR-3.

(iii) Whether the deceased was traveling in the vehicle in question as a gratuitous passenger? OPR-3.

(iv) Whether the petition is bad for non-joinder of necessary parties? OPR.

(v) To what amount and from who the petitioner is entitled? OPP.

(vi) Relief.

5. The claimant examined Jitender as PW1 and herself stepped into witness-box as PW2.

6. On the other hand, driver and owner stepped into witness-box and have not examined any witness. Thus, the evidence led by the claimant have remained un-rebutted.

7. The Tribunal held that the driver had driven the vehicle rashly and negligently on the said day and Issue No. 1 came to be decided in favour of the claimant and against the respondents. Thus the findings returned on this issue have attained finality and are accordingly upheld.

8. The insurer has failed to lead any evidence on issues No. 2 to 4 as such it has failed to discharge the onus. The Tribunal has rightly decided these issues in favour of the claimant and against the insurer. The Tribunal held that the claimant is entitled to Rs.2,10,000/-, which, on the face of it, is meager for the following reasons.

9. Admittedly, the deceased was 21 years of age at the time of accident and the multiplier applicable is “15” in view of the ratio laid down in ***Sarla Verma and Ors versus Delhi Transport Corporation and anr.*** reported in ***AIR 2009 SC 3104*** which has also been followed and affirmed in ***Reshma Kumari and others versus Madan Mohan and anr***. reported in ***2013 AIR (SCW) 3120***. But the Tribunal has applied the multiplier of “12”.

10. It is pleaded that he was a mason by vocation and was earning Rs.15000/- per month. By a guess work, it can be safely said that, he would have been earning, at least, Rs.6000/- per month, as labourer. The Tribunal has fallen in an error in holding that deceased was earning Rs.2500/- per month only.

11. A mother has lost at least Rs.3000/- per month as source of dependency, thus is entitled to Rs.3000x12x14= 5,04,000/-, as compensation. Viewed thus, the claimant

is held entitled to Rs.5,04,000/- + Rs.30,000/- as awarded by the Tribunal for love and affection, total Rs.5,34,000/-., with interest at the rate of 7.5% per annum.

12. Accordingly, amount of compensation is enhanced. The impugned award is modified and appeal is allowed. The insurer is directed to deposit the entire amount of compensation minus the amount already deposited, within eight weeks from today in the Registry.

13. On deposit, the Registry is directed to release the amount in favour of the claimant strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

14. Accordingly, the appeal is allowed and the impugned award stands modified, as indicated hereinabove.

15. Send down the record forthwith, after placing a copy of this judgment.

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

Sanjay Kumar …Appellant
Versus
Yashpal Singh …Respondent.

FAO No.89 of 2012.
Date of Decision: 29.05.2015.

Motor Vehicle Act, 1988- Section 166- Claimant had suffered 100% permanent disability - he has not only lost his earning capacity but his whole life has become burden for himself and his family- Court has to pass an award which is fair, just and proper – court has to keep in view hardships, discomfort, amenities of life, pain and sufferings undergone while assessing compensation. (Para-17 to 23)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771

For the Appellant: Mr.Adarsh K. Vashista, Advocate.
For the Respondent: Mr.B.L. Soni, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

CMP(M) No.622 of 2015:

This application has been filed by the appellant under Section 5 of the Limitation Act for condoning the delay in filing the application under Order 41 Rule 19, read with Section 151 of the Code of Civil Procedure, (for short, the CPC).

2. Learned counsel for the respondent has no objection in case the application is allowed and the delay in filing the application is condoned.

3. Accordingly, the application is allowed and the delay in filing the application, (CMP no.5945 of 2015), is condoned. The application is disposed of.

CMP No.5945 of 2015:

4. Taken on Board. This application has been filed by the appellant under Order 41 Rule 19, read with Section 151 CPC, for recalling the order, dated 27th February, 2015, passed in the main appeal, whereby the appeal was dismissed for non-prosecution.

5. For the reasons given in the application, the same is allowed, the order dated 27th February, 2015 is recalled and the appeal is readmitted. The application stands disposed of accordingly.

FAO No.89 of 2012:

6. The appeal is taken on the Board and heard finally, with the consent of the learned counsel for the parties.

7. This appeal is directed against the award, dated 31st August, 2011, passed by the Motor Accident Claims Tribunal, Hamirpur, in a Claim Petition No.1 of 2009, titled Yashpal Singh vs. Sanjay Kumar, whereby compensation to the tune of Rs.7,00,127/-, with interest at the rate of 7.5% per annum from the date of the claim petition till realization, was awarded in favour of the claimant and the respondent (appellant herein) was saddled with the liability, (for short, 'the impugned award').

Brief facts:

8. Yashpal Singh, claimant-injured, invoked the jurisdiction of the Motor Accident Claims Tribunal, Hamirpur, (for short, the Tribunal), in terms of Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), for grant of compensation to the tune of Rs.20.00 lacs, as per the break-ups given in the Claim Petition. It was averred in the Claim Petition that the claimant was employed by respondent Sanjay Kumar, owner/driver of bus No.HP-67-0346, as Conductor. The said bus was being repaired in a Workshop at Bijhari. On asking by the mechanic, the claimant went beneath the bus to bring a nut and in the meantime, the jack applied to the bus slipped and the claimant got crushed, was taken out with the help of a Joseph Cyril Bamford (for short, the JCB), was taken to Zonal Hospital, fromwhere he was referred to PGI, Chandigarh, where the claimant had undergone operation on 9th January, 2007 and remained admitted till 30th January, 2007. Thereafter, again w.e.f. 22nd February, 2007 to 2nd March, 2007, he remained admitted in the PGI. The petitioner was again taken for check up to PGI on 10th March, 2007 and he remained there till 12th March, 2007. It was averred that the petitioner could not be treated and he became 100% disabled permanently.

9. The Petition was resisted by the owner/driver on various grounds.

10. After considering the pleadings of the parties, the Tribunal framed the following issues:

> *"1. Whether the petitioner-claimant is entitled to the compensation, if so, to what amount? OPP*
>
> *2. Whether the petition is not maintainable, as alleged? OPR*
>
> *3. Whether this Tribunal has no jurisdiction to try the present claim petition, as alleged? OPR*

4. Relief."

11. Parties led their evidence. The petitioner examined as many as six witnesses, including Dr.Ramesh Chouhan (PW-3) and Dr.Surjit Tripathi (PW-5). The petitioner also stepped into the witness box as PW-4. The petitioner has also placed on record Medicine bills (Exts.P-4 to P-34), taxi bills (Exts.P-1 to P-3), treatment chart (Ext.PW-5/A) and disability certificate (Ext.PW-3/A). On the other hand, the respondent/owner/driver appeared as RW-3 and also examined two other witnesses.

12. The Tribunal, after scanning the entire evidence and the rival contentions, came to the conclusion that the claimant-injured has proved on record that he suffered the injuries during the course of employment of the owner/driver and held the claimant entitled for compensation, as discussed above.

13. Feeling aggrieved and dissatisfied, the original respondent i.e. owner/driver has questioned the impugned award on various grounds taken in paragraphs A to H of the memo of appeal. In paragraphs B and D, it has been claimed that the vehicle was insured with the Kangra Cooperative Bank Limited and the insurance policy was issued by the said Bank, being the insurer. Therefore, it was urged that the insurer was liable to be saddled with the liability, meaning thereby that the owner/driver has himself admitted that the claimant was entitled to compensation, but the insurer was to be saddled with the liability.

14. It is apt to reproduce ground D taken in the grounds of appeal hereunder:

> *"D. That the ld. Tribunal below has wrongly held that the vehicle in question was not insured. As submitted supra, the vehicle was being insured by the Kangra Cooperative Bank, therefore, the liability should have been fastened on the Insurance Company and not upon the appellant, therefore, the impugned award is liable to be quashed and set-aside."*

15. Even otherwise, since the claimant-injured suffered injuries during the course of employment, therefore, he was entitled for compensation under the Workmen's Compensation Act, 1923. However, Section 167 of the Act provides for an option to the victims of a vehicular accident to seek compensation in terms of the Act, which option has been exercised by the claimant-injured by filing the Claim Petition under Section 166 of the Act. Thus, the Claim Petition is maintainable.

16. During the course of hearing, the learned counsel for the appellant also submitted that the amount awarded by the Tribunal is excessive and needs to be reduced considerably.

17. To meet the above argument of the learned counsel for the appellant, I may place on record that the claimant-injured has proved on record the disability certificate as Ext.PW-3/A, which shows that he had suffered 100% disability, which is permanent in nature. Thus, owing to the nature of injury suffered by the claimant-injured, he has not only lost his earning capacity, but his whole life has also become a burden for himself and his family. The claimant-injured has to lead a miserable life full of disappointment and frustration. Therefore, in such cases, the courts are expected to pass an award which appears to be fair, just and proper, and keeping in mind the hardships, discomfort, loss of amenities of life, pain and sufferings undergone and has to undergo by the claimant-injured throughout his life.

18. The Apex Court in series of cases has laid certain guidelines as to how compensation has to be granted in injury cases.

19. The Apex Court in case titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755,** had discussed all aspects and laid down guidelines how a guess work is to be done and how compensation is to be awarded under various heads in the cases where permanent disability is suffered by the victim of a vehicular accident. It is apt to reproduce paras 9 to 14 of the judgment hereinbelow:

> *"9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.*
>
> *10. It cannot be disputed that because of the accident the appellant who was an active practising lawyer has become paraplegic on account of the injuries sustained by him. It is really difficult in this background to assess the exact amount of compensation for the pain and agony suffered by the appellant and for having become a life long handicapped. No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame.*
>
> *11. In the case Ward v. James, 1965 (1) All ER 563, it was said:*
>
> > *"Although you cannot give a man so gravely injured much for his "lost years", you can, however, compensate him for his loss during his shortened span, that is, during his expected "years of survival". You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet Judges and Juries have to do the best they can and give him what they think is fair. No wonder they find it well-nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The*

Judges have worked out a pattern, and they keep it in line with the changes in the value of money."

12. In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards.

13. This Court in the case of C.K. Subramonia Iyer v. T. Kunhikuttan Nair, AIR 1970 SC 376, in connection with the Fatal Accidents Act has observed (at p. 380):

"In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable."

14. In Halsbury's Laws of England, 4th Edition, Vol. 12 regarding non-pecuniary loss at page 446 it has been said :-

"Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award. The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."

20. The said judgment was also discussed by the Apex Court in case titled as **Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085,** while granting compensation in such a case. It is apt to reproduce paragraph 7 of the judgment hereinbelow:

"7. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases - and that is now recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand."

21. The Apex Court in case titled as **Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787,** also laid down guidelines for granting compensation. It is apt to reproduce paras 8 & 9 of the judgment hereinbelow:

> *"8. The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The Tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.*
>
> *9. The term "disability", as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case."*

22. The Apex Court in case titled as **Kavita versus Deepak and others, 2012 AIR SCW 4771,** also discussed the entire law and laid down the guidelines how to grant compensation. It is apt to reproduce paras 16 & 18 of the judgment hereinbelow:

> *"16. In Raj Kumar v. Ajay Kumar (2011) 1 SCC 343, this Court considered large number of precedents and laid down the following propositions:*
>
> > *"The provision of the motor Vehicles Act, 1988 ('the Act', for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. The heads under which compensation is awarded in personal injury cases are the following:*
> >
> > > *"Pecuniary damages (Special damages)*

(i) Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

17. …………………………

18. In light of the principles laid down in the aforementioned cases, it is suffice to say that in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and inability to lead a normal life and enjoy amenities, which would have been enjoyed but for the disability caused due to the accident. The amount awarded under the head of loss of earning capacity are distinct and do not overlap with the amount awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses."

23. Applying the above tests, the compensation awarded by the Tribunal, by no stretch of imagination, can be said to be excessive, rather it is on the lower side. However, the claimant-injured has not questioned the impugned award on the ground of adequacy of compensation. Therefore, the impugned award is reluctantly upheld.

24. Before parting with this judgment, it is worthwhile to record herein that the owner/appellant has not taken any steps to array the insurer as party either before the Tribunal or before this Court. However, he is at liberty to seek appropriate remedy, in any available, in accordance with law, to recover the compensation amount from the insurer, if at all the vehicle was insured, for the reason that the insurer has to indemnify, provided that the insured is not caught by his own conduct.

25. Having said so, the appeal merits to be dismissed and the same is dismissed accordingly. The Registry is directed to release the award amount strictly in terms of the conditions contained in the impugned award.

26. Send down the records alongwith a copy of this judgment.

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

Satish Kumar alias Bichhu ……Appellant.
Vs.
State of H.P. …..Respondent.

Cr. Appeal No. 194 of 2011
Reserved on: 27.05.2015
Date of decision: 29.05.2015

Indian Penal Code, 1860- Section 302- An altercation took place in marriage in which accused and the deceased grappled with each other - subsequently at Ner Chowk, accused came near the vehicle in which deceased was sitting and asked him to come down as the accused wanted to have duel with the deceased- accused and the deceased started grappling with each other- accused took out a Khukhari and started stabbing the deceased repeatedly due to which deceased fell down and died at the spot- held, that act of the accused was not premeditated- quarrel had taken place, which resulted in subsequent fight- fight had taken place all of a sudden- accused had a knowledge that his act would result in the death of the deceased- his act falls within the preview of Section 304(II) and not Section 302 of IPC.

(Para-12 to 16)

For the appellant : Mr. Sanjeev Kuthiala, Advocate.
For the respondent: Mr. M.A. Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

This appeal is instituted against the judgment, dated 08.03.2006, rendered by the learned Presiding Officer, Fast Track Court, Mandi, H.P. in Sessions Trial No. 18/2004, 79/2005, whereby the appellant-accused, who was charged with and tried for offence under Section 302 of the Indian Penal Code, was convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- and in default of payment of fine to undergo further imprisonment for a period of one year.

2. Case of the prosecution, in a nut-shell, is that Karam Singh (PW-1) was employed as a driver in Tata Sumo bearing registration No. HP-01-M-3659. He had gone to Panarsa on 22.01.2004 at about 10:30 a.m. in a barat and about 7-8 persons were occupying the vehicle of Karam Singh. There were two other vehicles carrying baratis. The barat reached panarsa at about 1:00 p.m.. Girdhari Lal (PW-2) was also in the barat. The accused had also gone in a barat to Panarsa. Deceased Suman Kumar had also gone in the barat in the vehicle being driven by Karam Singh (PW-1). When at Panarsa the baratis were taking meals, then some altercation took place between the accused and the deceased, as the deceased objected to the act of dispersing rice by the accused at which the accused and

the deceased grappled with each other. The fight was averted by Girdhari Lal (PW-2). The baratis left for village Jugahan at about 5:30 p.m. While returning to village Jugahan, the deceased and PW-2 were occupying the vehicle of PW-1, whereas the accused was occupying the vehicle in which bridegroom was sitting. The vehicle driven by PW-1 was the last in the convoy of the vehicles and at about 7:00 p.m., the vehicle of PW-1 reached at Nerchowk where the accused was standing by the side of the road. The vehicle was stopped by PW-1 at Nerchowk in order to purchase '*biri'* and cigarette. At that time, accused came near the vehicle of PW-1 and asked the deceased Suman Kumar to alight from the vehicle as he wanted to have one to one duel with the deceased. The deceased alighted from the vehicle and the accused and the deceased started grappling with each other. The accused took out Khukhari concealed inside the T. Shirt by him and started stabbing the deceased repeatedly till the deceased fell flat on the ground. The Khukhari blows were struck by the accused all over the body of the deceased and the accused ran away from the spot. The deceased was taken to hospital. He was declared dead by the Medical Officer. An intimation was sent to the police. The statement of PW-1, Karam Singh was recorded under Section 154 of the Cr. P.C. vide Ex. PW1/A, on the basis of which, an FIR was registered vide Ex. PW10/A. The post mortem of the body was conducted by Dr. Hemant Kapoor (PW-7), Medical Officer, Zonal Hospital, Mandi. He issued the post mortem report Ex. PW7/A and as per his opinion, the deceased died due to bleeding into pericardial sack, left pleural cavity, peritoneal cavity and mediastinum caused by injury Nos. 1 to 9 and 10. He has taken into possession the blood smeared clothes of the deceased bearing cut marks. He has also preserved the viscera of the deceased alongwith blood sample of the deceased and handed over the same to the police for getting the same chemically examined. Spot map Ex. PW10/D was prepared. The accused was arrested and Khukhari Ex. P1 alongwith cover Ex. P2 was recovered from the possession of the accused in the presence of Sh. Mehar Chand (PW-3), which was seized vide seizure memo Ex. PW3/B. The rough sketch of Khukhari was also prepared which is Ex. PW3/A. The statements of the witnesses were recorded by PW-10 as per their version and Khukhari alongwith viscera, blood sample and clothes of the deceased were sent for chemical examination as per report of the Chemical Examiner Ex. PW10/E. The investigation was completed and after the completion of all the codal formalities, the challan was put up in the Court.

3. The prosecution has examined as many as 10 witnessed to support its case. The accused was also examined under Section 313 of the Cr. P.C. Accused denied the case of the prosecution. The accused was convicted and sentence, as noticed hereinabove. Hence, this appeal.

4. Mr. Sanjeev Kuthiala, learned counsel for the appellant has vehemently argued that the prosecution has failed to prove the case against the appellant.

5. Mr. M.A. Khan, learned Additional Advocate General has supported the judgment, dated 08.03.2006.

6. We have heard the learned counsel for the parties and gone through the judgment and records, carefully.

7. PW-1, Karam Singh, has deposed that on 22.01.2004, he carried baratis from his village Jugahan to Panarsa at 10:30 a.m. and 7-8 baratis were occupying his vehicle. There were two other vehicles carrying baratis. The vehicles carrying baratis reached at Panarsa at 1:00 p.m. At Panarsa, the Baratis took meal and tea. Suman Kumar told him that a fight had taken place between him and accused Satish alias Bichhu. He identified the accused in the Court. Suman Kumar was sitting in his vehicle. At 5:30 p.m., the bride left

for matrimonial home and while returning with the bride to their matrimonial home, his vehicle was last in the convoy of vehicles. Suman and Girdhari were occupying front seat alongwith him. On the back of the vehicle, 7-8 baratis were sitting. He did not remember the name of those persons. At 7:00-7:30 p.m., his vehicle reached Nerchowk and Bichhu was standing by the side of the road and two vehicles plying in front of his vehicle had already left. He stopped the vehicle at Nerchowk, as Suman wanted to purchase *biris* and cigarette. When the vehicle stopped at Nerchowk, accused Bichhu came near his vehicle and went to the seat occupied by Suman that he should alight from the vehicle, as he wanted to have one to one duel with him. Suman alighted from the vehicle and walked a few places and thereafter both started grappling. In the course of grappling, the accused took out Khukri concealed inside the T-Shirt and repeatedly started stabbing Suman till he did not fell down. The Khukhari blows were struck all over the body. Suman Kumar was taken to hospital at CHC, Ratti. Accused ran towards Subzi Mandi alongwith Khukhari. The deceased was taken to CHC, Ratti, he was declared dead by the doctor. Police was intimated by the doctor. His statement was recorded under Section 154 Cr. P.C. which is Ex. PW1/A. He identified Khukhari Ex. P1 and sheath Ex. P2. In his cross-examination, he has admitted that the quarrel between the deceased and the accused has taken place in their presence. However, they did not try to avert the fight as the accused was wielding the weapon.

8. PW-2, Girdhari Lal, deposed that he proceeded to attend the marriage in Tata Sumo bearing registration No. HP-01-M-3659 and Karam Singh (PW-1) was driving the same. The deceased was occupying the front seat alongwith him, Moti Ram, Parkash Chand and other baratis including 2-3 children were sitting in the rear of the vehicle. The baratis were being carried in three vehicles. They reached at Panarsa. Accused started dispersing rice, on which deceased Suman objected that food should not be wasted, at which both grappled which fight was averted by him. They left for Jugahan at 5:30 p.m. in the same vehicle. They reached at Nerchowk at 7:15 p.m.. Accused was standing by the side of the vehicle near the seat which was occupied by the deceased. He advanced threat to the deceased that he should alight from the vehicle as he wanted to have one to one duel with him. The deceased alighted from the vehicle. Accused pulled a Khukhari kept inside the T-Shirt and without wasting the time started repeatedly stabbing the deceased. The deceased fell on the ground. Thereafter, the accused fled away from the spot. In his cross-examination, he has admitted that the accused signalled the deceased from a distance of 7 feet and Suman went to the place where the accused was standing on the left side of the vehicle. They raised hue and cry. They immediately got down from the vehicle to save the deceased.

9. PW-3, Sh. Mehar Chand, has deposed that in his presence and Up-Pradhan, Mani Ram of Bhangrotu, the accused handed over Khukhari Ex. P1 alongwith cover Ex. P2 by taking out the same from the pocket of his trouser to the police regarding which sketch Ex. PW3/A was prepared and the same was seized vide seizure memo Ex. PW3/B. He identified his signatures on the recovery memo.

10. PW-4 Sh. Rajinder Singh, PW-5 Shri Arun Sharma and PW-6, Constable Puran Chand are formal witnesses. PW-7, Dr. Hemant Kapoor, Medical Officer conducted the post mortem on the body of the deceased. According to him, the probable time that was left between injury and death was around 10 to 15 minutes and between death and post mortem, it was 12 to 24 hours. He issued post mortem report Ex. PW7/A. According to him, the cause of the death was due to bleeding into pericardial sack, left pleural cavity, peritoneal cavity and mediastinum caused by injuries No. 1 to 9 and 10.

11. PW-8, HC Amar Nath, sent the case property to FSL, Junga through Constable Puran Chand. PW-10, SI Uttam Singh deposed that on 22.01.2004, rapat No. 17, Ex. PW9/A was recorded in Police Station, Balh. He went to the spot where the statement of Karam Singh alias Kalu was recorded under Section 154 Cr. P.C. vide Ex. PW1/A. Thereafter, FIR Ex. PW10/A was recorded. Photographs of the deceased were taken by Rajinder Singh, which are Ex. PW4/A-1 to Ex. PW4/A-6. Accused was arrested on 22.01.2004 and Khukhari was recovered vide seizure memo Ex. PW3/B. It was properly sealed. He deposited the case property with MHC, which was lateron sent for chemical examination alongwith viscera or the deceased and his clothes. The report of the Chemical Examiner is Ex. PW10/E.

12. The case of the prosecution, precisely is that the accused and deceased have gone in a barat to village Panarsa on 22.01.2004. A quarrel took place between the accused and the deceased at Panarsa. When they were coming back to village Jugahan, accused was standing on the side of the road. He challenged the deceased to come out of the vehicle to have duel with him. The deceased came out from the vehicle. They grappled and the injuries were inflicted upon the deceased by the accused with the Khukhari Ex. P1. Suman Kumar was taken to hospital. He was declared dead by the Medical Officer. The post mortem on the body of the deceased was conducted by PW-7.

13. It is evident from the statements of PW-1, Karam Singh and PW-2, Girdhari Lal that when the incident has taken place, there were other baratis in the Jeep who have seen the incident, but they have not tried to separate the accused and the deceased. If PW-1, Karam Singh and PW-2 Girdhari Lal and other baratis had intervened, the life of deceased could be saved. The accused and the deceased had also quarreled as per PW-2 Girdhari Lal at the time of taking their meal. However, in his cross-examination, he has admitted that he has not seen them quarrelling at village Panarsa. Accused has challenged the deceased to come out from the vehicle to have a duel with him and thereafter they grappled in the presence of PW-1 Karam Singh, PW-2 Girdhari Lal and other *baratis.* The deceased was stabbed by the accused with Khukhari Ex. P1.

14. The act of the accused was not premeditated. In fact, the quarrel has taken place earlier at village Panarsa, which has resulted in another fight between the accused and the deceased at Nerchowk.

15. Mr. Sanjeev Kuthiala, learned counsel for the appellant has strenuously argued that it is not a case of murder. According to him, the fight has taken place all of a sudden. Mr. M.A. Khan, learned Additional Advocate General has vehemently argued that it was a case of murder.

16. We are of the considered view after analyzing the evidence that it is not a case of murder, but the accused had the knowledge that his act would result in the death of the deceased and, thus, this case would fall within the ambit of Section 304-I and not under Section 302 of the Indian Penal Code.

17. Accordingly, the appeal is partially allowed and the accused is convicted under Section 304-I of the Indian Penal Code instead of Section 302 of the Indian Penal Code. The respondent-State is directed to produce the accused for hearing on the question of quantum of sentence on 17th June, 2015.

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

FAOs (MVA) No.143 and 144 of 2008.
Date of decision: 29th May, 2015.

FAO No. 143 of 2008.

Sudesh Bala	…..Appellant.
Versus	
Union of India and others	…Respondents

FAO No. 144 of 2008.

Smt. Vandana and another	…..Appellants.
Versus	
Union of India and others	…Respondents

Motor Vehicle Act, 1988- Section 166- Deceased 'A' was riding the scooter while other deceased was a pillion rider - scooter was hit by a bus- deceased sustained injuries and subsequently succumbed to the injuries- Claim Petition was filed by the parents of the deceased- Tribunal held that it was a case of contributory negligence and directed the Union of India to satisfy 50% of the award - driver of the bus was court martialed and was convicted - therefore, he cannot take the plea of contributory negligence- held, that Tribunal had wrongly recorded the findings of contributory negligence. (Para-8 to 15)

Motor Vehicle Act, 1988- Section 166- Deceased were students of Class 11th – they would have got employment after 2-3 years or at least they would have become labourers and would have been earning not less than Rs. 5000/- per month each- loss of dependency can be taken as Rs. 2,500/- per month - multiplier of '16' has to be applied- compensation of Rs.4,80,000/- is to be paid to the claimants along with interest @ 7.5% per annum. (Para-17 to 22)

Cases referred:

NKV Bros. (P) Ltd vs. M. karumai Ammal and others, AIR 1980 SC 1354
Sarla Verma and Ors versus Delhi Transport Corporation and anr., AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and anr., 2013 AIR (SCW) 3120,

For the appellant(s):	Mr. Ramakant Sharma, Advocate.
For the respondents:	Mr. Ashok Sharma, Assistant Solicitor General of India, for respondents No. 1 and 2-Union of India. Nemo for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *Oral.*

Both these appeals are outcome of a vehicular traffic accident thus; I deem it proper to determine both these appeals by this common judgment.

2. Scooter bearing registration No.HP-19A-1021, was hit by vehicle No. 02K-7071W-275-Class-I at Bus stand, Jhangoli at about 2.45 p.m, which was being driven by its driver rashly and negligently. Aayush Banyal was driving the scooter and other was pillion rider, sustained injuries and succumbed to the injuries.

3. The claimants are the parents of the deceased in both the claim petitions and sought compensation as per the break-ups given in the claim petition.

4. The Union of India-respondents herein in the claim petition resisted the claim petitions on the ground that Aayush Banyal has driven the scooter rashly and negligently.

5. After examining the pleadings, the Tribunal framed the issues in both the claim petitions which are similar. Thus, I deem it proper to reproduce the issues framed in one of the claim petitions (FAO No. 143 of 2008) herein:

(i) *Whether Aayush Banyal died in a motor accident caused by rash and negligent driving of a truck (No.02k-7071W-275) by Bijender Pal (respondent No.3) on 29.6.2005. …OPP*

(ii) Whether the petitioner is entitled to compensation, if so, to what amount and from whom. …..OPP

(iii) Whether the accident occurred due to rashness and negligence of the deceased Ayush Banyal, as alleged. …..OPR

(iv) Relief.

6. Parties have examined witnesses.

7. The Tribunal, after scanning the evidence held that the accident was outcome of contributory negligence and awarded compensation to the tune of Rs.2,40,400/ in FAO No. 143 of 2008 and Rs.2,26,000/- in FAO No. 144 of 2008, with interest at the rate of 7.5% per annum and directed the Union of India to satisfy the 50% of the compensation awarded in both the cases.

8. Feeling aggrieved, the claimants have questioned both the awards on following two grounds.

(i) *That the accident is not outcome of contributory negligence but was outcome of rash and negligent driving of the diver of Union of India.*

(ii) The amount awarded is inadequate.

9. I deem it proper to record herein that respondents-Union of India have not taken the plea of contributory negligence in the reply filed before the Tribunal but have pleaded that the accident was outcome of rash and negligent driving of the driver of the scooter.

10. FIR No.105 of 2005 was also lodged at Police Station Amb, investigation was conducted and final report came to be filed before the Court of competent jurisdiction. The Court of competent jurisdiction transferred the case to the Court Martial and Court Martial conducted the proceedings.

11. I have gone through the statement of RW2, namely, Indraj Kumar who has stated that he and driver of the offending vehicle has been convicted by the Court Martial.

12. Mr. Ashok Sharma, learned Assistant Solicitor General of India, was asked to place on record the Court Martial proceedings and has placed on record the photocopies of charge sheet, plea of guilt made by the accused-driver and order of conviction and sentence made by the Court Martial. Thus, it is established, rather admitted that the driver, namely, Bijender Pal has driven the vehicle rashly and negligently and has been convicted. A driver, who is convicted, cannot take the ground of contributory negligence and claimants are not supposed to prove the plea of rashness or negligence. Thus, it can be safely said that the driver Bijender Pal has caused the accident by driving the vehicle rashly and negligently.

13. The apex Court in ***case*** titled ***NKV Bros. (P) Ltd*** *vs*. ***M. karumai Ammal and others reported in AIR 1980 SC 1354*** held that in criminal case acquittal of the driver cannot be a ground to dismiss the claim petition. Applying the test in this case, the driver has been convicted, no more proof was required.

14. The driver and the Union of India have not questioned the impugned awards on any ground, thus, have attained finality so far the same relate to them.

15. Having said so, I hold that the accident was only outcome of rash and negligent driving of the driver of Truck of the Union of India. Accordingly, the finding returned by the Tribunal is set aside and Issue No. 1 is decided in favour of the claimant and against the Union of India.

16. The next question is-whether the amount awarded is adequate? The answer is in negative for the following reasons.

17. Admittedly, both the deceased were students of 11th class and their parents have lost their budding sons, who were their future source of income and hope for old age.

18. By guess work, it can be held that after few years, they would have qualified graduation and would have got employment or, at least, after two or three years they would have become labourers and would have been earning not less than Rs.5000/- per month each.

19. Applying the ratio laid down in ***Sarla Verma and Ors versus Delhi Transport Corporation and anr.,*** reported in ***AIR 2009 SC 3104*** which has also been followed and affirmed in ***Reshma Kumari and others versus Madan Mohan and anr***. reported in ***2013 AIR (SCW) 3120***, it can be safely said that the parents have lost source of dependency to the tune of 50%, i.e. Rs.2,500/- per month, in each case.

20. Keeping in view the age of the deceased and the parents, the multiplier of "16" is just and appropriate multiplier in both these cases, while keeping in view the ratio laid down in the judgment, supra. Thus, multiplier of "16" is applied in both these cases. The claimants are held entitled to Rs.2500x12x16= Rs.4,80,000/-, in each case.

21. In view of the above, the compensation to the tune of Rs.4,80,000/- with interest at the rate of 7.5% per annum from the date of claim petition till its realization is awarded in each of the cases.

22. Accordingly, the impugned awards are modified, as indicated hereinabove, and the appeals merit to be allowed and are accordingly allowed.

23. The Union of India is directed to deposit the enhanced amount within eight weeks from today, provided it has already deposited the amount already awarded by the Tribunal. If not deposited, the entire amount be deposited within the above time frame. On deposit, the Registry is directed to release the entire amount in favour of the claimants strictly, in terms of the conditions contained in the impugned awards, through payee's cheque account.

24. Send down the record forthwith, after placing a copy of this judgment.

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

Sumitra Rani …..Petitioner.
Versus
Vinod Kumar and others …..Respondents.

CMPMO No.171 of 2015.
Date of decision: 29.05.2015.

Code of Civil Procedure, 1908 - Order 8 Rule 1- Defendants were granted time for filing written statement on 08.07.2014 and on 01.08.2014- defendant No. 1 died thereafter and application for bringing on record legal representatives was allowed on 25.11.2014 – application was filed for placing on record written statement- held, that main case could not proceed further on account of death of defendant No. 2-delay was not unreasonable, which could not be compensated in terms of money- trial Court had rightly exercised the discretion to allow the defendant to file written statement. (Para-3 to 5)

Case referred:
Kailash versus Nanhku and others (2005) 4 SCC 480

For the Petitioner : Mr.Vivek Chandel and Mr.Devender K.Sharma, Advocates.
For the Respondents : None.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner by way of this petition under Article 227 of the Constitution of India has sought quashing of the order dated 20.04.2015 passed by learned Civil Judge (Senior Division), Kasauli, whereby he allowed the application filed by the respondents under Order 8 Rule 1 readwith Section 151 of the Code of Civil Procedure (for short 'Code') and permitted the respondents to file their written statement. It is claimed that the impugned order is not sustainable as the same is not only irregular but illegal and, therefore, is not sustainable in the eyes of law.

2. I have heard learned counsel for the petitioner and have gone through the records.

3. A perusal of the zimini orders upon which a lot of emphasis has been placed by learned counsel for the petitioner would reveal that the respondents were granted time to file written statement on 08.07.2014 and on 01.08.2014. But, thereafter it appears that the defendant No.2 died and the matter remained pending for bringing on record his legal representatives. This application came to be allowed only on 25.11.2014 and by the next date i.e. 06.01.2015 the respondent had already filed application under Order 8 Rule 1 readwith Section 151 of the Code for placing on record the written statement.

4. The Hon'ble Supreme Court in ***Kailash*** *versus* ***Nanhku and others (2005) 4 SCC 480*** has already held the provisions of Order 8 Rule 1 of the Code to be directory in nature. Therefore, the Court has discretionary jurisdiction to condone the delay. This, however, does not mean that the defendants can be permitted to file the written statement after 90 days as a matter of course. It is only in exceptional situation that the Courts may enlarge the period.

5. The perusal of the zimini orders show that the main case had derailed on account of the death of defendant No.2. It also appears that the documents as annexed with the plaint for some reasons were also not made available to the respondents. Be that as it may, the delay is not so unreasonable which cannot be condoned otherwise also the petitioner has already been compensated by awarding costs. Moreover, the petitioner cannot be allowed to get away with a "walk over" that too merely on a technical ground. It has to be remembered that procedure is the handmaid of justice and the Courts must be always anxious to do justice and to prevent victories by way of technical knock outs.

6. In view of the aforesaid discussion, I find no merit in this petition and the same is dismissed in limine alongwith pending application, if any.

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

Kartar Singh son of Sh Tula Ram. .....Appellant.
Vs.
State of H.P. .....Respondent.

Cr. Appeal No. 105 of 2013.
Judgment reserved on: 13.5.2015
Date of Judgment: May 30, 2015.

N.D.P.S. Act, 1985- Section 42- I.O specifically stated that she had prepared special information report and had handed it over to H.C with a direction to take it to SP Crime- HC stated that he had deposited the special report with SP Crime- testimonies are corroborating each other – there is no reason to disbelieve their testimonies – held that the provision of Section 42 of N.D.P.S. Act was complied. (Para- 10)

N.D.P.S. Act, 1985- Section 50- Accused was found in possession of a bag from which 2.1 k.g of charas was recovered- held, that Section 50 is applicable only when the contraband was found on the person of the accused - since the contraband was found from the bag and not from the person of the accused, therefore, Section 50 of N.D.P.S. Act is not applicable. (Para-13)

N.D.P.S. Act, 1985- Section 20- Petitioner was found in possession of 2.1 kg. of charas- driver of the bus was declared hostile- he and conductor of the bus admitted part of the prosecution version- police officials had corroborated their version- conviction can be made on the basis of testimonies of the police official if the same are found to be trustworthy, credible and reliable - minor contradictions are bound to come in the testimonies when they are recorded after a considerable period of time and are not sufficient to reject the prosecution version. (Para-14 to 18)

Cases referred:

Kalema Tumba Vs. State of Maharashtra and another, 1999 (8) SCC 257
State of HP Vs. Pawan Kumar, 2005 (4) SCC 350
Jarnail Singh Vs. State of Punjab, 2011 Crl.L.J. 1738
Lella Srinivasa Rao Vs. State of Andhra Pradesh, AIR 2004 SC 1720
Radha Mohan Singh Vs. State of UP, AIR 2006 SC 951
State of Rajasthan Vs. Bhawani, AIR 2003 SC 4230
Appabhai and another Vs. State of Gujarat, AIR 1988 SC 696

Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat, 2011 (6) SCC 312
Ramesh Harijan Vs. State of Uttar Pradesh, 2012 (5) SCC 777
Rabindra Kumar Dey Vs. State of Orissa, AIR 1977 SC 170
Khujji Vs. State of Madhya Pradesh, AIR 1991 SC 1853
Sama Alana Abdulla Vs. State of Gujarat, 1996 (1) SCC 427
Tahir Vs. State of Delhi, AIR 1996 (3) SCC 338
Nathu Singh Vs. State of MP, AIR 1973 SC 2783
State of Gujarat Vs. Raghunath Vamanrao Baxi, AIR 1985 SC 1092
Govindaraju Vs. State, 2012 (4) SCC 722
Tika Ram Vs. State of MP, 2007 15 SCC 760
Girja Prasad Vs. State of MP., 2007 (7) SCC 625
Shashidhar Purandhar Hedge and another Vs. State of Karnataka, 2004 (12) SCC 492
Leela Ram Vs. State of Haryana, 1999 (9) SCC 525
C.Muniappan and others Vs. State of Tamil Nadu, 2010 (9) SCC 765
Sohrab and another Vs. The State of Madhya Pradesh, AIR 1972 SC 2020
State of UP Vs. M.K.Anthony, AIR 1985 SC 48
Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753
State of Rajasthan Vs. Om Parkash, AIR 2007 SC 2257
Prithu Chand and another Vs. State of HP, 2009 (11) SCC 588
State of UP Vs. Santosh Kumar and others, 2009 (9) SCC 626
State Vs. Saravanan and another, AIR 2009 SC 152
Appabhai and another Vs. State of Gujarat, AIR 1988 SC 696
Rammi Vs. State of M.P, AIR 1999 SC 3544
State of H.P. Vs. Lekh Raj and another, 2000(1) SCC 247
Laxman Vs. Poonam Singh and others , 2004 (10) SCC 94
Dashrath Singh Vs. State of UP, 2004 (7) SCC 408
Kuriya and another Vs. State of Rajasthan, 2012 (10) SCC 433

For the appellant: Mr. Manoj Pathak, Advocate.
For the respondent: Mr.Ashok Chaudhary, Mr.V.S.Chauhan, Addl. Advocate Generals with Mr.J.S.Guleria, Asstt. Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment and sentence passed by learned Special Judge Fast Track Court Shimla HP in Session Trial No. 21-S/7 of 2011 titled State of HP Vs. Kartar Singh decided on 31.8.2012.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on dated 1.5.2011 at about 2.15 PM near Hasan valley accused was travelling in bus No. HP-22B-2087. It is further alleged by prosecution that accused was sitting on seat No. 37 and bus was coming from Rampur side and was approaching towards Shimla. It is further alleged by prosecution that Inspector Minakshi received secret information on dated 1.5.2011 at 12.30 PM that one person wearing black coloured jean trouser and having brown colour bag was coming to Shimla side in bus No HP-22B-2087 with charas in his possession. It is further alleged by

prosecution that thereafter Inspector Minakshi recorded information under Section 42 (2) of the Narcotic Drugs & Psychotropic Substance Act 1985 and sent the same through HC Devinder to SP Crime Branch Shimla. It is further alleged by prosecution that thereafter Inspector Minakshi constituted a raiding party by associating HC Balbir Singh, Constable Praveen Kumar and Constable Vikesh Guleria and moved towards Kufri-Theog side on official vehicle No. HP-07B-0324 which was driven by constable Brij Lal vide rapat No.8 (A) Ext PW1/H. It is further alleged by prosecution that thereafter Inspector Minakshi had given her introduction to the driver of the bus. It is further alleged by prosecution that Inspector Minakshi started checking passengers from seat No.1 and when she reached at seat No. 37 then she noticed that accused was carrying contraband. It is further alleged by prosecution that accused was apprised about his legal right to be searched before the magistrate or gazetted officer. It is alleged by prosecution that accused had given his consent that he should be searched by police official at the spot and consent memo Ext PW5/B was prepared. It is further alleged by prosecution that accused was carrying bag on his leg and was sitting at seat No.37 of the bus. It is further alleged by prosecution that 2.100 Kg. charas was found from exclusive and conscious possession of accused. It is further alleged by prosecution that thereafter charas was sealed and NCB form was prepared. It is further alleged by prosecution that specimen of seal on NCB form was obtained on pieces of cloth and seal was handed over to witness Sunil Kumar. It is further alleged by prosecution that thereafter site plan was prepared and statements of the witnesses were recorded. It is further alleged by prosecution that thereafter special report was sent to SP Crime Branch Shimla through HC Devinder. It is further alleged by prosecution that thereafter on dated 2.5.2011 MHC handed over parcel containing charas, NCB-1 form and other relevant documents to HC Neel Kanth vide RC No. 27/11 Ext PW1/E with direction to deposit the same in the office of FSL Junga. It is further alleged by prosecution that articles were deposited in the office of FSL Junga and receipt was obtained. Charge was framed by learned Special Judge Fast Track Court Shimla on dated 18.8.2011. Accused did not plead guilty and claimed trial.

3. Prosecution examined following oral witness and accused adduced following defence witness in support of defence.

Sr.No.	Name of Witness
PW1	HC Prakash Chand
PW2	HC Neel Kanth
PW3	HC Devinder
PW4	Vijay Bhuria
PW5	HC Balbir Singh
PW6	Bahadur Singh
PW7	Inspector Minakshi
DW1	Sunil Kumar

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

Sr.No.	Description:
Ext.PW1/A	FIR
Ext.PW1/B	Sample Seal
Ext.PW1/C	Resealing certificate
Ext.PW1/D	Entry No.41
Ext.PW1/E	RC

Ext.PW1/F,G & H	Rapats
Ext.PW1/J	Certificate u/s 65 of Evidence Act.
Ext.PW4/A	Route permit
Ext.PW4/B	Copy of time table
Ext. PW5/A	Memo U/S 50 of the Act
Ext.PW5/B	Identification memo
Ext.PW5/C	Seizure memo
Ext.P1	Parcel
Ext.P2	Inner parcel
Ext.P3	Rexen bag
Ext.P4	Yellow coloured tape
Ext.P5	Card board box
Ext.P6	Charas
Ext.PW6/A	Search memo
Ext.PW6/B	Memo
Ext.PW6/B-1	Personal search memo vide which tickets were recovered from the accused.
Ext.PW6/C	Specimen seal
Ext.PW7/A	Special information report
Ext.PW7/B	NCB Form
Ext.PW7/C	Rukka
Ext.PW7/D	Site Plan
Ext.PW7/E	Arrest memo
Ext.PW7/F	Special report
Ext.PW7/G	FSL Report
Ext.P7	Mobile phone
Ext.P8	ID card
Ext.P9	Voter ID card of accused
Ext.P10	Currency notes
Ext.P11	Valet
Ext.P12	Envelope

5. Statement of accused was also recorded under Section 313 Cr PC. Learned trial Court convicted appellant to rigorous imprisonment for a period of ten years and fine to the tune of Rs.1,00,000/- (One lac) . Learned trial Court further directed that in default of payment of fine appellant shall further undergo simple imprisonment for a period of one year.

6. Feeling aggrieved against the judgment and sentence passed by learned Special Judge Fast Track Court Shimla appellant filed present appeal.

7. We have heard learned Advocate appearing on behalf of the appellant and learned Additional Advocate General appearing on behalf of respondent and also gone through the entire record carefully.

8. Point for determination before us is whether learned trial did not properly appreciate oral as well as documentary evidence placed on record Court and whether learned trial Court had committed miscarriage of justice to appellant.

9.ORAL EVIDENCE ADDUCED BY PROSECUTION:

9.1 PW1 Prakash Chand has stated that he was posted as MHC in Police Station State CID Shimla since November 2009. He has stated that on dated 1.5.2011 at 5.45 PM HC Balbir Singh handed over one rukka mark 'A' to him along with parcel containing charas, NCB-I form in triplicate, sample seal and recovery memo. He has stated that he registered FIR Ext PW1/A which bears his signature. He has stated that he prepared case file and handed over the same to HC Balbir Singh with direction to hand over the same to Inspector Minakshi. He has stated that as no superior officer was present in police station so he resealed parcel with nine seals of seal impression 'P'. He has stated that he prepared certificate regarding resealing of parcel. He has stated that he deposited case property i.e. parcel, NCB form, recovery memo and sample seals in the malkhana and entry at serial No. 41 was recorded. He has stated that extract of register No.19 Ext PW1/D is true copy of original record. He has stated that on dated 2.5.2011 he handed over case property to HC Neel Khanth vide RC No. 27/11 Ext PW1/E which is also true copy of original record. He has stated that thereafter article was deposited at FSL Junga and on the same day HC Neel Khanth had handed over the receipt which was in red circle. He has stated that case property remained intact in his custody. He has denied suggestion that rapat Ext PW1/F to Ext PW1/H were prepared at later stage. He has denied suggestion that case property was not deposited with him on dated 1.5.2011. He has denied suggestion that no parcel was resealed by him. He has denied suggestion that case property was not sent in the office of FSL Junga for chemical examination. He has denied suggestion that resealing certificate was prepared later on just to create evidence against accused.

9.2 PW2 Neel Khanth has stated that he was posted as Head Constable in police station State CID since last four years. He has stated that on dated 2.5.2011 MHC handed over one parcel which was sealed with nine seals of seal impression 'P' along with NCB form, recovery memo and sample seal vide RC No.27/2011 with direction to deposit the same in the office of FSL Junga. He has stated that thereafter he deposited parcel in the office of FSL Junga and handed over receipt to MHC on the same day. He has stated that case property remained intact in his custody. He has denied suggestion that no case property was handed over to him. He has denied suggestion that he did not deposit case property in the office of FSL Junga. He denied suggestion that documents were later on prepared just to create evidence in the present case.

9.3. PW3 Devinder has stated that he was posted as Head Constable in police station State CID since 2010. He has stated that on dated 1.5.2011 Inspector Minakshi police station CID Shimla handed over special information report to him with direction to take same to SP Crime Branch Shimla and handed over the same to Inspector Minakshi. He has stated that on dated 2.5.2011 he took special report to the office of SP Crime Branch Shimla and handed over the same to Reader and obtained receipt. He has denied suggestion that special report was not handed over to him by Inspector Minakshi. He denied suggestion that he did not hand over special report to SP Crime Branch Shimla.

9.4 PW4 Vijay Bhuria has stated that he was posted as Sr. Assistant in RTO office Hamirpur and he brought record pertaining to bus No. HP-22B-2087. He has stated that the route of the bus was from Pragpur to Theog. He has stated that copy of the route permit and time table are Ext PW4/A and Ext PW4/B which are correct as per original record.

9.5 PW5 HC Balbir Singh has stated that he was posted as Investigating Officer in Police Station CID Shimla w.e.f. 2009. He has stated that on dated 1.5.2011 he along with Constable Sunil and Constable Vikesh under the supervision of Inspector Minakshi

approached towards Theog-Kufri side in official vehicle No. HP-07B-0324 which was driven by Brij Lal. He has stated that at about 2.15 PM when they reached near Hasan valley then vehicle having registration No. HP-22B-2087 was stopped. He has stated that Inspector Minakshi disclosed her identity to the driver and conductor of the bus. He has stated that driver of the bus disclosed his name as Bahadur Singh and conductor disclosed his name as Sunil Kumar. He has stated that police officials gave their personal search and memo was prepared. He has stated that thereafter driver and conductor of the bus were associated in the raiding party and thereafter search of the bus was conducted. He has stated that accused was sitting on seat No.37 of bus. He has stated that Inspector Minakshi apprised accused about his legal rights to be searched before Magistrate or gazetted officer. He has stated that accused has given his option to be searched before police official. He has stated that thereafter the bag which was in the possession of accused was searched. He has stated that charas to the quantity of 2.100 Kg. was found from the possession of accused. He has stated that thereafter parcel was sealed with ten seals of seal impression 'N' and NCB form was filled up. He has stated that seal after use and after obtaining specimen of seal on piece of cloth was handed over to conductor of bus. He has stated that copy of seizure memo was supplied to accused free of cost. He has stated that thereafter Inspector Minakshi prepared rukka and handed over the same to him along with parcel containing charas, NCB form and sample seal with direction to take the same to police station CID Crime Branch Shimla and handed over case property and rukka to MHC Prakash Chand. He has stated that MHC Parkash Chand was officiating SHO at the relevant time. He has stated that after opening of rexen bag and card board box charas was found. He has stated that accused present in Court is the same person from whom possession of charas was recovered. He has denied suggestion that he did not give his personal search either to the driver or the conductor. He has denied suggestion that accused was falsely implicated in the present case. He denied suggestion that he deposed falsely in Court.

9.6 PW6 Bahadur Singh has stated that he is driver by profession and working as driver with Parmar RTC Hamirpur. He has stated that on dated 1.5.2011 he was coming from Rampur to Hamirpur and when the bus reached at Hasan valley at about 1.45 PM then one vehicle belonging to police official came and asked the bus driver to stop the bus. He has stated that all police officials asked him to take personal search of police officials and thereafter he and conductor took personal search of police officials and no incriminatory material was found in their possession. He has stated that thereafter search memo Ext PW6/A was prepared which bears his signature in red circle. He has stated that two police officials boarded the bus from back side and other police officials boarded the bus from front door. He has stated that he was also accompanying with police officials. He has stated that at the time of search of bus police officials recovered one brown bag which was kept upon the lap by the passenger sitting on seat No.37. Witness was declared hostile. In cross examination conducted by prosecution PW6 has stated that charas in the shape of wicks and marble recovered from person sitting on seat No.37 of bus. He has stated that accused told his name as Kartar Singh son of Tula Ram. He has stated that Kartar Singh son of Tula Ram had given his option to be searched before police officials. He has stated that charas was weighed with the help of scale which was found 2.100 Kg. He has stated that contraband was sealed with ten seals of seal impression 'N'. He has stated that NCB form was filled. He has stated that seal after use was handed over to conductor Sunil Kumar. He has stated that copy of seizure memo was supplied to accused free of cost. He has stated that site plan was prepared and his statement was recorded. He proved charas Ext P6 in the Court. He has stated that owner of bus came to the spot within one hour and he took the bus to its destination and he remained at the spot for two hours. He has stated that police officials conducted search of all passengers and they remained inside bus throughout checking. He has stated that seat No.37 was just in front of back door. He has stated that

one document was signed inside bus and rest of documents were signed outside but. He has denied suggestion that no incriminating substance was recovered from the passenger sitting on seat No.37. He has denied suggestion that police officials called him at Police Station Bharari and obtained signature on various documents just to create evidence against accused. He has denied suggestion that police officials obtained signatures on various documents at police station Bharari.

9.7. PW7 Inspector Minakshi has stated that on dated 1.5.2011 when she was in police station CID at Bharari at 12.30 PM then she received secret information relating to contraband. She has stated that on the basis of information she prepared special report under Section 42 of NDPS Act. She has stated that special information report was handed over to HC Devinder with direction to take the same to SP Crime Shimla. She has stated that after sending special information she along with HC Balbir, Constable Praveen Kumar, Constable Vikesh Guleria proceeded towards Kufri-Theog on official vehicle No HP-07B-0324 which was driven by Constable Brij Lal. She has stated that when they reached near Hasan valley then she spotted bus No. HP-22B-2087 coming from Chharbra side and she gave signal to the bus to stop. She has stated that she gave her identification to the driver of bus. She has stated that driver of the bus disclosed his name as Bhadur Singh and conductor disclosed his name as Sunil Kumar. She has stated that thereafter driver and conductor were associated in raiding party. She has stated that she and police officials have also given their personal search and memo Ext PW6/A was prepared. She has stated that she boarded the bus from front side and other four constables were deputed to check the passengers. She has stated that thereafter she started checking passenger from seat No.1. She has stated that accused was sitting upon seat No.37 of the bus. She has stated that she apprised the accused about his legal right to be searched before Magistrate or gazetted officer. She has stated that accused had given his option to be searched before police officials and consent memo Ext PW5/A was prepared. She has stated that charas was kept by accused in a bag. She has stated that charas was weighed and 2.100 Kg. charas was found from the possession of accused. She has stated that parcel of charas was sealed with ten seals of seal impression 'N' and NCB form was filled up in triplicate. She has stated that seal after use and after taking specimen of seal on pieces of cloth was handed over to witness Sunil Kumar. She has stated that she prepared rukka Ext PW7/C and handed over the same to HC Balbir Singh along with case property, NCB form in triplicate, recovery memo and specimen seal with direction to take the same to police station Bharari. She has stated that she prepared site plan Ext PW7/D and also recorded statement of witnesses under Section 161 Cr.PC. She has stated that ground of arrest was informed to accused. She has stated that charas was recovered from accused. She has stated that special report was prepared and sent. She has stated that she received chemical analyst report from FSL Junga and thereafter challan was presented in Court after completion of investigation. She has denied suggestion that no charas was recovered from the accused. She has denied suggestion that all the documents were prepared later on at police station Bharari. She has denied suggestion that she did not disclose ground of arrest to accused.

9.8 Statement of accused Kartar Singh was recorded under Section 313 Cr.PC. He has stated that he was travelling in bus and coming from Rampur side on dated 1.5.2011. He has stated that police party stopped bus at Dhalli and asked the passengers to come down from the bus. He has stated that police officials took him to police station Dhalli. He has stated that one bag was already in the possession of police officials. He has stated that police officials asked other four persons to go to their home and planted false case upon him.

9.9 Accused examined DW1 Sunil Kumar conductor of the bus as defense witness. DW1 Sunil Kumar has stated that in the year 2010-11 he remained conductor with Parmar bus service. He has stated that on dated 1.5.2011 he was conductor of the bus having registration No. HP-22B-2087 and bus was going from Hamirpur to Rampur. He has stated that bus started from Hamirpur at 6.30 AM and when he reached at Theog then he received telephone call from the owner of bus who directed to change the bus with another bus which was coming from Rampur to Hamirpur because the bus had developed some mechanical defect. He has stated that passengers alighted from bus No.1587 and boarded in bus No.2087 and sat on the seats as per their convenience. He has stated that there were about 47 passengers in the bus and in the meantime one jeep came from Theog side and jeep overtook bus No.HP-22B-2087 and asked the driver to stop the bus near Hasan valley. He has stated that police officials told him that they want to conduct search of the bus. He has stated that some police officials boarded the bus from front door and 3/4 police officials boarded the bus from rear door. He has stated that thereafter bus was locked and police officials asked 3/4 passengers sitting on the rear seats to come out of the bus. He has stated that police officials took up one bag from the rack and came out of bus. He has stated that police officials asked him and driver of bus to come to police station CID Bharari. He has stated that he along with driver and Manger of Parmar bus went to police station Bharari in the evening. He has stated that police officials obtained his signatures on some documents. He has stated that he does not know that accused present in Court was the same person who was apprehended by police officials. He has denied suggestion that bus No.2087 was coming from Rampur. Self stated that bus having registration No. 2087 started from Hamirpur to Rampur. He has admitted that accused was apprehended from bus No.2087 at Hasan valley. He denied suggestion that he took money from accused for deposing in his favour.

10. Submission of learned Advocate appearing on behalf of the appellant that prior information received by police official was not sent to immediate police official as per Section 42(2) of the Narcotic Drugs & Psychotropic Substance Act 1985 and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reason hereinafter mentioned. PW7 Inspector Minakshi has specifically stated when she appeared in witness box that she prepared special information report Ext PW7/A under Section 42(2) of the Narcotic Drugs & Psychotropic Substance Act and thereafter handed over the same to HC Devinder with direction to hand over special information report prepared under Section 42 (2) of NDPS Act in the office of SP Crime Branch Shimla. Court has carefully perused testimony of PW3 HC Devinder. PW3 has specifically stated that PW7 Inspector Minakshi had handed over him special information report prepared under Section 42(2) of NDPS Act with direction to deposit the same in the office of SP Crime Branch Shimla and thereafter he handed over the same to SP Crimes Shimla at his residence. Testimony of PW7 Inspector Minakshi and testimony of PW3 HC Devinder relating to sending of special information report by PW7 Inspector Minakshi to her superior officer are trustworthy, reliable and inspire confidence of Court. There is no reason to disbelieve the testimony of PW7 Inspector Minakshi and PW3 HC Devinder relating to sending special information report prepared under Section 42(2) of the Narcotic Drugs & Psychotropic Substance Act 1985 to SP Crimes Shimla. Even testimonies of PW7 Minakshi and PW3 HC Devinder are corroborated by documentary evidence Ext PW7/A placed on record.

11. Another submission of learned Advocate appearing on behalf of appellant that no information of ground of arrest was given to appellant as required under Section 52 of Narcotic Drugs & Psychotropic Substance Act 1985 and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. PW7 Inspector Minakshi Investigating Officer has specifically stated in positive

manner that information relating to ground of arrest was given to accused vide document Ext PW7/E placed on record. Court has carefully perused document Ext PW7/E placed on record. It is proved beyond reasonable doubt that information as required under Section 52 of the Narcotic Drugs & Psychotropic Substance Act 1985 relating to grounds of arrest was given to the appellant. Testimony of PW7 Inspector Minakshi is corroborated by documentary evidence Ext PW7/E placed on record which remains un-rebutted on record.

12. Another submission of learned Advocate appearing on behalf of appellant that no special report under Section 57 of NDPS Act relating to arrest and seizure of contraband was sent as required under law and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. Court has carefully perused the testimony of PW7 Inspector Minakshi. PW7 has specifically stated in positive manner that special report under Section 57 relating to arrest and seizure Ext PW7/F was sent to the office of SP Crime Shimla and special report Ext PW7/F placed on record is also proved on record in accordance with law. PW3 HC Devinder has specifically stated when he appeared in witness box that he took special report prepared under Section 57 of the NDPS Act relating to arrest and seizure in the office of SP Crime Branch Shimla. Testimony of PW7 Inspector Minakshi and testimony of PW3 Devinder corroborated with documentary evidence Ext PW7/F placed on record proved beyond reasonable doubt that special report prepared under Section 57 of NDPS Act relating to arrest and seizure was sent to SP Crime Branch Shimla in accordance with law.

13. Another submission of learned Advocate appearing on behalf of appellant that compliance of Section 50 of the Narcotic Drugs & Psychotropic Substance Act 1985 was not effected in the present case and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. Although in the present case consent of accused under Section 50 of the NDPS Act was obtained vide documentary evidence Ext PW5/A placed on record. It is the case of the prosecution that 2.100 Kg. charas was found from the exclusive and conscious possession of accused when accused was sitting on seat No.37 in bus having registration No. HP-2B-2087. It is the case of prosecution that charas to the quantity of 2.100 Kg. was recovered from the bag which was kept upon lap of the accused. It is well settled law that Section 50 of NDPS Act is attracted when the contraband is found from the person of accused. In the present case contraband was not found from the person of accused but contraband was found from the bag of the accused. It was held in case reported in 1999 (8) SCC 257 titled Kalema Tumba Vs. State of Maharashtra and another that when contraband was found from the bag then compliance of Section 50 is not mandatory. Also See 2005 (4) SCC 350 titled State of HP Vs. Pawan Kumar. Also see 2011 Crl.L.J. 1738 titled Jarnail Singh Vs. State of Punjab.

14. Another submission of learned Advocate appearing on behalf of the appellant that in view of the testimony of PW6 Bahadur Singh driver of bus No. HP-22B-2087 and in view of the testimony of DW1 Sunil Kumar conductor of bus No. HP-22B-2087 appeal filed by appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of PW6 Bahadur Singh driver and DW1 Sunil Kumar conductor of bus No. HP-22B-2087. PW6 Bahadur Singh was declared hostile by prosecution and thereafter he was cross-examined at length by prosecution. PW6 Bahadur Singh has stated in positive manner when he was cross examined by prosecution that when police official inquired from the person sitting upon seat No.37 of bus then he disclosed his name as Kartar Singh son of Tula Ram resident of Nirmand. PW6 Bahadur Singh has specifically stated that thereafter it was informed to accused Kartar Singh that he has legal right to be searched before the Magistrate or gazetted officer and memo Ext PW5/A was prepared which bears his signature in red circle 'X'. PW6 has specifically stated in

positive manner that thereafter accused had given his option to be searched by police officials present at the spot. PW6 has stated in positive manner that rexen bag which was kept upon the leg of accused was searched by police officials and black coloured substance in the shape of wicks and marbles were recovered. PW6 has specifically stated that thereafter charas was weighed with the help of scale which was found 2.100 Kg. PW6 has specifically stated in positive manner that thereafter parcel was sealed with ten seals of seal impression 'N' and NCB form was filled up. It is well settled law that principle of falsus in uno falsus in omnibus is not applicable in criminal trials. See AIR 1980 SC 957 titled Bhe Ram Vs. State of Haryana. Also See AIR 1971 SC 2505 titled Rai Singh Vs. State of Haryana. It is well settled law that testimony of hostile witness should not be discarded altogether. It is well settled law that testimony of hostile witness could be considered by criminal Court which is trust worthy, reliable and inspire confidence of Court. See AIR 2004 SC 1720 titled Lella Srinivasa Rao Vs. State of Andhra Pradesh. Also see AIR 2006 SC 951 titled Radha Mohan Singh Vs. State of UP. Also see AIR 2003 SC 4230 titled State of Rajasthan Vs. Bhawani. Also see AIR 1988 SC 696 titled appabhai and another Vs. State of Gujarat. Also See: 2011 (6) SCC 312 titled Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat. Also see 2012 (5) SCC 777 titled Ramesh Harijan Vs. State of Uttar Pradesh, also see AIR 1977 SC 170 titled Rabindra Kumar Dey Vs. State of Orissa, also see AIR 1991 SC 1853 titled Khujji Vs. State of Madhya Pradesh. We have carefully perused the testimony of DW1 Sunil Kumar. DW1 has specifically stated in positive manner that one jeep came from Theog side and jeep overtook the bus and asked the driver to stop the bus near Hasan valley. DW1 has specifically stated that thereafter police officials told that they want to conduct search of the bus some police officials boarded the bus from front door and 3/4 police officials boarded bus from rear door and they locked the bus. Search of bus having registration No. HP-22B-2087 on dated 1.5.2011 at Hasan valley is also proved as per testimony of DW1 Sunil Kumar.

15. Another submission of learned Advocate appearing on behalf of appellant that no possession of 2.100 Kg. charas was found from exclusive possession of accused and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. PW7 Inspector Minakshi has specifically stated in positive manner when she appeared in witness box that 2.100 Kg. charas was found from the exclusive and conscious possession of the accused. Testimony of PW7 Inspector Minakshi is corroborated by PW5 HC Balbir Singh. PW5 Balbir Singh has specifically stated in positive manner when he appeared in witness box that 2.100 Kg. charas was found from the possession of accused. Even PW6 Bahadur Singh driver of the bus has specifically stated when he was cross-examined by the prosecution that charas was recovered from the possession of person sitting on seat No.37 of bus in his presence. There is no evidence on record in order to prove that police officials have prior hostile animus against accused at any point of time. It is well settled law that conviction could be sustained upon the testimony of police official if the same is trustworthy, reliable and inspire confidence of Court. See 1996 (1) SCC 427 titled Sama Alana Abdulla Vs. State of Gujarat. Also see AIR 1996 (3) SCC 338 titled Tahir Vs. State of Delhi. It was held in case reported in AIR 1973 SC 2783 titled Nathu Singh Vs. State of MP that the mere fact that witnesses examined in support of prosecution case were police officials is not strong enough to discard their evidence. It was held that police officials should not be treated as interested witnesses. See AIR 1985 SC 1092 titled State of Gujarat Vs. Raghunath Vamanrao Baxi . Also see 2012 (4) SCC 722 titled Govindaraju Vs. State. Also see 2007 15 SCC 760 Tika Ram Vs. State of MP. Also see 2007 (7) SCC 625 titled Girja Prasad Vs. State of MP.

16. Another submission of learned Advocate appearing on behalf of appellant that it is not proved on record beyond reasonable doubt that charas was found from the

conscious possession of appellant and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. Under Section 35 of the Narcotic Drugs & Psychotropic Substance Act 1985 there is presumption of culpable mental state**.** Accused did not adduce any positive, cogent and reliable evidence on record in order to prove the fact that he had no culpable mental state. Even there is presumption against accused under Section 54 of the Narcotic Drugs & Psychotropic Substance Act 1985 relating to possession of contraband article and accused did not rebut presumption mentioned under Section 54 of the NDPS Act 1985 satisfactorily. See 2010 (9) SCC 608 titled Dharampal Singh Vs. State of Punjab.

17. Another submission of learned Advocate appearing on behalf of appellant that re-sealing process in NCB form was not conducted by Station House Officer and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused NCB form placed on record. There is recital in column No.9 of NCB form that NCB form was resealed with seal impression 'P' by MHC/SHO. PW5 Balbir Singh has specifically stated when he appeared in witness box that MHC Parkash Chand was also officiating SHO at the relevant time in police station. Testimony of PW5 HC Balbir Singh that PW1 Parkash Chand was officiating SHO at the relevant time remained un-rebutted on record. Accused did not adduce any positive, cogent and reliable evidence on record in order to prove that PW1 Parkash Chand was not officiating SHO at the relevant time.

18. Another submission of learned Advocate appearing on behalf of appellant that there is material contradictions in the prosecution case and on this ground appeal filed by appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. Appellant did not point out any material contradictions in the testimony of prosecution case which goes to the root of the case. It is well settled law that minor contradictions are bound to come in criminal case when testimony of prosecution witness is recorded after a gap of sufficient time. In the present case contraband was recovered from the exclusive and conscious possession of accused on dated 1.5.2011 and testimonies of prosecution witnesses were recorded on dated 17.1.2012, 18.1.2012, 21.3.2012, 21.4.2012, 21.5.2012 and 15.6.2012. It is held that minor contradictions are bound to come in criminal case when testimony of prosecution witness is recorded after gap of sufficient time. It was held that minor discrepancy should be ignored in criminal case. See 2004 (12) SCC 492 titled Shashidhar Purandhar Hedge and another Vs. State of Karnataka. Also see 1999 (9) SCC 525 titled Leela Ram Vs. State of Haryana. Also see 2010 (9) SCC 765 titled C.Muniappan and others Vs. State of Tamil Nadu. See AIR 1972 SC 2020 titled Sohrab and another Vs. The State of Madhya Pradesh, see AIR 1985 SC 48 titled State of UP Vs. M.K.Anthony, see AIR 1983 SC 753 titled Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, see AIR 2007 SC 2257 titled State of Rajasthan Vs. Om Parkash, see 2009 (11) SCC 588 titled Prithu Chand and another Vs. State of HP, see 2009 (9) SCC 626 titled State of UP Vs. Santosh Kumar and others, see AIR 2009 SC 152 titled State Vs. Saravanan and another,see AIR 1988 SC 696 titled Appabhai and another Vs. State of Gujarat, see AIR 1999 SC 3544 titled Rammi Vs. State of M.P, see 2000(1) SCC 247 titled State of H.P. Vs. Lekh Raj and another, see 2004 (10) SCC 94 titled Laxman Vs. Poonam Singh and others also See 2004 (7) SCC 408 titled Dashrath Singh Vs. State of UP. See 2012 (10) SCC 433 titled Kuriya and another Vs. State of Rajasthan. Even as per chemical analysis report placed on record Ext PW7/G it is proved on record that after various scientific tests such as physical identification, chemical and chromatograph analyses carried out in the laboratory contraband was found to be sample of charas.

19. In view of above stated facts it is held that learned trial Court has properly appreciated oral as well documentary evidence placed on record and it is held that no miscarriage of justice has been caused to the appellant. Appeal filed by appellant is dismissed and judgment and sentence passed by learned trial Court are affirmed. Appeal is disposed of. Pending application if any also disposed of.

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

Raj Pal Singh …Petitioner.

Versus

Central Bureau of Investigation & others …Respondents.

CWP No. 2526 of 2015-C
Reserved on: 18.05.2015
Decided on: 30.05.2015

Constitution of India, 1950- Article 226- Petitioner sought the transfer of investigation in FIR to CBI or to Delhi- record shows that closure report had been submitted to the Court of competent jurisdiction- interference by High Court will amount to taking over the jurisdiction and powers of the Magistrate- petitioner had filed similar petition before Delhi, High Court which was withdrawn in view of submission of cancellation report- when investigation is complete, it is not permissible to direct the police to conduct further investigation- there can be further investigation but no fresh investigation- second FIR cannot be registered when an FIR had already been registered- petition dismissed.
(Para-6 to 31)

Cases referred:

Bhagwant Singh versus Commissioner of Police and another, AIR 1985 Supreme Court 1285

Chittaranjan Mirdha versus Dulal Ghosh & Anr., 2009 AIR SCW 3873.

Samaj Parivartan Samudaya & Ors. versus State of Karnataka & Ors., 2012 AIR SCW 3323

Vinay Tyagi versus Irshad Ali alias Deepak and Ors., 2013 AIR SCW 220.

State of Bihar and another vs. J.A.C. Saldanna and others, AIR 1980 Supreme Court 326

Ramachandran versus R. Udayakumar & Ors., 2008 AIR SCW 5469

Reeta Nag versus State of West Bengal & Ors., 2010 AIR SCW 476

Anju Chaudhary versus State of U.P. and Anr., 2013 AIR SCW 245,

Amitbhai Anilchandra Shah versus Central Bureau of Investigation and Anr., 2013 AIR SCW 2353

For the petitioner: Mr. Hamender Chandel, Advocate.

For the respondents: Mr. Sandeep Sharma, Senior Advocate, with Mr. Prashant Sharma, Advocate, for respondent No. 1.

Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma, Additional Advocate General, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Petitioner has invoked the jurisdiction of this Court by the medium of the writ petition in hand seeking transfer of the investigation of FIR No. 128 of 2014, registered at Police Station Dharampur, District Solan, H.P. to the Central Bureau of Investigation (for short "CBI"); for declaring the cancellation report, if any filed by the police during the pendency of the writ petition, to be illegal and in the alternative, has also sought transfer of investigation of the said FIR to Delhi, on the grounds taken in the memo of writ petition.

2. It is averred that deceased-Satish Bosaya, a businessman, was having some dispute with respondent No. 5 and were trying to arrive at a settlement. On 08.08.2014, the petitioner received information that Shri Satish Bosaya sustained injuries in a car accident on 07.08.2014 at 7.45 p.m. at Dharampur, District Solan, H.P., constraining him, his friend and the driver to rush to Dharampur. In the post-mortem report conducted at Indira Gandhi Medical College and Hospital, Shimla (for short "IGMC") (Annexure P-1), it is recorded that the deceased died due to firearm injury. A complaint was lodged on 10.08.2014 at Amar Colony Police Station, Delhi (Annexure P-2) and representation was also made to the Director General of Police, Himachal Pradesh on 11.08.2014 (Annexure P-3) for registration of a case. Accordingly, FIR No. 128 of 2014 was registered under Section 302 of the Indian Penal Code (for short "IPC") at Police Station Dharampur, District Solan, on 12.08.2014 (Annexure P-4) and FIR No. 673 of 2014 was registered at Amar Colony Police Station, South East District, New Delhi on 14.08.2014 (Annexure P-5). On 21.08.2014, the Deputy Commissioner of Police, South East District, New Delhi, issued a letter to the SSP, District Solan, Himachal Pradesh for transfer of the investigation of FIR No. 128 of 2014 from Dharampur to Delhi (Annexure P-6). The petitioner also filed various representations to the authorities in Himachal Pradesh for transferring the investigation of the said FIR to Delhi (Annexure P-8). However, the Investigating Officer at Dharampur, District Solan, H.P. conducted the investigation and reported that it was a case of suicide. Accordingly, the Superintendent of Police, Solan, vide its letter, dated 14.11.2014 (Annexure P-9) informed the Director General of Police, Shimla that no case for transfer of the investigation to Delhi was made out, constraining the petitioner to file a writ petition before the Hon'ble High Court of Delhi being W.P. (CRL) No. 1847 of 2014, which was withdrawn on 16.04.2015 (Annexure P-10).

3. We have heard learned counsel for the petitioner.

4. The following questions arise for consideration in this writ petition:

> (i) Whether after submission of the final report in terms of Section 173 of the Code of the Criminal Procedure (for short "CrPC") before the Court of competent jurisdiction, a writ can be filed for transferring the investigation?
>
> (ii) Whether this Court has the jurisdiction to transfer the investigation of a case from Police Station Dharampur, District Solan, H.P. to Delhi?
>
> (iii) Whether in the given circumstances, investigation can be entrusted to any other agency, i.e. CBI?
>
> (iv) Whether this Court is having power to declare the closure report submitted in terms of Section 173 (2) CrPC as illegal?

5. The writ petition merits to be dismissed in limine for the following reasons:

6. Chapter XII of the CrPC contains Sections 154 to 176, which provide the mechanism how to conduct investigation. It provides that in case a report is made about commission of any offence, First Information Report (for short "FIR") is to be registered in terms of Section 154 CrPC, which sets the investigating agency into motion, investigation is to be conducted in terms of the mandate of the said Chapter and on completion, report is to be submitted in terms of Section 173 CrPC before the Court of competent jurisdiction. The final report is to be considered by the Court of competent jurisdiction in order to pass appropriate orders after perusal of the record. In case, closure report is made, it is for the Magistrate/Court of competent jurisdiction either to accept the report or to direct further investigation or to take cognizance and issue process. But, in case the Magistrate decides not to take cognizance and accepts the closure report, then it has to hear the informant.

7. Admittedly, in the case in hand, closure report has been submitted to the Court of competent jurisdiction and it is for that Court/Magistrate to decide whether the closure report is to be accepted or otherwise. Thus, the alternate remedy is available to the writ petitioner. In the given circumstances, the writ Court cannot interfere.

8. A similar matter came up for consideration before the Apex Court in a case titled as **Bhagwant Singh versus Commissioner of Police and another,** reported in **AIR 1985 Supreme Court 1285,** wherein it has been held that in case the Magistrate decides not to take cognizance of offence or to drop the proceedings against some persons mentioned in the FIR, the Magistrate must give notice and hear the informant. It is apt to reproduce relevant portion of para 4 of the judgment herein:

> *"4. ....But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding against others mentioned in the First Information Report, the informant would certainly be prejudiced because the First Information Report lodged by him would have failed of its purpose, wholly or in part. Moreover, when the interest of the informant in prompt and effective action being taken on the First Information Report lodged by him is clearly recognised by the provisions contained in sub-sec. (2) of S. 154, sub-sec. (2) of S. 157 and sub-sec. (2)(ii) of Section 173, it must be presumed that the informant would equally be interested in seeing that the Magistrate takes cognizance of the offence and issues process, because that would be culmination of the First Information Report lodged by him. There can, therefore, be no doubt that when, on a consideration of the report made by the officer in charge of a police station under sub-section (2)(i) of S. 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of S. 173 decides not to take cognizance of the offence and to*

drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. It was urged before us on behalf of the respondents that if in such a case notice is required to be given to the informant, it might result in unnecessary delay on account of the difficulty of effecting service of the notice on the informant. But we do not think this can be regarded as a valid objection against the view we are taking, because in any case the action taken by the police on the First Information Report has to be communicated to the informant and a copy of the report has to be supplied to him under sub-section (2)(i) of S. 173 and if that be so, we do not see any reason why it should be difficult to serve notice of the consideration of the report on the informant. Moreover, in any event, the difficulty of service of notice on the informant cannot possibly provide any justification for depriving the informant of the opportunity of being heard at the time when the report is considered by the Magistrate."

9. The same principle has been laid down by the Apex Court in a case titled as **Chittaranjan Mirdha versus Dulal Ghosh & Anr.,** reported in **2009 AIR SCW 3873.** It is apt to reproduce paras 14 and 17 of the judgment herein:

"14. When a report forwarded by the police to the Magistrate under Section 173(2)(i) is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate, he has again the option of adopting one of the three courses open i.e., (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3) . The position is, therefore, now well-settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take

cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. [See M/s. India Sarat Pvt. Ltd. v. State of Karnataka and another (AIR 1989 SC 885)]. The informant is not prejudicially affected when the Magistrate decides to take cognizance and to proceed with the case. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops the proceeding or takes the view that there is material for proceeding against some and there are insufficient grounds in respect of others, the informant would certainly be prejudiced as the First Information Report lodged becomes wholly or partially ineffective. Therefore, this Court indicated in Bhagwant Singh's case (supra) that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory. As indicated above, there is no provision in the Code for issue of a notice in that regard.

15. ....

16. ....

17. Therefore, the stress is on the issue of notice by the Magistrate at the time of consideration of the report. If the informant is not aware as to when the matter is to be considered, obviously, he cannot be faulted, even if protest petition in reply to the notice issued by the police has been filed belatedly. But as indicated in Bhagwant Singh's case (supra) the right is conferred on the informant and none else."

10. It would also be profitable to reproduce paras 17 and 20 of the judgment rendered by the Apex Court in a case titled as **Samaj Parivartan Samudaya & Ors. versus State of Karnataka & Ors.,** reported in **2012 AIR SCW 3323,** herein:

"17. The machinery of criminal investigation is set into motion by the registration of a First Information Report (FIR), by the specified police officer of a jurisdictional police

station or otherwise. The CBI, in terms of its manual has adopted a procedure of conducting limited pre-investigation inquiry as well. In both the cases, the registration of the FIR is essential. A police investigation may start with the registration of the FIR while in other cases (CBI, etc.), an inquiry may lead to the registration of an FIR and thereafter regular investigation may begin in accordance with the provisions of the CrPC. Section 154 of the CrPC places an obligation upon the authorities to register the FIR of the information received, relating to commission of a cognizable offence, whether such information is received orally or in writing by the officer in-charge of a police station. A police officer is authorised to investigate such cases without order of a Magistrate, though, in terms of Section 156(3) Cr.P.C. the Magistrate empowered under Section 190 may direct the registration of a case and order the police authorities to conduct investigation, in accordance with the provisions of the CrPC. Such an order of the Magistrate under Section 156(3) CrPC is in the nature of a pre-emptory reminder or intimation to police, to exercise their plenary power of investigation under that Section. This would result in a police report under Section 173, whereafter the Magistrate may or may not take cognizance of the offence and proceed under Chapter XVI CrPC. The Magistrate has judicial discretion, upon receipt of a complaint to take cognizance directly under Section 200 CrPC, or to adopt the above procedure. [Ref. Gopal Das Sindhi & Ors. v. State of Assam & Anr., [AIR 1961 SC 986]; Mohd. Yusuf v. Smt. Afaq Jahan & Anr., [AIR 2006 SC 705]; and Mona Panwar v. High Court of Judicature of Allahabad Through its Registrar & Ors., [(2011) 3 SCC 496 : (AIR 2011 SC 529)].

18. ....

19. ....

20. Thus, the CrPC leaves clear scope for conducting of further inquiry and filing of a supplementary charge sheet, if necessary, with such additional facts and evidence as may be collected by the investigating officer in terms of sub-Sections (2) to (6) of Section 173 CrPC to the Court."

11. The Apex Court also discussed this issue in the judgment rendered in a case titled as **Vinay Tyagi versus Irshad Ali alias Deepak and Ors.,** reported in **2013 AIR SCW 220.** It is apt to reproduce para 21 of the judgment herein:

"21. Referring to the provisions of Section 173 of the Code, the Court observed that the police has the power to conduct further investigation in terms of Section 173(8) of the Code but also opined that even the Trial Court can direct further investigation in contradistinction to fresh investigation, even where the report has been filed. It will be useful to refer to the following paragraphs of the judgment wherein the Court while referring to the case of Mithabhai

Pashabhai Patel v. State of Gujarat (AIR 2009 SC (Supp) 1658 : 2009 AIR SCW 3780) (supra) held as under:

"13. It is, however, beyond any cavil that 'further investigation' and 'reinvestigation' stand on different footing. It may be that in a given situation a superior court in exercise of its constitutional power, namely, under Articles 226 and 32 of the Constitution of India could direct a 'State' to get an offence investigated and/or further investigated by a different agency. Direction of a reinvestigation, however, being forbidden in law, no superior court would ordinarily issue such a direction. Pasayat, J. in Ramachandran v. R. Udhayakumar, (2008) 5 SCC 413 : (AIR 2008 SC 3102 : 2008 AIR SCW 5469) opined as under: (SCC p. 415, para 7) : (Para 6 of AIR, AIR SCW)

'7. At this juncture it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under sub-section (8), but not fresh investigation or reinvestigation.' A distinction, therefore, exists between a reinvestigation and further investigation.

xxx xxx xxx

15. The investigating agency and/or a court exercise their jurisdiction conferred on them only in terms of the provisions of the Code. The courts subordinate to the High Court even do not have any inherent power under Section 482 of the Code of Criminal Procedure or otherwise. The precognizance jurisdiction to remand vested in the subordinate courts, therefore, must be exercised within the four corners of the Code."

12. Admittedly, in this case, closure report has been submitted, the matter is sub judice and if this Court interferes, that will amount to take over the jurisdiction and powers of the Magistrate, who is having the power and jurisdiction in terms of the mechanism contained in the CrPC, as discussed hereinabove. The first question is answered accordingly.

13. It is worthwhile to record herein that the writ petitioner had also filed a Writ Petition (Criminal) on 09.09.2014 before the Hon'ble High Court of Delhi, which was withdrawn on 16.04.2015, i.e. after a lapse of more than seven months.

14. Learned counsel for the writ petitioner has filed copy of the said writ petition, made part of the file. The writ petitioner had sought almost the same relief in the said writ petition, which he has sought in the present writ petition. It is apt to reproduce the prayer clause of the said writ petition herein:

"It is therefore most respectfully prayed that this Hon'ble Court may be pleased to:

a) issue a Writ, Order or Direction in the nature of mandamus or any other Writ, Order or Direction that the

FIR No. 128/2014 dated 12.08.2014 under Section 302 of the Indian Penal Code 1860 registered in the State of Himachal Pradesh at Police Station Dharampur, Solan, Himachal Pradesh be transferred to New Delhi and investigated along with FIR No. 673/2014 registered under Section 364 IPC at Delhi, Amar Colony Police Station or

b) Alternatively issue a Writ, Order or Direction in the nature of mandamus or any other Writ, Order or Direction that the FIR No. 128/2014 dated 12.08.2014 under Section 302 of the Indian Penal Code 1860 registered in the State of Himachal Pradesh at Police Station Dharampur, Solan, Himachal Pradesh and FIR No. 673/2014 registered under Section 364 IPC at Delhi, Amar Colony Police Station, both be investigated by an Independent Agency

c) Pass such other further Order(s) as deemed fit and proper in the facts and circumstances of the case and in the interest of justice."

15. In that writ petition, learned counsel for the State had brought to the notice of the Hon'ble High Court that investigations were complete and cancellation report had been prepared. Thereafter, the writ petitioner withdrew the writ petition with liberty to take other legal remedies.

16. It is apt to reproduce the relevant portion of the order made by the Hon'ble High Court of Delhi in the said writ petition (Annexure P-10) herein:

"Learned counsel for respondent No. 2 submits that investigations are complete and cancellation report has been prepared which is likely to be filed in the Court. In view of this statement, learned counsel for the petitioner seeks leave to withdraw present writ petition with liberty to take other legal remedies as may be available to the petitioner under the law.

Writ petition is disposed of as withdrawn."

17. A perusal of the order (supra) reveals that the writ petitioner has withdrawn the said writ petition with liberty to seek other legal remedies. The words *'other legal remedies'* mean *'the remedies other than the writ petition'*. Thus, the writ petition is not maintainable.

18. The next question is - when the investigation is already complete, can the High Court direct further investigation and transfer the investigation to other agency? The answer is in the negative for the following reasons:

19. Investigation has been completed and it is yet to be determined by the Court of competent jurisdiction as to whether the closure report is to be accepted or otherwise? So, it is the domain of the Magistrate to pass appropriate orders and the Writ Court cannot interfere at this stage.

20. The writ petition is not maintainable for the reason that the writ petitioner had sought the same relief before the Hon'ble High Court of Delhi by the medium of writ petition (supra), at the cost of repetition, which was withdrawn.

21. Whether further investigation is permissible, is also to be thrashed out by the Magistrate/Court of competent jurisdiction in terms of Section 173(8) CrPC. Re-investigation is unknown to law.

22. This issue has been discussed in a series of judgments by the Apex Court.

23. The Apex Court in a case titled as **State of Bihar and another versus J.A.C. Saldanna and others,** reported in **AIR 1980 Supreme Court 326,** held that power of the police to investigate into a cognizable offence is ordinarily not to be interfered with. It is apt to reproduce paras 19, 25 and 26 of the judgment herein:

> *"19. The power of the Magistrate under Section 156 (3) to direct further investigation is clearly an independent power and does not stand in conflict with the power of the State Government as spelt out hereinbefore. The power conferred upon the Magistrate under Section 156 (3) can be exercised by the Magistrate even after submission of a report by the investigating officer which would mean that it would be open to the Magistrate not to accept the conclusion of the investigating officer and direct further investigation. This provision does not in any way affect the power of the investigating officer to further investigate the c ase even after submission of the report as provided in Section 173 (8). Therefore, the High Court was in error in holding that the State Government in exercise of the power of superintendence under S. 3 of the Act lacked the power to direct further investigation into the case. In reaching this conclusion we have kept out of consideration the provision contained in Section 156 (2) that an investigation by an officer-in-charge of a police station, which expression includes police officer superior in rank to such officer, cannot be questioned on the ground that such investigating officer had no jurisdiction to carry on the investigation; otherwise that provision would have been a short answer to the contention raised on behalf of respondent 1.*
>
> *20 to 24. ....*
>
> *25. There is a clear-cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department, the superintendence over which vests in the State Government. The executive which is charged with a duty to keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounden duty to investigate into the offence and bring the offender to book. Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the*

offence. Once that is completed and the investigating officer submits report to the Court requesting the Court to take cognisance of the offence under Section 190 of the Code its duty comes to an end. On a cognizance of the offence being taken by the Court the police function of investigation comes to an end subject to the provision contained in Section 173 (8), there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the Court, and to award adequate punishment according to law for the offence proved to the satisfaction of the Court. There is thus a well defined and well demarcated function in the field of crime detection and its subsequent adjudication between the police and the Magistrate. This has been recognised way back the King Emperor v. Khwaja Nazir Ahmad, (1944) 71 Ind App 203 at p. 213, where the Privy Council observed as under :

> *"In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case as the present, however, the court's functions begin when a charge is preferred before it, and not until then".*

26. This view of the Judicial Committee clearly demarcates the functions of the executive and the judiciary in the field of detection of crime and its subsequent trial and it would appear that the power of the police to investigate into a cognizable offence is ordinarily not to be interfered with by the judiciary."

24. The Apex Court in a cases titled as **Ramachandran versus R. Udayakumar & Ors.,** reported in **2008 AIR SCW 5469,** and **Reeta Nag versus State of West Bengal & Ors.,** reported in **2010 AIR SCW 476,** held that there can be further investigation if required, but not fresh investigation or re-investigation. It is apt to reproduce para 19 of the judgment in **Reeta Nag's case (supra)** herein:

"19. What emerges from the above-mentioned decisions of this Court is that once a charge-sheet is filed under Section 173(2) Cr.P.C. and either charge is framed or the accused are discharged, the Magistrate may, on the basis of a protest petition, take cognizance of the offence complained of or on the application made by the investigating authorities permit further investigation under Section 173(8) . The Magistrate cannot suo motu direct a further investigation under Section 173(8) Cr.P.C. or direct a re-investigation into a case on account of the bar of Section 167(2) of the Code."

25. The Apex Court in **Samaj Parivartan Samudaya's case (supra)** held that further investigation is permissible, however, re-investigation is prohibited. It is apt to reproduce para 18 of the judgment herein:

"18. Once the investigation is conducted in accordance with the provisions of the CrPC, a police officer is bound to file a report before the Court of competent jurisdiction, as contemplated under Section 173 CrPC, upon which the Magistrate can proceed to try the offence, if the same were triable by such Court or commit the case to the Court of Sessions. It is significant to note that the provisions of Section 173(8) CrPC open with non-obstante language that nothing in the provisions of Section 173(1) to 173(7) shall be deemed to preclude further investigation in respect of an offence after a report under sub-Section (2) has been forwarded to the Magistrate. Thus, under Section 173(8), where charge-sheet has been filed, that Court also enjoys the jurisdiction to direct further investigation into the offence. {Ref., Hemant Dhasmana v. Central Bureau of Investigation & Anr., [(2001) 7 SCC 536v: (Air 2001 SC 2721)]}. This power cannot have any inhibition including such requirement as being obliged to hear the accused before any such direction is made. It has been held in Shri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandha Maharaj v. State of Andhra Pradesh and Ors., (JT 1999 (4) SC 537 : (AIR 1999 SC 2332) that the casting of any such obligation on the Court would only result in encumbering the Court with the burden of searching for all potential accused to be afforded with the opportunity of being heard."

26. It is also apt to reproduce paras 16, 18, 22, 23, 30, 31, 33 and 40 of the judgment rendered by the Apex Court in **Vinay Tyagi's case (supra)** herein:

"16. However, in the case of a 'fresh investigation', 'reinvestigation' or 'de novo investigation' there has to be a definite order of the court. The order of the Court unambiguously should state as to whether the previous investigation, for reasons to be recorded, is incapable of being acted upon. Neither the Investigating agency nor the Magistrate has any power to order or conduct 'fresh investigation'. This is primarily for the reason that it would

be opposed to the scheme of the Code. It is essential that even an order of 'fresh'/'de novo' investigation passed by the higher judiciary should always be coupled with a specific direction as to the fate of the investigation already conducted. The cases where such direction can be issued are few and far between. This is based upon a fundamental principle of our criminal jurisprudence which is that it is the right of a suspect or an accused to have a just and fair investigation and trial. This principle flows from the constitutional mandate contained in Articles 21 and 22 of the Constitution of India. Where the investigation ex facie is unfair, tainted, mala fide and smacks of foul play, the courts would set aside such an investigation and direct fresh or de novo investigation and, if necessary, even by another independent investigating agency. As already noticed, this is a power of wide plenitude and, therefore, has to be exercised sparingly. The principle of rarest of rare cases would squarely apply to such cases. Unless the unfairness of the investigation is such that it pricks the judicial conscience of the Court, the Court should be reluctant to interfere in such matters to the extent of quashing an investigation and directing a 'fresh investigation'. In the case of Sidhartha Vashisht v. State (NCT of Delhi), [(2010) 6 SCC 1 : (AIR 2010 SC 2352 : 2010 AIR SCW 4302)], the Court stated that it is not only the responsibility of the investigating agency, but also that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. An equally enforceable canon of the criminal law is that high responsibility lies upon the investigating agency not to conduct an investigation in a tainted or unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society. The maxim contra veritatem lex nunquam aliquid permittit applies to exercise of powers by the courts while granting approval or declining to accept the report. In the case of Gudalure M.J. Cherian & Ors. v. Union of India & Ors., [(1992) 1 SCC 397], this Court stated the principle that in cases where charge-sheets have been filed after completion of investigation and request is made belatedly to reopen the investigation, such investigation being entrusted to a specialized agency would normally be declined by the court of competent jurisdiction but nevertheless in a given situation to do justice between the parties and to instil confidence in public mind, it may become necessary to pass such orders. Further, in the case of R.S. Sodhi, Advocate v. State of U.P., [1994 SCC Supp. (1) 143 : (AIR 1994 SC 38 : 1994 AIR SCW 4039), where allegations were made against a police officer, the Court

ordered the investigation to be transferred to CBI with an intent to maintain credibility of investigation, public confidence and in the interest of justice. Ordinarily, the courts would not exercise such jurisdiction but the expression 'ordinarily' means normally and it is used where there can be an exception. It means in the large majority of cases but not invariably. 'Ordinarily' excludes extra- ordinary or special circumstances. In other words, if special circumstances exist, the court may exercise its jurisdiction to direct 'fresh investigation' and even transfer cases to courts of higher jurisdiction which may pass such directions.

17. ....

18. Next question that comes up for consideration of this Court is whether the empowered Magistrate has the jurisdiction to direct 'further investigation' or 'fresh investigation'. As far as the latter is concerned, the law declared by this Court consistently is that the learned Magistrate has no jurisdiction to direct 'fresh' or 'de novo' investigation. However, once the report is filed, the Magistrate has jurisdiction to accept the report or reject the same right at the threshold. Even after accepting the report, it has the jurisdiction to discharge the accused or frame the charge and put him to trial. But there are no provisions in the Code which empower the Magistrate to disturb the status of an accused pending investigation or when report is, filed to wipe out the report and its effects in law. Reference in this regard can be made to K. Chandrasekhar v. State of Kerala, [(1998) 5 SCC 223 : (AIR 1998 SC 2001 : 1998 AIR SCW 1852)]; Ramachandran v. R. Udhayakumar, [(2008) 5 SCC 413 : (AIR 2008 SC 3102 : 2008 AIR SCW 5469)], Nirmal Singh Kahlon v State of Punjab & Ors., [(2009) 1 SCC 441 : (AIR 2009 SC 984 : 2009 AIR SCW 60)]; Mithabhai Pashabhai Patel & Ors. v. State of Gujarat, [(2009) 6 SCC 332 : (AIR 2009 SC (Supp) 1658 : 2009 AIR SCW 3780)]; and Babubhai v. State of Gujarat, [(2010) 12 SCC 254 : (2010) AIR SCW 5126)].

19 to 21. ....

22. In the case of Minu Kumari & Anr. v. State of Bihar & Ors., [(2006) 4 SCC 359 : (AIR 2006 SC 1937 : 2006 AIR SCW 2330)], this Court explained the powers that are vested in a Magistrate upon filing of a report in terms of Section 173(2)(i) and the kind of order that the Court can pass. The Court held that when a report is filed before a Magistrate, he may either (i) accept the report and take cognizance of the offences and issue process; or (ii) may disagree with the report and drop the proceedings; or (iii) may direct further investigation under Section 156(3) and require the police to make a further report.

23. This judgment, thus, clearly shows that the Court of Magistrate has a clear power to direct further investigation when a report is filed under Section 173(2) and may also exercise such powers with the aid of Section 156(3) of the Code. The lurking doubt, if any, that remained in giving wider interpretation to Section 173(8) was removed and controversy put to an end by the judgment of this Court in the case of Hemant Dhasmana v. CBI, [(2001) 7 SCC 536 : (AIR 2001 SC 2721 : 2001 AIR SCW 3064)] where the Court held that although the said order does not, in specific terms, mention the power of the court to order further investigation, the power of the police to conduct further investigation envisaged therein can be triggered into motion at the instance of the court. When any such order is passed by the court, which has the jurisdiction to do so, then such order should not even be interfered with in exercise of a higher court's revisional jurisdiction. Such orders would normally be of an advantage to achieve the ends of justice. It was clarified, without ambiguity, that the magistrate, in exercise of powers under Section 173(8) of the Code can direct the CBI to further investigate the case and collect further evidence keeping in view the objections raised by the appellant to the investigation and the new report to be submitted by the Investigating Officer, would be governed by sub-Section (2) to sub-Section (6) of Section 173 of the Code. There is no occasion for the court to interpret Section 173(8) of the Code restrictively. After filing of the final report, the learned Magistrate can also take cognizance on the basis of the material placed on record by the investigating agency and it is permissible for him to direct further investigation. Conduct of proper and fair investigation is the hallmark of any criminal investigation.

24 to 29. ....

30. Having analysed the provisions of the Code and the various judgments as afore-indicated, we would state the following conclusions in regard to the powers of a magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code :

1. The Magistrate has no power to direct 'reinvestigation' or 'fresh investigation' (de novo) in the case initiated on the basis of a police report.

2. A Magistrate has the power to direct 'further investigation' after filing of a police report in terms of Section 173(6) of the Code.

3. The view expressed in (2) above is in conformity with the principle of law stated in Bhagwant Singh's case by a three Judge Bench and thus in conformity with the doctrine of precedence.

4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8).

5. The Code is a procedural document, thus, it must receive a construction which would advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the Court to the extent that even where the facts of the case and the ends of justice demand, the Court can still not direct the investigating agency to conduct further investigation which it could do on its own.

6. It has been a procedure of proprietary that the police has to seek permission of the Court to continue 'further investigation' and file supplementary chargesheet. This approach has been approved by this Court in a number of judgments. This as such would support the view that we are taking in the present case.

31. Having discussed the scope of power of the Magistrate under Section 173 of the Code, now we have to examine the kind of reports that are contemplated under the provisions of the Code and/or as per the judgments of this Court. The first and the foremost document that reaches the jurisdiction of the Magistrate is the First Information Report. Then, upon completion of the investigation, the police are required to file a report in terms of Section 173(2) of the Code. It will be appropriate to term this report as a primary report, as it is the very foundation of the case of the prosecution before the Court. It is the record of the case and the documents annexed thereto, which are considered by the Court and then the Court of the Magistrate is expected to exercise any of the three options afore-noticed. Out of the stated options with the Court, the jurisdiction it would exercise has to be in strict consonance with the settled principles of law. The power of the magistrate to direct 'further investigation' is a significant power which has to be exercised sparingly, in exceptional cases and to achieve the ends of justice. To provide fair, proper and unquestionable investigation is the obligation of the investigating agency and the Court in its supervisory capacity is required to ensure the same. Further investigation conducted under the orders of the Court, including that of the Magistrate or by the police of its own accord and, for valid reasons, would lead to the filing of a supplementary report. Such supplementary report shall

be dealt with as part of the primary report. This is clear from the fact that the provisions of Sections 173(3) to 173(6) would be applicable to such reports in terms of Section 173(8) of the Code.

32. ....

33. At this stage, we may also state another well-settled canon of criminal jurisprudence that the superior courts have the jurisdiction under Section 482 of the Code or even Article 226 of the Constitution of India to direct 'further investigation', 'fresh' or 'de novo' and even 'reinvestigation'. 'Fresh', 'de novo', and 'reinvestigation' are synonymous expressions and their result in law would be the same. The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. Of course, it is also a settled principle that this power has to be exercised by the superior courts very sparingly and with great circumspection.

34 to 39. ....

40. We have already noticed that there is no specific embargo upon the power of the learned Magistrate to direct 'further investigation' on presentation of a report in terms of Section 173(2) of the Code. Any other approach or interpretation would be in contradiction to the very language of Section 173(8) and the scheme of the Code for giving precedence to proper administration of criminal justice. The settled principles of criminal jurisprudence would support such approach, particularly when in terms of Section 190 of the Code, the Magistrate is the competent authority to take cognizance of an offence. It is the Magistrate who has to decide whether on the basis of the record and documents produced, an offence is made out or not, and if made out, what course of law should be adopted in relation to committal of the case to the court of competent jurisdiction or to proceed with the trial himself. In other words, it is the judicial conscience of the Magistrate which has to be satisfied with reference to the record and the documents placed before him by the investigating agency, in coming to the appropriate conclusion in consonance with the principles of law. It will be a travesty of justice, if the court cannot be permitted to direct 'further investigation' to clear its doubt and to order the investigating agency to further substantiate its charge sheet. The satisfaction of the learned Magistrate is a condition precedent to commencement of further proceedings before the court of competent jurisdiction. Whether the Magistrate should direct 'further investigation' or not is again a matter which will depend upon the facts of a given case. The learned Magistrate or the higher court of competent jurisdiction would direct 'further investigation'

or 'reinvestigation' as the case may be, on the facts of a given case. Where the Magistrate can only direct further investigation, the courts of higher jurisdiction can direct further, re-investigation or even investigation de novo depending on the facts of a given case. It will be the specific order of the court that would determine the nature of investigation. In this regard, we may refer to the observations made by this court in the case of Sivanmoorthy and Others v. State represented by Inspector of Police, [(2010) 12 SCC 29 : (AIR 2011 SC (Cri) 2082)]. In light of the above discussion, we answer the questions formulated at the opening of this judgment as follows:

Answer to Question No. 1

The court of competent jurisdiction is duty bound to consider all reports, entire records and documents submitted therewith by the Investigating Agency as its report in terms of Section 173(2) of the Code. This Rule is subject to only the following exceptions;

a) Where a specific order has been passed by the learned Magistrate at the request of the prosecution limited to exclude any document or statement or any part thereof;

b) Where an order is passed by the higher courts in exercise of its extra- ordinary or inherent jurisdiction directing that any of the reports i.e. primary report, supplementary report or the report submitted on 'fresh investigation' or 're-investigation' or any part of it be excluded, struck off the court record and be treated as non est.

Answer to Question No. 2

No investigating agency is empowered to conduct a 'fresh', 'de novo' or 're-investigation' in relation to the offence for which it has already filed a report in terms of Section 173(2) of the Code. It is only upon the orders of the higher courts empowered to pass such orders that aforesaid investigation can be conducted, in which event the higher courts will have to pass a specific order with regard to the fate of the investigation already conducted and the report so filed before the court of the learned magistrate."

27. Applying the test to the instant case, it can be safely said that it is the domain of the Magistrate/Court of competent jurisdiction to pass appropriate orders, while examining the report filed by the Investigating Agency.

28. Now, the next question is - whether second FIR is permissible on the same allegations for the same cause, one at P.S. Dharampur, District Solan and second at Delhi?

29. The Apex Court in the case titled as **Anju Chaudhary versus State of U.P. and Anr.,** reported in **2013 AIR SCW 245**, held that second FIR for the same incident is not permissible. It is apt to reproduce para 23 of the judgment herein:

"23. The First Information Report is a very important document, besides that it sets the machinery of criminal

law in motion. It is a very material document on which the entire case of the prosecution is built. Upon registration of FIR, beginning of investigation in a case, collection of evidence during investigation and formation of the final opinion is the sequence which results in filing of a report under Section 173 of the Code. The possibility that more than one piece of information is given to the police officer in charge of a police station, in respect of the same incident involving one or more than one cognizable offences, cannot be ruled out. Other materials and information given to or received otherwise by the investigating officer would be statements covered under Section 162 of the Code. The Court in order to examine the impact of one or more FIRs has to rationalise the facts and circumstances of each case and then apply the test of 'sameness' to find out whether both FIRs relate to the same incident and to the same occurrence, are in regard to incidents which are two or more parts of the same transaction or relate completely to two distinct occurrences. If the answer falls in the first category, the second FIR may be liable to be quashed. However, in case the contrary is proved, whether the version of the second FIR is different and they are in respect of two different incidents/crimes, the second FIR is permissible, This is the view expressed by this Court in the case of Babu Babubhai v. State of Gujarat and Ors., [(2010) 12 SCC 254 : (2010 AIR SCW 5126)]. This judgment clearly spells out the distinction between two FIRs relating to the same incident and two FIRs relating to different incident or occurrences of the same incident etc."

30. In another case titled as **Amitbhai Anilchandra Shah versus Central Bureau of Investigation and Anr.,** reported in **2013 AIR SCW 2353,** the Apex Could has laid down the same law. It is apt to reproduce relevant portion of para 52 and para 53 of the judgment herein:

"52. ....

d) Further, on receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering FIR in the Station House Diary, the officer-in-charge of the police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Code. Sub-section (8) of Section 173 of the Code empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report (s) to the Magistrate. A case of fresh investigation based on the second or successive FIRs not being a counter case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same

> *transaction and in respect of which pursuant to the first FIR either investigation is underway or final report under Section 173(2) has been forwarded to the Magistrate, is liable to be interfered with by the High Court by exercise of power under Section 482 of the Code or under Articles 226/227 of the Constitution.*
>
> *e) First Information Report is a report which gives first information with regard to any offence. There cannot be second FIR in respect of the same offence/event because whenever any further information is received by the investigating agency, it is always in furtherance of the first FIR.*
>
> *...........................*
>
> *53. In the light of the specific stand taken by the CBI before this Court in the earlier proceedings by way of assertion in the form of counter affidavit, status reports, etc. we are of the view that filing of the second FIR and fresh charge sheet is violative of fundamental rights under Article 14, 20 and 21 of the Constitution since the same relate to alleged offence in respect of which an FIR had already been filed and the court has taken cognizance. This Court categorically accepted the CBI's plea that killing of Tulsiram Prajapati is a part of the same series of cognizable offence forming part of the first FIR and in spite of the fact that this Court directed the CBI to "take over" the investigation and did not grant the relief as prayed, namely, registration of fresh FIR, the present action of CBI filing fresh FIR is contrary to various judicial pronouncements which is demonstrated in the earlier part of our judgment."*

31. Admittedly, now, the investigation is complete and the Hon'ble High Court of Delhi has dismissed the writ petition as withdrawn while directing the writ petitioner to take recourse to the other legal remedies available. Thus, we deem it proper not to decide the issue.

32. Having said so, the writ petition is misconceived and is dismissed in limine.

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

State of H.P. through Secretary (GAD) .....Appellant

Versus

Shri Purushottam Sharma ...Respondent.

LPA No. 68 of 2015

Date of decision: 30th May, 2015.

Constitution of India, 1950- Article 226- State pleaded that it was not in a position to consider the cases of employees for the allotment of Government accommodation as per

their entitlement and prayed that government be directed to examine the cases of government servant and to make allotment as per the rule - statement is acceptable to the Counsel for the respondent - accordingly State directed to make allotment as per rules which would be subject to the outcome of the Writ Petition. (Para-4 and 5)

For the appellant: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan & Mr. Romesh Verma, Addl. AGs, and Mr. Kush Sharma, Deputy Advocate General.

For the respondent: Mr. Subhash Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice ***(Oral)***

CMP No.5902/2015.

This application has been filed for preponement of date fixed in this appeal, i.e., 15th June, 2015. The learned counsel for the respondent has no objection in pre-poning the date fixed in this appeal. Thus, the application is granted and the appeal is taken up for hearing today itself. The application stands disposed of.

CMP (M) No. 338 of 2015.

2. The learned counsel for the respondent has no objection in case, the delay in filing the appeal is condoned. His statement is taken on record. Therefore, for the reasons stated in the application coupled with the statement made by the learned counsel for the respondent, the application is granted and the delay in filing the appeal is condoned. The application stands disposed of.

LPA No. 68 of 2015.

3. Issue notice. Mr. Subhash Sharma, Advocate waives notice on behalf of the respondent.

4. The learned Advocate General stated at the Bar that in terms of the interim orders passed by the learned Single Judge, the State/Competent Authority is not in a position to consider the cases of the employees for the allotment of government accommodation, as per their entitlement and prayed that the State/Competent Authority may be directed to examine their cases and make allotment, as per rules, occupying the field read with their eligibility. His statement is taken on record. The learned counsel for the respondent has no objection to this proposition. He stated at the Bar that the State/Competent Authority may be directed to make decision as per rules occupying the field but allotment may be kept subject to outcome of the writ petition. His statement is also taken on record.

5. In the given circumstances, we deem it proper to dispose of the appeal by providing that any exercise to be made shall be subject to outcome of the writ petition. Ordered accordingly.

6. We request the learned Single Judge to decide the writ petition, as early as possible, preferably within two weeks from today. List the writ petition before the appropriate Single Bench on **1st June, 2015.**

7. Accordingly, the LPA is disposed of, alongwith pending applications, if any. Dasti copy.

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

Court on its own motion ……….Petitioner.

Versus

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

CWPIL No.8480 of 2014
Date of order: May 02, 2015.

Constitution of India, 1950- Article 226- It was stated in the status report dated 25.4.2015 that first milestone would be achieved by June, 2015, subject to the weather conditions- Status report filed before the Court showed that required progress had not been made till filing of the status report- respondents were taking the plea that delay in the execution of the work was due to bad weather- held, that construction technology had improved to such an extent that construction work is being carried out smoothly even in the areas where temperature remains in minus - a committee of two persons appointed to monitor the progress of the work in question- committee members directed to visit the spot fortnightly and to submit the report about the progress of work and also to give suggestions to take work to logical conclusion.

For the Petitioner(s): Ms.Jyotsna Rewal Dua, Advocate, as Amicus Curiae.
Mr.R.K. Sharma, Senior Advocate, with Mr.Rajender Singh Dogra, Mr.Devinder Chauhan Jaita and Ms.Anita Parmar, Advocates.

For the respondents: Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma, Additional Advocate General and Mr.J.K. Verma, Deputy Advocate General, for respondents No.1 and 2.
Mr.Satyen Vaidya, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Mr.Shrawan Dogra, learned Advocate General, stated that the respondents have filed two status reports, dated 6th April, 2015 and 25th April, 2015.

2. In the status report, dated 25th April, 2015, it is stated that the first milestone would be achieved by June, 2015, subject to the weather conditions. It is apt to reproduce the relevant portion of the affidavit hereunder:

> *"……….All of them assured that they will work to their full capacity to achieve first milestone by June 2015 subject weather conditions remain favourable."*

3. The learned Amicus Curiae argued that the progress of the work is not reasonably good and the way the things are shaping are also not satisfactory.

4. Mr.Rajinder Dogra, Advocate, has filed CMP No.4428 of 2015 for interim directions to the respondents to start metaling of the road at least 3 meters in width from Theog to Rohru and also to depute some expert from the Horticulture and Agriculture

Departments to educate the farmers and fruit growers to save their plants and vegetables from the diseases caused due to dust and environmental pollution.

5. Newspaper cutting containing the speech of the Chief Minister, delivered on the floor of the Assembly, has also been annexed as Annexure A-1, wherein the Chief Minister has also expressed his concern about the execution of the work.

6. Mr.Rajender Dogra has also filed response to the status reports, by the medium of CMP No.4429 of 2015, and refuted the averments contained in the status reports.

7. We have passed the interim orders right from the institution of this petition till 23rd March, 2015 and commanded all the respondents to do the needful and achieve the milestone, without any delay, so that the public, in general, who is the sufferer and is suffering badly, is in a position to reap the benefits.

8. We have gone through the status reports, which are suggestive of the fact that required progress has not been made till the filing of the status reports. It is also apparent from the record that the respondents are repeatedly taking the stand that the delay in the execution of the work, in question, is due to the bad weather conditions.

9. The construction technology has undergone a sea change and the advancement in the field of construction has transformed the entire world. It has been experienced that with the help of technology, even in the zones where temperature remains in minus, the construction work is being carried out smoothly.

10. Mr.Satyen Vaidya, learned counsel for respondent No.3, argued that the contractor has to execute the work strictly in terms of the advice and the direction of the Consultant.

11. The learned Amicus Curiae stated that the World Bank report also discloses that the Consultant is not performing the job satisfactorily. Therefore, we deem it proper to array the Consultant, i.e. M/s LOIUS BERGER GROUP, Construction Supervision Consultant, B-7, Lane-I, Sector-I, New Shimla, through its team leader Mr.Andrew Boghle, as party respondent, who shall figure as respondent No.4 in the writ petition.

12. Issue notice to the newly added respondent No.4 for causing appearance before this Court on the next date of hearing and also to file reply/status report by or before the next date of hearing.

13. Keeping in view the facts and circumstances and the discussion made hereinabove, we are of the view that the subject matter of the lis is to be declared *custodia legis*, but we refrain to do so for the time being and deem it proper to constitute a Committee of two members, namely – i) Shri B.L. Soni, District & Sessions Judge (Retd.) and; ii) Shri Arun Sharma, Chief Engineer (Retd.), to monitor the progress of the work in question. The Committee Members shall visit the spot fortnightly and submit their report about the progress of the work and also give suggestions, in order to take the work to its logical end.

14. The Chief Secretary is held personally responsible for providing all facilities to the Committee Members, so that they are in a position to visit the spot and prepare the reports etc. The remuneration of each Member, per visit, is fixed at Rs.20,000/-, which shall be borne out by the State Government.

15. List on **18th May, 2015**. In the meantime, all the respondents are also directed to file the status reports in terms of the orders passed by this Court from time to time. Copy dasti.

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

Sh. Amrik Singh and others ....Appellants.
Versus
Sh. Abnash Chand and others. ......Respondents.

RSA No. 85 of 2001
Reserved on 15th May, 2015
Decided on: 28th May, 2015

H.P. Land Revenue Act, 1954- Section 135- Plaintiff applied for partition of the land before Assistant Collector 1st Grade- respondent stated that suit land had already been partitioned- this objection was rejected and the land was partitioned- appeal was preferred against the order which was allowed and the case was remanded- meanwhile, settlement operation started in the revenue estate, Una- application was allowed by Tehsildar Settlement Una – appeal was preferred before Settlement Officer, Kangra who allowed the same and directed the parties to approach the Civil Court having jurisdiction in the matter-a civil suit was preferred pleading that land was joint- held, that where the parties had partitioned the land privately without intervention of the revenue officer, any party can apply to a revenue official to record the same- a report was made in rapat roznamcha regarding the partition – this entry was also reflected in the jamabandi- parties were shown in separate possession- this probablises the plea of private partition - it is permissible for the parties to partition a particular piece of land leaving other land joint- merely because the award was accepted by the parties cannot belie the plea of private partition- appeal dismissed. (Para-12 to 20)

Cases referred:

Dhan Kaur (Died) through LRs versus Shamsher Singh and others, 2005(3) Civil Court Cases 673 (P&H)
Lila Wati and others versus Paras Ram and others, AIR 1977 Himachal Pradesh 1
Surat Singh versus F.C. (Appeals) and another, 2008(1) Shim,LC 3
Md. Mohammad Ali (Dead) by LRs versus Jagadish Kalita and others, (2004)1 Supreme Court Cases, 271
Bhartu versus Ram Sarup 1981 Punjab Law Journal, 204
Suba Singh versus Mohinder Singh and others, 1983 Revenue Law Reporter 384
Dhoom Singh and another versus Ram Kumar and another 1988 Punjab Law Journal 72
Mangat Ram versus Gulat Ram (since deceased) through his LRs Jagdeep Kumar and others Latest HLJ 2011(H.P.) 274
Sunder and others versus Hukmi Devi and another 1999(1) CLJ (H.P) 314
Janku and others versus Nagnoo and others AIR 1986 Himachal Pradesh 10,
Khem Dutt and others versus Palkia and another 1983 Shim.L.C 77
Kale versus Deputy Director of Consolidation, AIR 1976 SC 807,

For the appellants: Mr. Bhupender Gupta, Senior Advocate with Mr. Ajit Jaswal, Advocate.

For the respondent: Mr. N.K. Thakur, Senior Advocate with Mr. Ramesh Sharma and Rohit Bharoll, Advocates for respondents No. 1 and 2.
None for the remaining respondents.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

Plaintiffs are in second appeal before this Court. They are aggrieved by the judgment and decree dated 10.01.2001 passed by learned District Judge, Una in Civil Appeal No. 25 of 1993, whereby the appeal has been dismissed and the judgment and decree passed by learned Senior Sub Judge, Una in case No. 330 of 1983 dated 30.01.1993 affirmed.

2. The facts giving rise for filing of the present appeal, in a nut-shell, are that :

(i) land measuring 9 Kanals 6 Marlas, Khewat No. 260, Khatoni Nos. 544, 545, 546, Khasra Nos. 4689/3923/1052min, 4689/3923/1052-1053min, 4689/3923/1052min-1053 min;

(ii) land measuring 12 Kanals 1 Marla, Khewat No. 258, Khatoni No. 541, Khasra Nos. 1282, 1361 and 1362 ; and

(iii) land measuring 4 Kanals 7 Marlas, Khewat No. 259, Khatoni No. 542, 543, Khasra No. 46min;

total 25 Kanals 14 Marlas situated in Revenue Estate, Una, as per entries in the Jamabandi for the year 1976-77 is claimed to have been in joint ownership and possession of the parties to the suit. The plaintiffs though applied for partition thereof by filing an application under the Land Revenue Act before the Assistant Collector 1st Grade, Una during the year 1972, however, respondents No. 1 and 2 (hereinafter referred to as 'defendants No. 1 and 2') have raised the question of title, as according to them the suit land was already partitioned. The Assistant Collector, however, rejected the said objections and allowed the partition of the suit land. Defendants No. 1 and 2 preferred an appeal before S.D.O (Civil), Una, who remanded the case for deciding the objections afresh. During the currency of the partition proceedings, settlement operation started in the Revenue Estate, Una. The case file was taken over by Tehsildar (Settlement), Una. The application was allowed vide order dated 29.06.1982 and the mode of partition also drawn. Defendants No. 1 and 2 have assailed the order so passed before the Settlement Officer, Kangra. The Settlement Officer accepted the appeal and order to relegate the parties to Civil Court for getting the question of title decided from the Civil Court having jurisdiction over the matter. The partition proceedings initiated on the application filed by the plaintiffs were kept in abeyance till the question of title is decided.

3. The plaintiffs claim that the suit land is joint of the parties. The same has not yet been partitioned privately or through intervention of the Court. The suit land measuring 9 Kanals 6 Marlas abuts Una-Hamirpur road adjoining to new bus stand, Una, hence valuable. Defendants No. 1 and 2 allegedly influential persons want to occupy the best portion of the land in dispute abutting the road to the exclusion of the plaintiffs-appellants forcibly. The plaintiffs, therefore, seek the declaration to the effect that the suit land is joint of the parties with permanent prohibitory injunction, restraining the defendants

from raising any construction thereon by occupying best and valuable portion abutting the road.

4. Defendants No. 1 and 2 when put to notice have contested the suit. According to them, they have nothing to do with the suit land except for a portion of land measuring 9 Kanals 6 Marlas entered in Khewat No. 260, Khatoni Nos. 544, 545 and 546. This land, according to them, stands partitioned between their predecessor-in-interest Smt. Durgi and predecessor-in-interest of the plaintiff Sh. Bhagat Ram, co-sharers in the year 1952. The said private partition was given effect in the revenue record by lodging rapat in rojnamcha vakayati on 24.10.1952. As per private partition, land in eastern side bearing Khasra Nos. 3923, 1052 and 1053 measuring 4 Kanals 14 Marlas fell in the share of their predecessor-in-interest Smt. Durgi Devi and remaining 4 Kanals 14 Marlas bearing Khasra No. 3932, 1023, 1052/2 in western side abutting old Una-Arnayala road to that of Sh. Bhagat Ram, co-sharer. Tatimas of the partition of the land so having taken place were carved out by the Patwari, therefore, Smt. Durgi Devi their predecessor-in-interest had no connection with the land of Bhagat Ram and Bhagat Ram with that of her separate parcel. Although, no mutation of such private partition was entered in the revenue record. It has also been pointed that Bhagat Ram, predecessor-in-interest of the plaintiff had retained best portion of the land at that time and the inferior portion thereof that too, under the tenancy on the eastern side was given to Smt. Durgi Devi.

5. One Ajit Singh had acquired the portion of the land measuring 1 Kanal 11 Marlas out of 4-14 Kanals in the share of said Smt. Durgi Devi vide sale deed dated 28th July, 1962. Said Ajit Singh further sold his entire land i.e. 1 Kanal 11 Marlas to defendants No. 1 and 2 through registered sale deed dated 12.07.1966. The defendants are, therefore, now in possession of 1 Kanal 11 Marlas of land. They have raised construction thereon and also installed a water tap. The vacant land is being used by them for storing coal, fuel wood and other materials. The plaintiffs allegedly were using 4 Kanals 14 Marlas land exclusively without interference of said Smt. Durgi Devi or her successor-in-interest. They even sold the earth also from that portion of the land exclusively with them. It is further pointed out that defendants are not concerned with the suit land except for 1 Kanals 11 Marlas, they purchased from Ajit Singh.

6. Defendants No. 3, 7 to 9 in separate written statement filed on their behalf have not contested the suit and rather admitted the claim of the plaintiffs to be true and correct.

7. Defendants No. 4 to 6 have also admitted the claim of the plaintiffs to be true and correct.

8. On such pleadings of the parties, learned trial Court has framed the following issues:

1. Whether the land had been privately partitioned as alleged ? OPD 1 and 2.

2. Whether the plaintiffs are estopped by their act and conduct form filing the suit as alleged? OPD 1&2.

2-A. Whether the suit is barred by principle of res judicata? OPD 1&2.

2-B. Whether the suit is barred under Order 2 ru7le 2 CPC? OPD.

2-C. If issue No. 1 is not proved, whether possession of defendants No. 1 and 2 has ripened into ownership by adverse possession as alleged? OPD, 1 and 2.

2-D. Whether the suit is collusive between the plaintiffs and defendants No. 3 to 5, if so, its effect? OPD.

3. Relief.

9. The parties were put to trial. On appreciation of the evidence comprising oral as well as documentary, learned trial Court has decreed the suit. Learned lower appellate Court has affirmed the judgment and decree so passed and dismissed the appeal vide judgment and decree under challenge in this appeal before this Court.

10. The challenge to the judgment and decree is on the grounds inter-alia that the plea of private partition raised by defendants No. 1 and 2 has erroneously been accepted by both Courts below. The revenue record does not support the plea of private partition so raised. The factum of the defendants did not assert any claim for award of separate compensation during the course of acquisition proceedings of a portion of the suit land and rather received the compensation jointly, is stated to be not taken into consideration. Overwhelming evidence available on record showing that the land in suit being most valuable and adjoining the main highway and as such, could have not fallen in the share of defendants in private partition is erroneously ignored. The case law cited on behalf of plaintiffs has not been applied and to the contrary, the judgment of the Apex Court relied upon by learned lower appellate Court has wrongly been applied. Neither there was any order of private partition passed by a competent Revenue Officer nor the property ever privately partitioned, but such facts have erroneously been ignored. The evidence available on record is stated to be misread, mis-appreciated and mis-construed.

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

1. Whether the presumption of private partition could be raised merely on the ground that in the revenue record the parties have been recorded in separate possession? In the absence of any instrument of partition and delivery of possession as envisaged under the Land Revenue Act, could the presumption of partition be raised merely on the basis of report Rojnamcha which was inadmissible in evidence?

2. Whether both the courts below have erroneously ignored from consideration that the admission of defendants-respondents exhibit the status of the parties as co-owners by accepting the Award of Land Acquisition and not assailing the same in any proceedings?

12. As per description already given at the very out, the suit land though is 25 Kanals 14 Marlas, however, for the purpose of the present controversy, it is the land measuring 9 Kanals 6 Marlas entered in Khewat No. 260, is the subject matter of dispute. Rather real controversy is qua 1 Kanal 11 Marlas, out of the same purchased by defendants No. 1 and 2, S/Sh. Surinder Lal and Abnash Chand. It is they who alone contested the suit that too, qua the suit land to the extent of 1 Kanal 11 Marlas, they purchased and qua remaining, it is their case that they have nothing to do therewith. Since the plaintiffs claim that the entire suit land including 9 Kanals 6 Marlas aforesaid is joint of the parties, whereas, defendants No. 1 and 2 have raised the plea of private partition and also that the same stands duly acted upon by giving effect in the revenue record, therefore, the legal question need adjudication is that the evidence available on record substantiates the plea of private partition and the same having given due effect in the revenue record or not?

13. Sh. Bhupender Gupta, learned Senior Advocate has argued that mere separate possession for convenience of cultivation without any instrument as required to be drawn under Section 133 followed by delivery of possession as required under Section 134 of the H.P. Land Revenue Act cannot at all be taken as partition of the suit land having taken place in accordance with law. This Court, however, find no substance in the argument so addressed for the reason that instrument of partition is required to be prepared in those cases where partition has taken place with the intervention of a Revenue Officer. Therefore, Sections 133 and 134 of the H.P. Land Revenue Act has no application in the case in hand. True it is that in a case where partition has taken place without the intervention of a Revenue Officer, any party thereto may apply to a Revenue Officer for affirmation thereof under Section 135 of the Act. In the case in hand, the partition of the suit land entered in Khewat No. 260 measuring 9 Kanals 6 Marlas had taken place in October, 1952. Reference in this behalf can be made to Ext. DW-5/A rapat rojnamcha Vakayati, Hindi version whereof is Annexure A-3 to the application, CMP No. 3936 of 2015. In this document, out of the suit land measuring 9 Kanals 6 Marlas bearing Khasra Nos. 3923, 1052 and 1053, 4 Kanals 14 Marlas in western side was taken by Bhagat Ram, predecessor-in-interest of the plaintiffs for himself and 4 Kanals 14 Marlas in eastern side was given to Smt. Durgi Devi, predecessor-in-interest of defendants No. 1 and 2. In this document, word "Garv" stands for west and word "Shak" for east. There is no dispute qua it. The partition had taken place with mutual consent between the co-sharers, namely, Bhagat Ram and Durgi Devi and a rapat Ext. DW-5/A was entered in Rojnamcha Vakayati of the concerned Patwar Circle. The rapat rojnamacha ultimately was given effect in the Jamabandi for the year 1956-57, Ext. P-13, in which defendants No. 1 and 2 have been shown owners and in separate possession of 1/6 shares of the suit land denoted by Khasra Nos. 3923, 1052, 1053/2/2. The other owners have been shown in separate possession of the land to the extent of their respective shares i.e. 1/3 of Gurdass Ram etc., and half share that of the plaintiffs. If coming to the Jamabandi for the year 1976-77, while Khewat number of the land is 260, the same has been bifurcated in different Khatonis i.e. 544, 545 and 546. Land purchased by defendants No. 1 and 2 has been denoted by Khatoni No. 545 measuring 1 Kanal 11 Marlas, Khasra Nos. 4689/3923/1052min, 1053min. The Khatoni of the land with the plaintiffs is 544, Khasra Nos. 4689/3923.1052, 1053min measuring 4 Kanals 14 Malras. The remaining 3 Kanals 1 Marla has been denoted by separate Khatoni No. 546 and denoted by Khasra Nos. 4689/3923/1052min, 1053. As a matter of fact, as per this document, land measuring 4 Kanals 14 Marlas is that of the plaintiffs and it has been gifted to them by their predecessor-in-interest Sh. Bhagat Ram, whereas, 1 Kanal 11 Marals with defendants No. 1 and 2 and 3 Kanal 1 Marla, total 4 Kanal 14 Marlas with Gurdass Ram etc., was in the share of their predecessor-in-interest of Smt. Durgi Devi. Smt. Durgi Devi had sold 1 Kanal 11 Marlas to one Ajit Singh vide sale deed Ext. DW-9/A. It is from said Sh. Ajit Singh, defendants No. 1 and 2 have purchased the same further. In the sale deed Ext. DW-9/A location of the land sold to Sh. Ajeet Singh by Durgi Devi find mentioned. The same tallies with the entries in the rapat rojnamcha Ext. DW-5/A. If coming to Khasra Girdawari Ext. DW-7/A for the year 1952-53, Hindi version whereof is at page No. 547 of the trial Court record, tatima has been drawn and as per the same, out of the suit land, 4 Kanals 14 Marlas was given to Smt. Durgi Devi, predecessor-in-interest of defendants No. 1 and 2 in eastern side. The location of the land sold to Ajit Singh and thereafter by Ajit Singh to defendants No. 1 and 2, if compared with tatima drawn and Khasra Girdawari Ext. DW-7/A, the same tallies with each other. In Khasra Girdawari for the year 1957-58, Ext. D-7 also land with Durgi Devi is in the direction "Shak" i.e. east, whereas, that of Sh. Bhagat Ram aforesaid in direction "Garv" i.e. west. In Khasra Girdawari Ext. D-8 map has also been drawn. As a matter of fact, this document clinched the point in issue because name of Smt. Durgi Devi in the map so drawn is on the top, whereas, that of defendants No. 1 and 2 below her name. Meaning thereby

that 1 Kanal 11 Marlas of the suit land in the ownership and possession of defendants No. 1 and 2 was adjoining to the remaining land 3 Kanal 13 Marlas. In Khasra Girdawari for the year 1969-70, 1971-72 and 1972-73, Ext. D-9 also, out of 4 Kanal 14 Marlas land belonging to Smt. Durgi Devi 1-11 Kanals in eastern side though has been shown in the ownership and possession of said Smt. Durgi Devi, however, through defendants No. 1 and 2 and the remaining 3-3 Kanals in her share again in her ownership but through Gurdass Ram etc., whereas, the land in the ownership and possession of the plaintiffs in western side. Therefore, from this document also, it is crystal clear that in the eastern side the land fell in the share of Smt. Durgi Devi, whereas, in the western side in that of Bhagat Ram, the predecessor-in-interest of the plaintiffs. One Smt. Sandla, as per Ext. P-22 was the Special Power of Attorney of the plaintiffs. If coming to Ext. DW-9/B, Hindi version whereof is at page No. 461, she claimed the plaintiffs to be exclusive owners in possession of 4 Kanals 14 Marlas i.e. half share out of suit land measuring 9 Kanals 6 Marlas. As a matter of fact, in this document, the land in question was given to a brick kiln owner for extraction of earth on payment of charges. The entries in the Jamabandi for the year 1952-53, Ext. D-12, makes it crystal clear that 4 Kanal 14 Marlas of land given to predecessor-in-interest of the defendants was in the possession of the tenants. The remaining 4 Kanal 14 Marlas taken by Sh. Bhagat Ram, the predecessor-in-interest of the plaintiffs, however, was not under the tenancy of anyone. Therefore, at the time of partition, said Sh. Bhagat Ram had taken best piece of land.

14. The documentary evidence discussed supra, make it crystal clear that the suit land measuring 9 Kanal 6 Marlas stands partitioned between Bhagat Ram and Smt. Durgi Devi, predecessor-in-interest of the parties to the suit. It is for this reason different Khatonis i.e. 544, 545 and 546 in respect of the same have been prepared. While land entered in Khewat No. 260, Khatoni No. 545, Khasra Nos. 4689/3923/1052, 1053min measuring 1-11 Marlas has been purchased by defendants No. 1 and 2, the remaining 3-1 Marlas in the share of Smt. Durgi Devi entered in Khewat No. 260, Khatoni No. 546, Khasra Nos. 4689/3923/1052min, 1053min measuring 3-1 has been recorded in the ownership and possession of Gurdass Ram etc. Similarly, the land measuring 4-14 Marlas of plaintiffs in this very Khewat has been denoted by separate Khatoni i.e. 544. It is, therefore, satisfactorily proved that suit land measuring 9 Kanals 6 Marlas stand duly partitioned with mutual consent amongst the co-shares i.e. Sh. Bhagat Ram and Smt. Durgi Devi long back in the year 1952. The partition so taken place was given effect by making entries in the Rojnamcha Vakayati vide rapat Ext. DW-5/A. Thus, the partition so taken place has been given effect in the revenue record also, because the entries in the jamabandi for the year 1956-57, Ext. P-13 and Jamabandi for the year 1976-77, Ext. P-10 show that the land is in separate possession of the plaintiff, defendants No. 1 and 2 and other co-sharers. The contentions to the contrary that for want of instrument of partition and delivery of possession, the legal and valid partition of the suit land cannot be inferred, are without any substance for the reason, already stated in para supra. Instrument of partition is required to be prepared in a case where the partition is effected through a Revenue Officer. Here, it is private partition having taken place with mutual consent. The Punjab and Haryana High Court in **Dhan Kaur (Died) through LRs** versus **Shamsher Singh and others, 2005(3) Civil Court Cases 673 (P&H)** has held as follows:

> "17. It is also well settled that there is no prohibition by law about oral partition and that a memorandum of past oral partition is not required to be registered. In this regard, reliance may also be placed on various other judgments of the Supreme Court in the cases of Bakhtawar Singh v. Gurdev Singh, 1969(9) S.C.C.370, Hans Raj Agarwal v. CIT,

> 2003(2) S.C.C. 295 and Digambar Adhar Patil v. Devram Girdhar Patil, 1995 Supp.(2) S.C.C.428.
>
> The facts of the present case are required to be examined in the light of the principles laid down by the Supreme Court in the above mentioned judgments. The learned lower appellate Court has fallen in a grave error by discarding documents Mark 'A' and 'B'which are mere memorandum of family partition. There is no necessity for everyone of the co-sharer to thumb-mark, sign and acknowledge such a memorandum. I am further inclined to hold that a family settlement once given effect to by the parties then the Courts should be very slow in interfering with the same………
>
> ………The evidence on record supports only one view that partition in fact has taken place and parties were in possession even earlier to the oral partition. Therefore, the findings on the issue as returned by the lower appellate Court are not sustainable because there are categorical admissions made by defendants, document Mark 'A' and 'B'- memorandum of partition and the recitals in Ex. P-1, P-3 and P-3. There is no evidence to the contrary. Revenue record cannot be considered in isolation. It was to be reckoned according to factual position. It is also pertinent to mention that possession of the parties in respect of their lands is long and settled. Therefore, the findings of the lower appellate Court are liable to be set aside and that of the trial Court deserve to be restored."

15. The point in issue in the present lis is squarely covered by the ratio of the judgment supra. The parties herein are also in separate possession, as is apparent from the over-whelming documentary evidence in the form of Jamabandis, Khasra Girdawaris as well as Rapat Rojnamcha etc. discussed hereinabove.

16. Otherwise also, in the present lis the Court is concerned with the suit land measuring 9-6 Marlas. Out of 4-14 Marlas in the share of Smt. Durgi Devi, defendants No. 1 and 2 had purchased 1-11 Marlas because the remaining defendants have not contested the claim of the plaintiffs. In view of the ratio of the judgment of a Division Bench of this Court in **Smt. Lila Wati and others** versus **Paras Ram and others, AIR 1977 Himachal Pradesh 1**, partition of a particular property leaving the remaining joint is legally permissible.

17. Interestingly enough, the plaintiffs have withdrawn the previous suit bearing No. 183 of 1979, filed for decree of declaration to the effect that suit land measuring 9-6 Marlas, which is subject matter of dispute in the present *lis* is unpartitioned and that till the partition thereof, the defendants be restrained from raising any construction on the best and specific portion thereof, unconditionally and without reserving liberty to file fresh suit, as is apparent from the perusal of order Ext. P-15 passed by learned Sub Judge, 1st Class, on 28.04.1981 in the said suit. Therefore, even the maintainability of the present suit is doubtful, as no fresh suit could have been filed. True it is that in the joint statement Ext. P-3 of learned counsel representing the defendants including defendants No. 1 and 2 herein, it was stated that till the partition of the suit land is effected, they will not raise construction thereon and will maintain status quo qua the same as on that day. It is on the statement

Ext. P-3, learned counsel representing the plaintiffs in that suit vide statement Ext. P-4 has not pressed the suit and sought the dismissal thereof. The liberty to file fresh suit, however, was not sought to be reserved by learned counsel for the plaintiff. Mr. Gupta, learned Senior Advocate has laid emphasis on the statement Ext. P-3 and has urged that the defendants had themselves agreed not to raise any construction over the suit land till the same is partitioned. However, the submissions so made are without any substance for the reason that statement Ext. P-3 cannot be taken to arrive at a conclusion that the defendants, particularly defendants No. 1 and 2 had admitted the suit land being unpartitioned. The issue that the same stands partitioned or not was not yet decided at the time of making statement Ext. P-3. If on the basis of statement Ext. P-3, it is to be inferred that the defendants had admitted the suit land unpartitioned, why the plaintiffs have filed the present suit. It appears that on construction of bus stand Una adjoining to the suit land and the suit land in the ownership and possession of defendants No. 1 and 2 is abutting to Una-Hamirpur highway, became more valuable and the plaintiffs with a motive to grab the same have instituted the suit to unsettle the position settled long back in the year 1952, when the partition thereof had taken place with mutual consent. The arguments addressed on behalf of the appellants-plaintiffs that on the construction of Una-Hamirpur highway, this piece of land has become valuable and as such they are entitled to seek partition thereof are without any substance, because position qua suit land settled long back in the year 1952 cannot be allowed to be unsettled at this stage, that too, when the predecessor-in-interest of the plaintiffs at that time had taken the best portion of the suit land for himself and portion thereof under the tenancy was given to Smt. Durgi Devi by putting her in an advantageous position. Now, with the passage of time if the Una-Hamirpur road has been constructed adjoining to the portion of the suit land in the possession of defendants No. 1 and 2, the possession of the said defendants cannot be unsettled, particularly when they as per entries in the jamabandis Ex. P-10 and Ext. P-13 have raised construction of their house and using the remaining vacant land as go-down to store the coal, fuel wood etc.. The law laid down in **Surat Singh** versus **F.C. (Appeals) and another, 2008(1) Shim,LC 3** is not applicable in the case in hand for the reason that here it is not only Khasra Girdawaris which substantiates the plea of private partition but also the entries in the jamabandis and Rapat Rojnamcha Vakayati discussed hereinabove. As regards law laid down by the Apex Court in **Md. Mohammad Ali (Dead) by LRs** versus **Jagadish Kalita and others, (2004)1 Supreme Court Cases, 271** and by Punjab and Haryana High Court in **Bhartu** versus **Ram Sarup** **1981 Punjab Law Journal, 204** there cannot be any quarrel qua the same, however, here the suit land measuring 9-6 Marlas has lost its characteristics of joint property after its private partition having taken place in the year 1952. If coming to the law laid down by Punjab and Haryana High Court in **Suba Singh** versus **Mohinder Singh and others, 1983 Revenue Law Reporter 384** and in **Dhoom Singh and another** versus **Ram Kumar and another 1988 Punjab Law Journal 72**. the same is also not attracted as in the case in hand the private partition arrived at between the parties with mutual consent was reported to the Revenue Authorities and consequently Rapat Ext. DW-5/A was entered in Rojnamcha Vakayati. Not only this but the partition so taken place has also been given due effect in the revenue record, such as jamabandis and Khasra Girdawaris. The law laid down by this Court in **Mangat Ram** versus **Gulat Ram (since deceased) through his LRs Jagdeep Kumar and others Latest HLJ 2011(H.P.) 274** is also distinguishable on facts, because here not only the private partition has taken place but the co-owners have given effect to the same in the revenue record and separate Khatonis have also been prepared with respect to the separate piece of land in possession of plaintiffs, defendants No. 1 and 2 and remaining defendants. As regards, the law laid down by this Court in **Sunder and others** versus **Hukmi Devi and another 1999(1) CLJ (H.P) 314**, the same has also no application in the case in hand, because in that case the private partition was set aside, whereas, in the case

in hand the private partition having been duly proved cannot be set aside. Similarly, in **Janku and others** versus **Nagnoo and others AIR 1986 Himachal Pradesh 10**, there was no oral or documentary evidence showing the partition of the property having taken place. However, in the case in hand, there is over whelming oral as well as documentary evidence to arrive at a conclusion that suit land measuring 9-6 Marlas stands already partitioned. The judgment of this Court in **Khem Dutt and others** versus **Palkia and another 1983 Shim.L.C 77** deals with the case pertaining to the partition of the land by a Revenue Officer under the H.P Land Revenue Act, hence not applicable in the case in hand. Learned lower appellate Court has rightly placed reliance on the judgment of the Hon'ble Apex Court in **Kale** versus **Deputy Director of Consolidation, AIR 1976 SC 807**, as the parties to the present suit should honour the private partition having taken place long back in the year 1952 by mutual consent. I am not persuaded to take a view of the matter that the family settlement is only to be honoured and the same does not prohibit a party to seek partition in accordance with law for the reason that in the case in hand it is not merely a family settlement but the plea of private partition set up by defendants No. 1 and 2 is proved on record satisfactorily.

18. In view of what has been said hereinabove, present is not a case of mere separate possession of the suit land but a case where partition thereof has taken place with mutual consent. In a case of this nature, no instrument of partition is required to be prepared and an information to the Revenue Officer is sufficient. Such information in the form of Rapat Rojnamcha Ext. DW-5/A was duly received by the Revenue Officer and entered in Rojnamcha Vakayati. On and after entry of the rapat, the partition so arrived at was given effect in the revenue record because as per entries in the jamabandis and Khasra Girdawaris not only the parties to the suit have been shown owner in possession of the suit land to the extent of their respective shares but separate Khatonis pertaining to the land in their respective shares also stand prepared.

19. If coming to 2nd substantial question of law, the acceptance of award by defendants No. 1 and 2 along with plaintiffs and defendants No. 3 to 9 in respect of acquired land cannot be taken to be a circumstance to belie the plea of private partition because it is not the case of the plaintiffs that out of the land in the ownership and possession of Sh. Ajit Singh, predecessor-in-interest of defendants No. 1 and 2, no portion thereof was acquired. The presumption, therefore, would be that out of the land Sh. Ajit Singh aforesaid had purchased and in their ownership and possession, some portion was acquired and they have been paid compensation in respect of such acquired land. The acceptance of the compensation, therefore, cannot be treated as an admission qua the suit land unpartitioned on the part of defendants No. 1 and 2 by any stretch of imagination.

20. In view of reappraisal of the given facts and circumstances and also evidence available on record, no legal question much less substantial question of law as formulated arise for determination in the present appeal. On the other hand, the concurrent findings recorded by both Courts below on appreciation of the evidence available on record in its right perspective need no interference in the present appeal. The judgment and decree under challenge being legally and factually sustainable is hereby affirmed.

21. This appeal, therefore, fails and the same is accordingly dismissed. No orders so as to costs.

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

M/s P.A. Times Industries ......Non-applicant/Plaintiff.
Versus
M/s Apex Marketing ......Applicant/defendant.

OMP (M) No. 4 of 2014 and OMP No. 49 of 2014 in C.S. No. 43 of 2011.
Reserved on: 20.5.2015
Decided on: 28th May, 2015.

Code of Civil Procedure, 1908- Order 9 Rule 13- A decree was passed by the Court ex-parte- an application was filed for setting aside ex-parte decree – held that ex-parte decree cannot be set aside on the ground that there was some irregularity in the service of the summons- Process Server went to the commercial premises and found it locked - thereafter he went to the residential house of the Managing Director, where he met the Managing Director- process was shown to the managing director but he refused to accept the same- therefore, copy of notice was affixed on the gate of his residence- it is apparent from the report that Managing Director was duly served and there was no reason for setting aside ex-parte decree- application dismissed. (Para-11 to 30)

Case referred:
Sushil Kumar Sabharwal Versus Gurpreet Singh & Others, (2002) 5 SCC 377

For the Plaintiff/ Non-applicant: Mr. I.S. Narwal, Advocate.
For the defendant/ applicant : Mr. B.S. Chauhan & Mr. Manish Thakur, Advocates.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

This order shall dispose of both the applications filed with a prayer to set aside the exparte judgment and decree dated 1.7.2013 on condonation of delay.

2. Suit for recovery of Rs.15,49,770/- came to be filed by M/s P.A. Times Industries, Kasauli Road, Dharampur, the non-applicant/plaintiff, against the applicant/defendant. The defendant-Company, as per order dated 9.4.2012, in 'B' part of the file was served with Dasti notice by way of affixation for 13.3.2012 as its Managing Director though present, however, refused to accept the notice. The defendant, therefore, was ordered to be proceeded against exparte as per the order passed on 1.6.2012 read with order dated 9.4.2012, passed in 'B' part of the file.

3. A co-ordinate Bench of this Court after recording exparte evidence has decreed the suit vide judgment and decree dated 1.7.2013. The judgment and decree so passed has been sought to be set aside on condonation of delay.

4. The delay as occurred in filing the application, OMP No.49 of 2014, aforesaid for setting aside the exparte judgment and decree has been sought to be condoned on the ground that the applicant-defendant came to know about the exparte judgment and decree dated 1.7.2013 passed in this suit on 14.1.2014 from one Rajesh Kumar Janak, Kishore Road, Kadam Kuan, Patna Bihar, who, in turn, was informed by one Vinay Dalamia. Mr. Dalamia was informed about the exparte decree passed in the suit by one Shri J.K. Mishra,

an employee of the non-applicant/Company. The delay as occurred, therefore, is stated to be neither intentional nor deliberate and allegedly occurred owing to the circumstances beyond the control of the applicant-defendant.

5. On merits, the case pleaded in the application OMP No.49 of 14 is that the applicant-defendant was never served legally and validly in the suit. He never refused to accept the service of notice. The report to this effect submitted by the Process-server is stated to be false and manipulated one. Otherwise also, the notice allegedly was affixed on the residence of the managing Director of the applicant-defendant and not in its business premises. There is no legal and valid service in terms of Order 5 Rule 2 CPC.

6. In reply filed on behalf of the non-applicant/ plaintiff, the question of maintainability of the application for setting aside the abatement has been raised. On merits, it is denied that the Managing Director of applicant-defendant has refused to accept the service. The reports Annexure P-1 and P-2 to the reply have been pressed into service in this regard. Therefore, it is submitted that no option was left except for affixation of the notice on the residential premises of the Managing Director of applicant-defendant. It is denied that the Managing Director of the applicant-defendant came to know about the decree passed in the suit on 14.1.2014. It is pointed out that the official of defendant-Company had been asking for the status of the proceedings in the suit from the employees of plaintiff-Company. Since defendant-Company was not willing to clear the dues of the non-applicant/plaintiff, it is for this reason the reports qua vacation of the rented accommodation and disconnection of electricity meter have been fabricated and falsely procured. Since the applicant-defendant refused to accept the notice, therefore, the refusal itself is to be treated as legal and valid service. The service upon the applicant is stated to be effected, in terms of the provisions contained under Order 5 Rule 2 CPC. Both applications have, therefore, been sought to be dismissed.

7. In rejoinder, the contentions to the contrary have been denied being wrong and on merits the case as set out in these applications reiterated. It is pointed out that as per reports Annexures P-1 and P-2, the service has been effected on the address of Managing Director of applicant-defendant i.e. near Sanichra Masjid, Thana Sultan Ganj, Bihar, however, as per Aadhar Card Annexure A-1, he is resident of Dargah Road, New Azimabad Colony, Sanichra, P.S. Bahadhurpur, Patna, Bihar. It is, therefore, reiterated that the Managing Director of the applicant-defendant has never been served with the notice legally and validly.

8. On the pleadings of the parties, the following issues were framed:-

> "1. Whether there are sufficient grounds for condonation of delay as occurred in filing the application for setting aside exparte decree passed on 1st July, 2013? OPA.
>
> 2. If issue No.1 held in affirmative, does the application disclose sufficient grounds for setting aside the ex-parte decree or not? OPA
>
> 3. Relief.

9. The applicant-defendant in turn has produced in evidence the affidavit of its Managing Director Najmul Haque Hashmi and that of Shri Rajesh Kumar S/o late Shri Om Prakash.

10. On hearing learned counsel on both sides and also going though the records my findings on the issues so framed are as under:

Issue No.1 : Yes.

Issue No.2	:	No.
Relief	:	OMP(M) No.2014 allowed, however, OMP No.49 of 2014 dismissed per operative part of the judgment.

Issue No. 1.

11. The application, OMP No.49 of 2014, filed with a prayer to set aside the exparte decree, is time barred. An application of this nature under Article 123 of the Limitation Act could have been filed within thirty days from the date of decree. Here the decree has been passed on 1.7.2013. The application has been filed on 10.2.2014. The delay actually occurred has neither been calculated and mentioned in the application by the applicant-defendant nor by the Registry at the time of scrutiny of the application. Any how, the delay as occurred in filing the application is more than six months, after deduction of the statutory period of thirty days prescribed for filing of an application of this nature. The explanation as forth coming is that the applicant-defendant was not aware of the passing of the judgment and decree on 1.7.2013 nor the pendency of the suit. It is on 14.1.2014, he was informed about the exparte decree passed by this Court in the suit on 1.7.2013 by Rajesh Kumar Janak, Kishore Road, Kadam Kuan, Patna, Bihar. Said Rajesh Kumar was informed by one Vinay Dalamia. Said Shri Dalamia had received the information from one J.K. Mishra, an employee of the non-applicant/plaintiff.

12. The response to such pleadings in the application OMP (M) No.4 of 2014 under Section 5 of the Limitation Act, however, is that the plaintiff had due knowledge and notice of the pendency of the suit and also the exparte judgment and decree passed by this Court. In support of such contentions, it has been submitted that the applicant-defendant remained in constant touch of the employee of the non-applicant/ plaintiff throughout during the course of proceedings in the suit and obtaining information qua the progress therein at each and every stage.

13. If coming to the evidence, the same has been produced by way of affidavit. Mr. Najmul Haque Hashmi, Managing Director of the applicant-defendant in his own affidavit has said all whatever averred in the application. Also that he was never served in the suit at his residential address as find mentioned in the Aadhar Card annexed to the rejoinder and on that address the Process-Server never served him with the notice of the suit. Shri Rajesh Kumar, in the affidavit sworn in by him, has supported the applicant's version qua his having come to know about exparte judgment and decree on 14.1.2014 because according to Mr. Rajesh Kumar, it is he, who informed the applicant-defendant in this regard. He came to know about the exparte judgment and decree from one Vinay Dalmia, who was informed by one J.K. Mishra, an employee of non-applicant/plaintiff.

14. In rebuttal of the evidence so produced by the applicant-defendant, the non-applicant/plaintiff has produced affidavit of one Mr. Vinod Rana, its Senior Manager (Accounts). Mr. Rana has stated that the pendency of the suit was well within the notice of the applicant-defendant because he always remained in touch with non-applicant and its officials during the pendency of the suit. According to him, the applicant-defendant has cooked up a false story just to get the exparte decree set aside. He allegedly has blown hot and cold in the same breath i.e. in the affidavit filed in support of the application under Order 9 Rule 13 and Section 5 of the Limitation Act the address given is;

> "R/o Sandalpur Behind Sanichra Mandir, near Mobile Tower Mahendru, Patna, Bihar";

whereas in the affidavit filed in support of the rejoinder, the address given by its Managing Director is;

"R/o Dargah Road, New Azimabad Colony, Sanichra, Police Post Bahadhurpur, Patna, Sampatchak, Patna, Bihar-800006";

altogether different.

15. Mr. B.S. Chauhan, learned counsel has urged that sufficient grounds are made out from the perusal of the application justifying the condonation of delay.

16. Mr. I.S. Narwal, learned counsel representing the non-applicant/plaintiff has, however, repelled the submissions so made and has come forward with the version that what to speak of sufficient cause, the application, according to him, does not disclose any ground warranting condonation of the inordinate delay as occurred in filing the application for setting aside the exparte judgment and decree.

17. As noticed supra, there is delay of over six months having occurred in filing the application for setting aside the exparte decree. Section 3 of the Limitation Act provides that no Court shall have the jurisdiction to entertain the suit and application if the same has been filed after the expiry of period of limitation. The period of limitation for filing an application for setting aside the exparte Order is thirty days from the date of knowledge of the decree. Here a separate application OMP (M) NO. 4 of 2014 has been filed with a prayer to condone the delay. It is well settled that the delay howsomuch long can be condoned, if sufficient cause is found to have been shown from the perusal of the pleadings and also the evidence available on record.

18. It is well settled at this stage that a party seeking the condonation of delay has to show "sufficient cause" warranting condonation of delay. The expression 'sufficient cause' should be interpreted liberally and in a meaningful manner to sub-serve the ends of justice. Also that the expression 'every day's delay must be explained' should be applied in a rational common sense by taking pragmatic approach to do substantial justice. The Courts have wide discretion in the matter of condonation of delay; however, the same should be exercised judiciously and only in a case where sufficient cause is found to be shown.

19. In the case in hand although it cannot be believed that the Managing Director of the applicant-defendant had no knowledge about the pendency of the suit, however, to my mind he had no knowledge of passing of the decree on 1.7.2013. Had he been in the notice and knowledge of passing of the decree dated 1.7.2013, would have not remained sit over the matter for a period over seven months because he was not going to be benefited in any manner whatsoever by delaying the institution of the application for setting aside the exparte decree. The explanation as set forth in the application for condonation of delay finds support from his own affidavit and also that of Rajesh Kumar produced in evidence. It seems that after having come to know about the exparte judgment and decree passed against the applicant-defendant, its Managing Director, rushed to Shimla and applied for certified copy of the judgment on 17.1.2014, through Mr. Manish Thakur, Advocate. It is apparent so from the perusal of the certified copy of the judgment filed along with the application for setting aside the exparte decree. The application having been filed on 10.2.2014 in the Registry is, therefore, within the period of 30 days from the date of knowledge. The delay as occurred in filing the application for setting aside the exparte judgment and decree, therefore, stands satisfactorily explained and as such is hereby ordered to be condoned. This issue is answered in affirmative i.e. in favour of the applicant-defendant.

<u>Issue No. 2.</u>

20. Now coming to the application filed for setting aside the exparte decree, the only ground raised is that the applicant-defendant was not aware of the pendency of the suit

in this Court as he was never served with the notice, in accordance with law. The response to such averments in the application OMP No. 49 of 2014, however, is denial, as according to non-applicant/ plaintiff, the Managing Director of applicant-defendant remained throughout in touch with its employees, hence the pendency of the suit was well within the notice of its Managing Director. It has also been pleaded in reply to the application that the Managing Director of the applicant-defendant has refused to accept the notice issued Dasti when Process-Server visited him at his residence and as a result thereof the notice was affixed in the house.

21. If coming to the evidence, Shri Najmul Haque Hashmi, the Managing Director of the applicant-defendant has only stated in his affidavit that he was never served with the notice at his business premises nor at residential address. According to him, the report made by the Process-Server is false and manipulated. The service by way of affixation is also stated to be carried out on wrong address. This is the only evidence, the applicant-defendant produced to substantiate this aspect of the matter. Now coming to the evidence produced by the non-applicant/plaintiff, its Senior Manager, Mr. Vinod Rana has stated that on the face of the report made by the Process-Server, the Managing Director of the applicant-defendant has refused to accept the service of notice. As a result thereof, copy of the notice had to be affixed on his house. The applicant-defendant, therefore, had due knowledge and notice of the pendency of the suit and also the date fixed and as such has rightly been proceeded against exparte.

22. It is also averred that the applicant-defendant remained in touch with non-applicant and its officials throughout during the pendency of the suit. The applicant's version that he has not been served on correct address is stated to be false for the reason that he has blown hot and cold in the same breath as in the affidavit filed in support of the applications, he has given some different address whereas in the affidavit filed in support of the rejoinder some other address. Mr. Rana has therefore, further stated that the applicant-defendant has not only played hide and seek with the plaintiff but with this Court also.

23. Now coming to the arguments addressed, according to Mr. Chauhan, on account of invalid service, the applicant-defendant could have not been treated to be served. Otherwise also, the fixation of notice not accompanied by plaint cannot be treated to be a valid service.

24. Mr. Narwal, however, has emphasized that no ground is made out for setting aside the exparte decree and the application deserves dismissal.

25. Order 9 Rule 13 CPC makes it crystal clear that the Court, if satisfied that the summons was not duly served or that the defendant was prevented by sufficient cause from putting appearance on the date fixed, the Court may order to set aside the exparte decree.

26. It is well settled at this stage that an exparte decree could only be set aside, if sufficient grounds are found to be made out. The summons were not accompanying the copy of the plaint may be an irregular service of summons, however, does not constitute a ground to set aside the exparte decree. The apex Court in ***Sushil Kumar Sabharwal*** versus ***Gurpreet Singh & Others, (2002) 5 SCC 377,*** has held that exparte decree cannot be set aside merely on the ground that there has been an irregularity in the service of the summons, if the Court is satisfied that the defendant had due notice of the date of hearing and had sufficient time to appear. Relevant portion of this judgment reads as follows:-

> "11. The High Court has overlooked the second proviso to rule 13 of order 9 Code of Civil Procedure, 1908, added by the 1976

> amendment which provides that no court shall set aside a decree passed exparte merely on the ground that there has been an irregularity in the service of summons if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim. It is the knowledge of the 'date of hearing' and not the knowledge of 'pendency of suit' which is relevant for the purpose of the proviso abovesaid. Then the present one is not a case of mere irregularity in service of summons; on the facts it is a case of non-service of summons. The appellant has appeared in the witness box and we have carefully perused his statement. There is no cross examination directed towards discrediting the testimony on oath of the appellant, that is, to draw an inference that the appellant had in any manner a notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim which he did not avail and utilise."

27. Now coming to the evidence discussed hereinabove, the report of Process-Server Annexure P-2 to the reply filed by non-applicant/plaintiff, makes it crystal clear that the Process Server firstly went to the commercial address of applicant-defendant i.e. A.H. Complex, Exhibition Road Patna, Bihar. He found the premises locked. The proprietor of "Vatika Slash Enterprises" in western side of the business premises of the applicant-defendant had informed the Process-Server that the defendant had closed the business at that place and had vacated that premises also. He has also given the residential address of the Managing Director of the defendant-Company i.e. Near Sanishchra Maszid, Police Station Sultanganj, Patna. The Process Server went to the residential house of the Managing Director on the address so disclosed. As per the report, it was a cream-white coloured house. Shri R.S. Hashmi, father of the Managing Director of the defendant-Company met the Process-Server there. The Managing Director of the applicant-Company, Mr. Najmul Haque Hashmi, was called. He came to the Process-Server. He was shown the notice. The Process-Server requested him to receive the copy of the notice and issued the receipt under his signature. The Managing Director, however, refused to accept the copy of the notice and also issuance of the receipt. According to the Process-Server, he, therefore, was compelled to affix the copy of the notice on the grill of the door of the house of the Managing Director. The report further reveals that the Process-Server had to witness the report himself because Amit Kumar and Ashok Kumar present there refused to witness the service of the notice upon the Managing Director of the applicant-defendant.

28. The report Annexure P-2 so submitted by Process-Server has also been verified by the Registrar of the Civil Court, Patna, as per the endorsement made by the Registrar under his signature. The report alone is sufficient to come to the conclusion that the defendant had due knowledge and notice of the pendency of the suit and also that the same was fixed in the Court on 13th March, 2012. He, however, opted for not accepting the copy of the notice and to put in appearance in this Court on the date fixed and may be with a motive to play hide and seek with the Court. The notice was issued dasti because initially the notices issued, through ordinary mode and registered AD post, were received back undelivered with the report that the premises were found locked.

29. True it is that the applicant-defendant had vacated the place of its business as per address given in the plaint because Process-Server has also stated so in the report Annexure P-2. The fact, however, remains that the Process-Server when visited the residential place of the Managing Director of the applicant-defendant, he refused to accept the notice. The plea that he has not been served on the correct address is palpably false

because had the residential address of Najmul Haque Hashmi aforesaid was "Dargah Road, New Azimabad Colony, Sanichra, Police Post Bahadhurpur, Patna", why in the affidavit filed in support of the application he has given his address as "Sandalpur Behind Shanichra Mandir, Near Mobile Tower Mahendru, Patna". It is crystal clear that in order to wriggle out from the exparte judgment and decree, he has manipulated his address as given in the affidavit filed in support of the rejoinder. Though in Adhar Card Annexure A-1 filed with the rejoinder, this address finds mentioned therein, however, it is not known as to when the Aadhar Card was prepared. There is also nothing to show that after issuance of Aadhar Card, he had not changed his place of residence.

30. On the other hand, the report submitted by the Process-Server, who not only mentioned the colour of the house of the Managing Director of the applicant-defendant, but also the name of his father present there, cannot be disbelieved. Otherwise also, the Process-Server being a public servant cannot be said to have any enmity or any grudge with the applicant-defendant leading to manipulate the report. Rather he, being a public servant, every correctness and sanctity is attached to the report Annexure P-2, he submitted. As generally is now the trend of avoiding the processes issued by the Courts of law, the Managing Director of the applicant-defendant also seems to have avoided the service of the notice intentionally and deliberately and may be with a motive to hamper the proceedings in the suit. Therefore, no ground for setting aside the exparte decree is made out from the record. The application OMP No.49 of 2014, therefore, deserves dismissal. This issue is accordingly decided in negative i.e. against the applicant-defendant.

Relief.

31. In view of my findings on both issues hereinabove, application OMP (M) No. 4 of 2014 succeeds and the same is accordingly allowed. Consequently, the delay as occurred in filing the application, OMP No. 49 of 2014, for setting aside the exparte order is hereby ordered to be condoned, whereas application, OMP No. 49 of 2014, fails and the same is accordingly dismissed as no ground for setting aside the exparte decree is made out. Both the applications stand disposed of accordingly.

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

Cr.MMO No.26 of 2015 and
Cr. Revision No. 369 of 2014.
Judgement reserved on: 28.5.2015.
Date of decision: 1.6.2015.

1. Cr.MMO No. 26 of 2015.

Vipul Lakhanpal …… Petitioner.
Vs.
Smt. Pooja Sharma ….. Respondent

2. Cr. Revision No. 369 of 2014.

Smt. Pooja Sharma …… Petitioner.
Vs.
Vipul Lakhanpal ….. Respondent

Protection of Women from Domestic Violence Act, 2005- Section 12- Wife was maltreated by the petitioner- her petition was allowed and the husband was prohibited from committing any act of domestic violence -he was ordered to pay maintenance @ Rs. 5,000/- along with compensation of Rs. 10,000/-- husband contended that wife is TGT Maths and was drawing salary of Rs. 9,000/-- he was compelled to tender resignation from his job and

was not doing anything- held, that husband is under an obligation to maintain his wife- statute commands that there has to be some acceptable arrangement so that wife can sustain herself- if husband is an able-bodied person capable of earning sufficient money, he cannot deny his obligation to maintain his wife - carry home salary of the husband was Rs. 45,000/-- income of the wife was taken into consideration by the Court, while awarding maintenance – wife is entitled to the status which she was enjoying in the house of her husband –hence, maintenance of Rs. 5,000/- cannot be said to be excessive. (Para-12 to 27)

Cases referred:

Kota Varaprasada Rao and another vs. Kota China Venkaiah and others AIR 1992 AP 1
Shamima Farooqui vs. Shahid Khan JT 2015 (3) SC 576

For the petitioner	:	Mr. G.D.Sharma, Advocate, for the petitioner in Cr.MMO No. 26 of 2015 and for respondent in Cr.Revision No. 369 of 2014.
For the respondents	:	Mr. Anirudh Sharma, Advocate, for the respondent in Cr.MMO No. 26 of 2015 and for petitioner in Cr. Revision No. 369 of 2014.

The following judgment of the Court was delivered

Tarlok Singh Chauhan, Judge.

Since both the petitions arise out of the same judgement, they are being taken up together for disposal. The parties shall hereinafter referred to as wife and husband.

2. The wife filed a petition through Protection Officer, under section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short, the Act) against her husband. It transpires that wife had made a written complaint before the Protection Officer, in which it had been averred that her marriage was solemnized with the husband on 30.10.2009 in accordance with the Hindu Rites. After the marriage, she went to the house of husband at Longwood, Shimla where on the first night the husband threatened her and told her that had he been in possession of a knife he could have killed her and in case she opened her mouth her entire family will be killed by him.

3. The wife thereafter was taken to the native village at Hamirpur by her husband and his family members for POOJA purpose, where the husband and his family members also maltreated her. The husband also told the wife that in fact he wanted to marry with the niece of Karuna Vaid and he does not like her.

4. The husband could not consummate the marriage with the wife as he is not physically fit. The wife also joined the company of her husband at Mumbai where he could also not consummate the marriage with her, rather he had beaten her and her mother at Mumbai. Two meetings were called by the relatives of the wife, where father of the husband admitted that his son is not physically fit.

5. Thereafter, the husband attacked his wife in her parental house and in this manner, made her life hell by making telephonic calls and SMS and, therefore, action be taken against him. The Protection Officer filed incident report. The complaint was forwarded by him through incident report in the Court.

6. The respondents contested the petition by filing their separate replies. In his reply the husband took preliminary objection regarding maintainability. On merits, he

denied that he or his family members ever maltreated or had beaten the wife. The wife remained with him and his family members even at his native place in District Hamirpur and also stayed with him at Mumbai. The wife joined his company at Mumbai when she was brought by his father to Mumbai. The meeting was convened by the relatives of the husband but the wife refused to join the company of her husband without sufficient cause. In fact, in the meeting father and relatives of the wife asked the father of husband to pay Rs.15-20 lacs and get divorce from the wife and the husband and his family members never maltreated the petitioner. The wife also lodged FIR against the respondents under Sections 498-A and 506 IPC at Solan just to harass the respondents. The petition filed by the wife is false and frivolous, same be dismissed with costs.

7. The other respondents also filed the reply in which they denied the allegations as had been made by the wife.

8. The learned Magistrate after recording evidence and hearing the parties vide his order dated 1.9.2012 partly allowed the petition of the wife against the respondent-husband, whereby he was prohibited from committing any act of domestic violence and further ordered to pay a maintenance to the tune of Rs.5,000/- per month alongwith compensation of Rs.10,000/-.

9. The husband assailed this order before the learned appellate authority, who affirmed and upheld the order passed by the learned Magistrate.

10. Aggrieved by the orders passed by the learned courts below, the husband has invoked the jurisdiction of this court under Section 482 of the Code of Criminal Procedure with a prayer to quash and set-aside the aforesaid orders.

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

12. It has been alleged that the learned courts below have failed to appreciate the fact that the wife who is TGT in Maths and was drawing a handsome salary of Rs.9,000/- per month and was therefore, not entitled to maintenance. It was further alleged that due to the act and conduct of the wife, the husband was compelled to tender resignation from his job as Manager on 25.4.2010 and ever since then not only that he is doing any job, rather he is under mental distress and undergoing treatment at IGMC Shimla. It has been lastly contended that the courts below have miserably failed to appreciate that the husband has no source of income and therefore, cannot be directed to pay maintenance.

13. The learned counsel for the husband has vehemently argued that since the wife is earning an amount of Rs.9,000/- per month whereas the husband is not at all earning, therefore, she is not entitled to maintenance.

14. In support of his contention, strong reliance has been placed by him on the judgement of learned single Judge of Delhi High Court in **Crl. M.C. No. 491 of 2009** titled **Sanjay Bhardwaj & ors.** vs. **The State & anr., decided on 27.8.2010**, particularly on the following observations:-

> "4. A perusal of Domestic Violence Act shows that Domestic Violence Act does not create any additional right in favour of wife regarding maintenance. It only enables the Magistrate to pass a maintenance order as per the rights available under existing laws. While, the Act specifies the duties and functions of protection officer, police officer, service providers, magistrate, medical facility providers and duties of Government, the Act is silent about

the duties of husband or the duties of wife. Thus, maintenance can be fixed by the Court under Domestic Violence Act only as per prevalent law regarding providing of maintenance by husband to the wife. Under prevalent laws i.e. Hindu Adoption & Maintenance Act, Hindu Marriage Act, Section 125 Cr.P.C - a husband is supposed to maintain his un-earning spouse out of the income which he earns. No law provides that a husband has to maintain a wife, living separately from him, irrespective of the fact whether he earns or not. Court cannot tell the husband that he should beg, borrow or steal but give maintenance to the wife, more so when the husband and wife are almost equally qualified and almost equally capable of earning and both of them claimed to be gainfully employed before marriage. If the husband was BSc. and Masters in Marketing Management from Pondicherry University, the wife was MA (English) & MBA. If the husband was working as a Manager abroad, the wife with MBA degree was also working in an MNC in India. Under these circumstances, fixing of maintenance by the Court without there being even a prima facie proof of the husband being employed in India and with clear proof of the fact that the passport of the husband was seized, he was not permitted to leave country, (the bail was given with a condition that he shall keep visiting Investigating Officer as and when called) is contrary to law and not warranted under provisions of Domestic Violence Act.

5. We are living in an era of equality of sexes. The Constitution provides equal treatment to be given irrespective of sex, caste and creed. An unemployed husband, who is holding an MBA degree, cannot be treated differently to an unemployed wife, who is also holding an MBA degree. Since both are on equal footing one cannot be asked to maintain other unless one is employed and other is not employed. As far as dependency on parents is concerned, I consider that once a person is grown up, educated he cannot be asked to beg and borrow from the parents and maintain wife. The parents had done their duty of educating them and now they cannot be burdened to maintain husband and wife as both are grown up and must take care of themselves.

6. It must be remembered that there is no legal presumption that behind every failed marriage there is either dowry demand or domestic violence. Marriages do fail for various other reasons. The difficulty is that real causes of failure of marriage are rarely admitted in Courts. Truth and honesty is becoming a rare commodity, in marriages and in averments made before the Courts. "

15. I have gone through the aforesaid judgement and find myself unable to agree with the same.

16. Indisputably the factum of marriage has not been denied by the husband. If that be so, it is not only his moral obligation but legal duty to maintain his wife by providing food, clothing and shelter, if not anything more.

17. The law on the subject has been elaborately dealt in **Kota Varaprasada Rao and another** vs. **Kota China Venkaiah and others AIR 1992 AP 1**, wherein it has been held as follows:-

"8. The oldest case decided on the subject is one in Khetramani Dasi v. Kashinath Das, (1868) 2 Bengal LR 15. There, the father-in-law was sued by a

Hindu widow for maintenance. Deciding the right of the widow for maintenance, the Calcutta High Court referred to the Shastric law as under:

"The duty of maintaining one's family is, however, clearly laid down in the Dayabhaga, Chapter II, Section XXIII, in these words:

'The maintenance of the family is an indispensable obligation, as Manu positively declares.' Sir Thomas Strange in his work on Hindu Law Vol. I page 67, says:

'Maintenance by a man of his dependants is, with the Hindus, a primary duty. They hold that he must be just, before he is generous, his charity beginning at home; and that even sacrifice is mockery, if to the injury of those whom he is bound to maintain. Nor of his duty in this respect are his children the only objects, co-extensive as it is with the family whatever be its composition, as consisting of other relations and connexions, including (it may be) illegitimate offspring. It extends according to Manu and Yajnavalkya to the outcast, if not to the adulterous wife; not to mention such as are excluded from the inheritance, whether through their fault, or their misfortune; all being entitled to be maintained with food and raiment."

At page 21, the learned Judges have also referred to a situation where there is nothing absolutely for the Hindu widow to maintain herself from the parents-in-law's branch by referring to the following texts from NARADA:

"In Book IV, Chapter I Section I, Art. XIII of Celebrooke's Digest, are the following texts from NARADA:

'After the death of her husband, the nearest kinsman on his side has authority over a woman who has no son; in regard to the expenditurte of wealth, the government of herself, and her maintenance, he has full dominion. If the husband's family be extinct, or the kinsman be unmanly, or destitute of means to support her, or if there is no Sapindas, a kinsman on the father's side shall have authority over the woman; and the comment on this passage is : "'Kinsman on the husband's side; of his father's or mother's race in the order of proximity. 'Maintenance' means subsistence. Thus, without his consent, she may not give away anything to any person, nor indulge herself in matters of shape, taste, small, or the like, and if the means of subsistence be wanting he must provide her maintenance. But if the kinsman be unmanly (defecient in manly capacity to discriminate right from wrong) or destitute of means to support her, if there be no such person able to provide the means of subsistence, or if there be no SAPINDAS, then any how, determining from her own judgment on the means of preserving life and duty, let her announce her affinity in this mode : 'I am the wife of such a man's uncle; 'and if that be ineffectual, let her revert to her father's kindred; or in failure of this, recourse may be had even to her mother's kindered" (Emphasis supplied.)

In Book III, Chapter II, Section II, Art. CXXII, of Colebrooke's Digest, we have the following texts and comments:

"She who is deprived of her husband should not reside apart from her father, mother, son, or brother, from her husband's father or mother, or from her maternal uncle; else she becomes infamous."

As per the above texts and comments, a Hindu widow if the parents-in-law's branch is unmanly or destitute of means to support her is entitled to be with the father or the kinsman on the father's side.

9. In Janki v. Nand Ram, (1889) ILR 11 All 194 (FB), a Hindu widow after the death of her father-in-law sued her brother-in-law and her father-in-law's widow. The Full Bench of the Allahabad High Court held that the father-in-law was under a moral, though not legal, obligation not only to maintain his widowed daughter-in-law during his life time, but also to make provision out of his self-acquired property for her maintenance after his death; and that such moral obligation in the father became by reason of his self-acquired property having come by inheritance into the hands of his surviving son, a legal obligation enforceable by a suit against the son and against the property in question. While so deciding, the learned Judges at page 210 made a reference to a passage from Dr. Gurudas Banerjee's Tagore Law Lectures, thus:

"We have hitherto been considering the claim of a widow for maintenance against the person inheriting her husband's estate. The question next arises how far she is entitled to be maintained by the heir when her husband leaves no property and how far she can claim maintenance from other relatives. The Hindu sages emphatically enjoin upon every person the duty of maintaining the dependant members of his family. The following are a few of the many texts on the subject:--

MANU: 'The ample support of those who are entitled to maintenance is rewarded with bliss in heaven; but hell is the portion of that man whose family is afflicted with pain by his neglect: therefore let him maintain his family with the utmost care.'

NARADA: 'Even they who are born, or yet unborn and they who exist in the womb, require funds for subsistence; deprivation of the means of subsistence is reprehended.'

BRIHASPATI: 'A man may give what remains after the food and clothing of his family, the giver of more who leaves his family naked and unfed, may taste honey at first, but still afterwards find it poison.' ”

The text of MANU as added reads:

"He who bestows gifts on strangers, with a view to worldly fame, while he suffers his family to live in distress, though he has power to support them, touches his lips with honey, but swallows poison; such virtue is counterfeit: even what he does for the sake of his future spiritual body, to the injury of those whom he is found to maintain, shall bring him ultimate misery both in this life and in the next."

Having so quoted the texts, the Full Bench based its judgment on the proposition:

> *"......under the Hindu law purely moral obligations imposed by religious precepts upon the father ripen into legally enforceable obligations as against the son who inherits his father's property."*

10. In Kamini Dassee v. Chandra Pode Handle, (1890) ILR 17 Cal 373, it is held by the Calcutta High Court that the principle that an heir succeeding to the property takes it for the spiritual benefit of the late proprietor, and is, therefore, under a legal obligation to maintain persons whom the late proprietor was morally bound to support, has ample basis in the Hindu law of the Bengal School and accordingly decreed the suit for maintenance laid by a widowed brother against her husband's brothers.

11. In Devi Prasad v. Gunvati Koer, (1894) ILR 22 Cal 410, deciding an action brought for maintenance by a Hindu widow against the brothers and nephew of her deceased husband after the death of her father-in-law, the Calcutta High Court held that the plaintiff's husband had a vested interest in the ancestral property, and could have, even during his father's life time, enforced partition of that property, and as the Hindu law provides that the surviving coparceners should maintain the widow of a deceased coparcener, the plaintiff was entitled to maintenance.

12. In Bai Mangal v. Bai Rukmini, (1899) ILR 23 Bom 291, the statement of law of MAYNE that

> *"After marriage, her (meaning the daughter's) maintenance is a charge upon her husband's family, but if they are unable to support her, she must be provided for by the., family of her father."*

was understood to have been one of monetary character than laying down any general legal obligation. The learned Judge, Ranede, J., after examining all the authorities has broadly laid down the law, as he understood, thus:

> *"In fact, all the text writers appear to be in agreement on this point, namely, that it is only the unmarried daughters who have a legal claim for maintenance from the husband's family. If this provision fails, and the widowed daughter returns to live with her father or brother, there is a moral and social obligation, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heirs." (page 295).*

13. However, the same learned Judge, Ranede, J., in a later case in Yamuna Bai v. Manubai, (1899) ILR 23 Bom 608, expressed his absolute concurrence with the law laid down by the Allahabad High Court in Janaki's case, (1889 ILR 11 All 194) (supra), as regards the right of the widow of a predeceased son to maintenance against the estate of the deceased father-in-law in the hands of his heirs.

14. The view of Ranede, J., in Bai Man-gal's case, (1899 ILR 23 Bom 291) (supra), was further conditioned by Ammer Ali, J., in Mokhoda Dassee v. Nundo Lall Haldar, (1900) ILR 27 Cal 555, by holding that the right of maintenance is again subject to the satisfaction of the fact that the widowed sonless daughter must have been at the time of her father's death maintained by him as a dependant member of the family.

15. But, both the views of Ranede, J., in Bai Mangal's case, (1899 ILR 23 Bom 291) (supra), and Ameer Ali, J., in Mokhode Dassee's case, (1900 ILR 27 Cal 555) (supra), did not find acceptance of A. K. Sinha, J., of the Calcutta High Court in Khanta Moni v. Shyam Chand, . The learned Judge held that a widowed daughter to sustain her claim for maintenance need not be a destitute nor need be actually maintained by the father during his life time... All that she is required to prove to get such maintenance, the learned Judge held, is that at the material time she is a destitute and she could not get any maintenance from her husband's family."

"19. In Appavu Udayan v. Nallamrnal, AIR 1949 Madras 24, the Madras High Court has to deal with the rights of daughter-in-law against her father-in-law and his estate in the hands of his heirs. There it is held that the father-in-law is under a moral obligation to maintain his widowed daughter-in-law out of his self-acquired property and that on his death if his self-acquired property

descends by inheritance to his heirs, the moral liability of the father-in-law ripens into a legal one against his heirs.

20. A Full Bench of this High Court in T. A. Lakshmi Narasamba v. T. Sundaramma, AIR 1981 Andh Pra 88 held:

"The moral obligation of a father-in-law possessed of separate or self-acquired property to maintain the widowed daughter-in-law ripens into a legal obligation in the hands of persons to whom he has either bequeathed or made a gift of his property.

Under the Hindu law there is a moral obligation on the father-in-law to maintain the daughter-in-law and the heirs who inherit the property are liable to maintain the dependants. It is the duty of the Hindu heirs to provide for the bodily and mental or spiritual needs of their immediate and nearer ancestors to relieve them from bodily and mental discomfort and to protect their souls from the consequences of sin. They should maintain the dependants pf the persons of property they succeeded. Merely because the property is transferred by gift or by will in favour of the heirs the obligation is not extinct. When there is property in the hands of the heirs belonging to the deceased who had a moral duty to provide maintenance, it becomes a legal duty on the heirs. It makes no difference whether the property is received either by way of succession or by way of gift or will, the principle being common in either case."

21. It is rather pertinent to notice here that the view of Ranede, J., in Bai Mangal's case, (1899 ILR 23 Bom 291) (supra) has been dissented from specifically by the Full Bench of this High Court."

18. The next question, which arises for consideration is as to whether employed wife can be refused maintenance only on the ground that the husband is unemployed.

19. It can never be forgotten that inherent and fundamental principle behind section 12 of the Act is for amelioration of the financial state of affairs as well as mental agony and anguish that woman suffers when she is compelled to leave her matrimonial home. The statute commands that there has to be some acceptable arrangements so that she can sustain herself. Sustenance does not mean and can never allow to mean a mere survival.

20. A woman, who is constrained to leave the matrimonial home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. She cannot be compelled to become a destitute or a beggar.

21. Now, I deal with the plea advanced by the husband that he does not have the job and his survival is on the little pension that his father is getting. Similar question came up before the Hon'ble Supreme Court in **Shamima Farooqui** vs. **Shahid Khan JT 2015 (3) SC 576,** wherein it has been held as follows:-

> **"**15. ....Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right. While determining the quantum of

maintenance, this Court in Jabsir Kaur Sehgal v. District Judge Dehradun & Ors. [JT 1997 (7) SC 531: 1997 (7) SCC 7] has held as follows:-

> "The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate."

16. Grant of maintenance to wife has been perceived as a measure of social justice by this Court. In Chaturbhuj v. Sita Bai [JT 2008 (1) SC 78 : 2008 (2) SCC 316], it has been ruled that:-

> "Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Veena Kaushal [1978 (4) SCC 70] falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat [JT 2005 (3) SC 164]".

16.1. This being the position in law, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning.

17. In this context, we may profitably quote a passage from the judgment rendered by the High Court of Delhi in Chander Prakash Bodhraj v. Shila Rani Chander Prakash [AIR 1968 Delhi 174] wherein it has been opined thus:-

> "An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodies person to show to the Court cogent grounds for holding that he is unable to reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. When the husband does not disclose to the Court the exact amount of his income, the presumption will be easily permissible against him."

22. From the aforesaid enunciation of law, it is absolutely clear that once the husband is an able-bodied young man capable of earning sufficient money, he cannot simply deny his legal obligation of maintaining his wife.

23. It has to be remembered that when the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort. Sometimes the faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm for which she cannot be allowed to resign to destiny. Therefore, the lawful imposition for grant of maintenance allowance. [Ref: **Shamima Farooqui** vs. **Shahid Khan** (supra)].

24. The learned counsel for the husband has vehemently argued that the learned courts below have ignored the fact that the wife is earning Rs.9,000/- by taking her income only to be Rs.5000/-. I am afraid that such contention is belied from the records as the learned appellate court has duly taken into consideration the fact that the wife was getting a salary of Rs.9,000/-.

25. The learned counsel for the wife has further vehemently argued that since the husband is already getting a salary of Rs.9,000/-, therefore, the amount of maintenance can in no manner be said to be justified. I am afraid that this contention is without force. It has to be remembered that it was probably because of the fact that husband was getting Rs.60,000/- when he was at Mumbai and his carry home salary was Rs.45,000/- that too in the year 2010 that this matrimonial relationship came into existence. It was after taking into consideration the status and the earning capacity of the husband that the marriage proposal was accepted and thereafter solemnized. Therefore, taking into consideration all the aforesaid facts, coupled with the price index and the high cost of living, the maintenance of Rs.5,000/- in no manner can be held to be excessive.

26. That apart after having rendered the wife a total destitute, the husband cannot be heard to complain that because now she is earning, therefore, she is not entitled to any maintenance. After-all, it was the circumstances created by the husband which compelled the wife to look for means to sustain herself and she accordingly took up the job of teaching.

27. Though the wife has filed a separate revision petition claiming enhancement of maintenance and compensation, but after having gone through the records of the case, I find that award of maintenance at the rate of Rs.5,000/- and award of compensation to the tune of Rs.10,000/- is just and proper.

28. In view of the aforesaid discussion, I find no merit in both the petitions and the same are accordingly dismissed, leaving the parties to bear their own costs. The Registry is directed to place a copy of this judgment on the file of connected matter.

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

Mool Chand son of Shri Tulle Ram ....Petitioner

Versus

State of H.P. ....Non-petitioner

Cr.MP(M) No. 522 of 2015
Order Reserved on 21st May 2015
Date of Order 3rd June, 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 468, 471 of IPC-

held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- if anticipatory bail is allowed, interests of the State and general public will not be adversely affected- petitioner had cooperated with the police, therefore, bail application allowed and the petitioner ordered to be released on bail. (Para-6 to 8)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702

For the Petitioner: Mr. J.L. Bhardwaj, Advocate.
For the Non-petitioner: Mr. J.S.Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 36 of 2015 dated 9.5.2015 registered under Sections 420, 468, 471 IPC at P.S. Ani District Kullu H.P.

2. It is pleaded that petitioner has been falsely implicated in present case. It is pleaded that petitioner was initially engaged as Beldar on daily wages in the year 1994 and after completion of ten years service the petitioner was given work charge status. It is further pleaded that petitioner was regularized in the month of January 2007 and at the time of regularization the petitioner was directed to furnish the date of birth certificate with the department. It is further pleaded that petitioner had presented the date of birth certificate which was procured by father of the petitioner wherein date of birth of petitioner has been shown as 16.5.1959. It is pleaded that one Shri Om Parkash who was neighbour of petitioner sought the information from the Executive Engineer Outer Seraj Division HPPWD Nirmand regarding the regularization of service of petitioner and information was also sought regarding date of birth of petitioner. It is pleaded that information was given to complainant but complainant was not satisfied with certificate and asked the department to verify the said certificate from school authorities. It is further pleaded that thereafter Executive Engineer Seraj Division HPPWD Nirmand verified the date of birth of petitioner from school authorities and it was found that name of petitioner was not figuring in school as per information supplied by the Principal Govt. Senior Secondary School Teban District Mandi. It is pleaded that school certificate was procured by father of petitioner and there is no mens rea on the part of petitioner and school certificate was obtained by father of petitioner. It is pleaded that matter is relating to documentary evidence and custodial interrogation of petitioner is not required in present case. It is pleaded that petitioner undertakes to join the investigation as and when required by Investigating Agency and would also cooperate with Investigating Agency and would not influence any witness. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. As per police report Mr. Om Parkash son of Sita Ram filed complaint that forged certificate was submitted by petitioner in the department. There is recital in police report that petitioner has joined the investigation.

There is further recital in police report that petitioner Mool Chand had qualified only first and second class exam and petitioner could not read and write Hindi and only could sign. There is further recital in police report that the school certificate was prepared by father of petitioner in the year 1972. There is further recital in police report that as per petitioner version, petitioner has no knowledge that from where the father of petitioner procured the forged certificate.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Assistant Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether anticipatory bail application filed under Section 438 Cr.P.C. by applicant is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that any condition imposed by Court will be binding upon the petitioner and offence is relating to documentary evidence only and on this ground anticipatory bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. In present case there is no recital in police report placed on record that custodial interrogation of petitioner is required. On the other hand there is recital in police report that petitioner has cooperated in investigation of present case. There is further recital in police report that as per investigation forged certificate was procured by father of petitioner. There is further recital in police report that petitioner has studied up to first and second class and petitioner could not read and write Hindi and only could sign. There is recital in police report that school leaving certificate was prepared in the year 1972. It is prima facie proved on record that in the year 1972 when forged certificate was prepared at that time the age of petitioner was 13 years and petitioner was minor. Court is of the opinion that if anticipatory bail is allowed to petitioner at this stage then interest of State and general pubic will not be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if bail is granted to petitioner then petitioner will induce, threat and

influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional anticipatory bail will be granted to petitioner and if petitioner will flout the terms and conditions of anticipatory bail order then prosecution will be at liberty to file application for cancellation of bail strictly in accordance with law. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final Order)

9. In view of my findings on point No.1 bail application filed by petitioner under Section 438 Cr.P.C. is allowed and interim order dated 7.5.2015 is made absolute. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 438 of Code of Criminal Procedure stands disposed of.

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

M/s Sainsons Pulp & Papers Ltd. and another …. Petitioners.
Versus
State Bank of India and others ….Respondents

CWP No. 2805 of 2011
Date of Interim Order 03rd June, 2015

Constitution of India, 1950- Article 226- **Sick Industrial Companies (Special Provisions) Act 1985**- Section 22- Petitioners sought a direction to the bank to take steps to prevent the petitioner from becoming sick- petitioners had stated that an order was passed by BIFR which was upheld in AAIFR- held that where an inquiry under Section 16 of the Act is pending or where any scheme is under preparation or consideration then all the inquiries and legal proceedings would be suspended- Sick Industrial Companies (Special Provisions) Act is a special Act and will prevail over the general law, hence, proceedings in the Writ Petition will remain under suspension till pendency of proceedings under Sick Industrial Companies (Special Provisions) Act. (Para- 16 and 17)

Cases referred:

Comet Filaments (India) Ltd. vs. Pradeshya Industrial and Investment Corporation of U.P. Ltd., (1989)Vol.66 Comp.Cases page124 (Allahabad High Court)
Raheja Universal Limited vs. NRC Limited and others, AIR 2012 SC 1440
Ghanshyam Sarda vs. M/s Shiv Shankar Trading Co. and others, AIR 2015 SC 403
M.D. Bhoruka Textiles Limited vs. M/s Kashmiri Rice Industries, AIR 2009 SC (Supp) 1947

For the Petitioners:	Mr. Vinay Kuthiala, Sr. Advocate with Mr.Rahul Mahajan, Advocate.
For Respondent No.1:	Mr. K.D. Sood, Sr. Advocate with Mr.Sanjeev Sood, Advocate.
For Respondent No.3:	Mr. J.S. Rana Assistant Advocate General.
For Respondent Nos. 4 & 5:	Mr. Angrej Kapoor Advocate vice Mr.Ashok Sharma, Assistant Solicitor General.

The following Interim Order of the Court was delivered:

P.S. Rana, Judge

INTERIM ORDER

Present civil writ petition is filed under Article 226 of Constitution of India seeking the following relief. (a) Direct respondent bank to immediately consider the issues raised in request letter/representation dated 3.3.2011 and provide for the measures to check and control the sickness of the unit of the petitioners inter alia with following provision: (a) (i) Conversion of the liability under existing/utilized cash credit limit of Rs.15.00 into working capital term loan and match the installments along with other term loans. (ii) Conversion of the liability under existing/utilized letter of credit and bank guarantee limits into working capital term loans and match the installments along with other term loans. (iii) Sanction of appropriate fresh/additional cash credit limit by assessing the requirement by applying the norms as per Tandon committee report with concessional rate of interest and others concessions/margins in tune with rate of interest and concessions/margins as provided for in the sanction letter dated 4.6.2008. (iv) Reversal by way of waiver the up to date interest as having been debited to the cash credit account and charged against term loans letter of credit limit and bank guarantee limit. (v) Re-schedulement of payment of term loans by extending the moratorium period up to 31.3.2012. (vi) Grant of permission to sell the properties belonging to clients at Sr. No. 2, 3, 5 and 6 alleged to have been mortgaged up to the bank by way of collateral security so that sale proceeds could be used and employed to meet out the paucity of working capital so as to ensure proper and profitable running of the unit. (vii) Restoration of margin on stocks and consumable stores, debtors, FLC/ILC/BG so as to be in consonance with terms of margins stipulated in the First Sanction of term loan.

2. (b) Direct respondent bank to provide for immediate measures so as to enable the petitioners to forthwith start the operation of the unit so that loss due to closure of the unit is averted and further sickness is arrested. (i) Release of the already sanctioned additional cash credit limit of Rs.5.00 crores without insisting for provision of corporate guarantees by M/s Sainsons Fibres Ltd. and M/s Executive Infrabuild Pvt. Ltd. (ii) Release requisite sum and requisite Bank Guarantee/Security to the HPSEB so that power connection is immediately restored. (iii) Allow full utilization of the letter of credit limit of Rs. 10.00 crores.

3. (c) Direct respondent Nos. 3 and 4 to forthwith cause the release of capital subsidy of Rs.30.00 lac.

4. (d) Direct respondent No. 5 to waive the condition of export obligation in the event of unit not being rehabilitated.

5. (e) Direct respondent No. 5 to consider the start of period of 8 years within which petitioner companies was obliged to complete the export obligation from the day when unit becomes operational after rehabilitation thereof.

6. E(i) Direct respondent No. 1 bank to reconsider the one time settlement proposal on realistic base and to grant an opportunity of hearing to the petitioners Companies to put forth their case for OTS.

7. E(ii) Quash and set aside letter dated 18.12.2014 rejecting OTS proposal.

8. E(iii) Direct the respondent bank to allow the petitioner to bring a better buyer in respect of the properties/assets and also in respect of the properties not mentioned in Annexure P-47.

9. E(iv) Direct respondent No. 1 bank to bear expenses of security guards, generators being run at the industrial premises at village Taliwal, Tehsil Haroli District Una H.P. amounting to Rs.5,00,000 per month in view of the facts that symbolic possession under SARFASI has already been taken by respondent No.1 bank.

10. E(v) To direct respondent No.1 bank to provide the guidelines for submitting of one time settlement as applicable to it and to follow these guidelines.

11. E(vi) Direct respondent No. 1 not to take any further action for recovery till the decision of proceedings pending before AIFR.

12. E(vii) In alternative respondent No. 1 may be directed to proceed against the principal security i.e. land, building and factory premises at the first instance.

13. Per contra response filed on behalf of the respondent i.e. State Bank of India pleaded therein that petitioners have violated the financial discipline of the bank and did not adhere to the payments schedule. It is pleaded that unit is not functioning. It is pleaded that power of unit was cut off in February 2011 by H.P. State Electricity Board for non-payment of dues to the tune of Rs.64 lacs and a sum of Rs.101,69,57,370/- were due from petitioners to the bank as on dated 27.5.2011. It is pleaded that notice dated 28.5.2011 was issued to the petitioners under Section 13 (2) of SARFESI Act and petitioners are not legally entitled to invoke the writ jurisdiction of High Court as alternative efficacious and speedy remedy is available to the petitioners to approach the Debt Recovery Tribunal in accordance with the provisions of Act. It is pleaded that OA No. 124 of 2012 for recovery of Rs.1161527277.95 was filed before the Debt Recovery Tribunal (I) Chandigarh on dated 29.12.2012 and proceedings are pending before the Debt Recovery Tribunal Chandigarh. It is pleaded that an amount of Rs.174,59,40,719.80 was due in March 2015 from petitioners Companies and presently an amount of Rs.179,67,14,362.38 is due on dated 30.4.2015. It is pleaded that after adjusting the sale proceeds of properties sold in village Baltana Zirakpur namely one commercial shop sold for Rs.21 lacs and second property namely residential house sold for Rs. 51 lacs on dated 14.3.2015 and properties were auctioned on dated 14.3.2015 and pursuant thereto the sale certificate was issued in favour of auction purchaser after receipt of the entire auction money. It is pleaded that petitioners resisted the taking over the factory in village Talhiwal on dated 19.1.2015 with help of local sympathizers including ladies and further pleaded that huge outstanding amount against the petitioners could only be recovered by sale of residential house in Panchkulla and factory, land, building including plant and machinery situated at Tahliwal which too would be insufficient to satisfy the amount outstanding to respondent bank. It is further pleaded that disputed facts are involved and thereafter one time settlement was turned down. It is pleaded that amount due could only be recovered by way of sale of properties of petitioners including residential house. Prayer for dismissal of civil writ petition sought.

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

15. Following points arise for determination in this civil writ petition at this stage of case:-

1. Whether proceedings of present civil writ petition No. 2805 of 2011 titled M/s Sainsons Pulp & Papers & others vs. State Bank of India and others are liable to be suspended as per Section 22 of

Sick Industrial Companies (Special Provisions) Act 1985 till the pendency of AAIFR appeal No. 13 of 2015 before the competent authority under Sick Industrial Companies (Special Provisions) Act 1985 or till pendency of proceedings under Sick Industrial Companies (Special Provisions) Act 1985?

2. Final Order.

Findings on point No.1

16. Petitioners have specifically pleaded in para No. 112(i) of the amended petition that BIFR order was passed in case No. 79 of 2012 dated 3.11.2014 under Sick Industrial Companies (Special Provisions) Act 1985 and thereafter AAIFR appeal No. 13 of 2015 was filed against the BIFR order announced in case No. 79 of 2012 dated 3.11.2014 before the appellate authority under Sick Industrial Companies (Special Provisions) Act 1985 which is pending for disposal. As per Section 22 of Sick Industrial Companies (Special Provisions) Act 1985 where inquiry under Section 16 of Sick Industrial Companies (Special Provisions) Act 1985 is pending or where any scheme referred to under Section 17 is under preparation or consideration or where any appeal under Section 25 of the Sick Industrial Companies (Special Provisions) Act 1985 is pending then all other legal proceedings would be suspended. It was held in case reported in ***(1989)Vol.66 Comp.Cases page124 (Allahabad High Court) titled Comet Filaments (India) Ltd. vs. Pradeshya Industrial and Investment Corporation of U.P. Ltd.*** that as long as proceedings under Sick Industrial Companies (Special Provisions) Act 1985 are pending then property of the Companies would remain under direct control of the authorities under Sick Industrial Companies (Special Provisions) Act 1985 and no proceeding in respect of property of the Companies would be proceeded except with consent of competent authority under Sick Industrial Companies (Special Provisions) Act 1985. ***(See AIR 2012 SC 1440 titled Raheja Universal Limited vs. NRC Limited and others. Also see AIR 2015 SC 403 titled Ghanshyam Sarda vs. M/s Shiv Shankar Trading Co. and others. Also see AIR 2009 SC (Supp) 1947 titled M.D. Bhoruka Textiles Limited vs. M/s Kashmiri Rice Industries.)*** Sick Industrial Companies (Special Provisions) Act 1985 is a special Act and it is well settled law that when there is conflict between special law and general law then special law always prevails. It is held that Section 22 of Sick Industrial Companies (Special Provisions) Act 1985 would also apply to proceedings filed under Article 226 of Constitution of India. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final Order)

17. In view of above findings on point No. 1 it is ordered that proceedings of civil writ petition No. 2805 of 2011 will remain under suspension till pendency of proceedings under Sick Industrial Companies (Special Provisions) Act 1985 before the competent authority of law. It is further held that parties will be at liberty to obtain the consent of BIFR board or appellate authority for continuation of legal proceedings relating to civil writ petition No. 2805 of 2011. Amended response to amended petition will be filed by respondents after completion of proceedings under Sick Industrial Companies (Special Provisions) Act 1985 or after obtaining consent of competent authority under Sick Industrial Companies (Special Provisions) Act 1985 for continuation of proceedings of civil writ petition No. 2805 of 2011. Interim order passed accordingly.

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

M/s Sainsons Pulp & Papers Ltd. and another ....Applicants/Petitioners.
Versus
State Bank of India and others ....Non-applicants/Respondents

CMP No. 5525 of 2015
CWP No. 2805 of 2011
Order Reserved on CMP: 21.5.2015
Date of Order upon CMP 3rd June, 2015

Code of Civil Procedure, 1908- Order 6 Rule 17- Petitioners sought amendment of the Writ Petition, which was opposed on the ground that application was filed with a view to delay the decision of civil writ petition- petitioners had violated the financial discipline of the bank and had not adhered to the payments schedule- notice was issued to the petitioner under Section 13(2) SARFESI Act and the Writ Petition is not maintainable- held, that Court should allow all the amendments, which are necessary for determining the real controversy between the parties and do not cause any prejudice to the other side, which cannot be compensated in terms of money – in the present case, no prejudice would be caused if the application is allowed as the proposed amendment is explanatory in nature relating to subsequent events- application allowed subject to the payment of cost of Rs. 3,000/-.

(Para- 25 to 27)

Cases referred:

Abdul Rehman vs. Mohd. Ruldu, 2012(10 JT SC 97
M/s Ganesh Trading Co. vs. Moji Ram, AIR 1978 SC 484

For the Applicants/Petitioners:	Mr. Vinay Kuthiala, Sr. Advocate with Mr.Rahul Mahajan, Advocate.
For Non-applicant/ Respondent No.1:	Mr. K.D. Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate.
For non-applicant/ Respondent No.3:	Mr. J. S. Rana Assistant Advocate General.
For Non-applicants/ Respondents Nos.4&5:	Mr. Angrej Kapoor Advocate vice Mr.Ashok Sharma, Assistant Solicitor General.

The following interim order of the Court was delivered:

P.S. Rana, Judge

INTERIM ORDER

Present application is filed under Order 6 Rule 17 CPC read with Section 151 CPC and Rule 13 of H.P. High Court Writ Jurisdiction Original Sides Rules 1997 and under Article 226(1) of the Constitution of India for amendment of CWP No. 2805 of 2011 titled as M/s Sainsons Pulp and Papers Ltd. vs. State Bank of India and another. It is pleaded that applicants filed civil writ petition which is pending adjudication before the Court. It is pleaded that applicants have set up a papers making unit under the name and style of M/s Saisons Pulp Papers Ltd. at village Taliwal Nichala Tehsil Haroli District Una H.P. with 200 TDP (Tone per day capacity) entailing a capital cost of Rs.125/- crores. It is pleaded that non-applicant State Bank of India granted credit facility to the applicant in the following manner:-

i) Term Loan-I Rs. 32.25 Crores

ii) Term Loan-II	Rs. 27.25 Crores
iii) Term Loan-III	Rs. 15.00 Crores
iv) Cash Credit limit	Rs. 15.00 Crores.

It is pleaded that apart from the above applicants company and its promoters had also invested an amount of Rs. 48.39 crores in setting up of the papers making unit at village Taliwal Nichala Tehsil Haroli District Una H.P. It is further pleaded that papers unit at village Taliwal started its operation on dated 27.3.2010 and fire broke out on dated 11.12.2010 in the industrial unit due to electrical short circuiting causing damage to revinder machine, finished stock of papers, instruments cable, electrical cable, control cable etc. It is pleaded that despite fire incident and despite hampering of production applicants company had paid to the State Bank of India a sum of Rs. 408.00 lacs by way of installments and interest as of 31.12.2010. It is pleaded that after filing the writ petition subsequent development took place. It is pleaded that by way of amendment applicants intended to bring on record the subsequent events which took place after filing of writ petition till date. It is pleaded that proposed amendment will not change the nature of writ petition and bringing on record subsequent events are necessary for just and proper adjudication of civil writ petition and for deciding the controversy inter se the parties properly. It is pleaded that no prejudice will be caused to non-applicants. Applicants sought following amendments.

2. 112(a) That applicants vide letter dated 19.01.2013 submitted a one time settlement (OTS)/proposal to non-applicant No.1. Applicants submitted that they desire of settlement with the Bank and Financial Institution after due consideration of statutory liability and market scenario condition of the assets and distress realization value so that the unit can be made viable with the help of investors, who are ready and willing to provide fund to the applicants company for amicable realistic OTS and later on for re-starting the operation of the industrial unit. It is pleaded that applicants also submitted that in order to make the unit viable fresh investments will also be required and to restart the operation and up-gradation working capital of Rs. 2000 to 2500 lac is required.

3. 112(b) That applicants company was asked by non-applicant No. 1 vide letter dated 22.1.2013 to improve OTS offer and further pleaded that applicants company vide letter dated 4.5.2013 justified one time settlement submit vide letter dated 19.1.2013 to non-applicant No.1. That non-applicant No.1/State Bank of India vide letter dated 7.5.2013 intimated the applicants that OTS submitted was put before the competent authority for action.

4. 112(c) That applicants thereafter again vide letter dated 30.7.2013 again requested the non-applicant No.1 to consider the OTS keeping in view the financial position and realizable value of the assets of the applicants company. It is further pleaded that non-applicant No. 1 vide letter dated 31.7.2013 intimated that the official of non-applicant No. 1 at Delhi have been asked to examine the "One time settlement" and they would respond to the applicants company directly. It is pleaded that however vide letter dated 26.8.2013 non-applicant No. 1 intimated that OTS was found not acceptable and it is further pleaded that applicants thereafter wrote letter dated 10.9.2013 requesting non-applicant No. 1 to allow applicants to meet its official for discussions on his proposal. It is also pleaded that request of applicants was accepted and was conveyed vide mail dated 13.9.2013 and in the meeting with official of non-applicant No. 1 bank applicants asked the bank officers at Chandigarh to get the assets valued from the recognized valuer of the assets who are on the list of non-applicant No.1.

5. 112(d) That applicants thereafter again vide letter dated 11.10.2013 submitted to non-applicant No.1 to consider the OTS of the assets of applicants company by taking a practical view and vide letter dated 14.11.2013 applicants also requested non-applicant No.1 to provide list of valuer and further pleaded that non-applicant No. 1 vide letter dated 16.11.2013 conveyed to the applicants that they have entrusted job of valuation of the property of applicants to M/s D.S. and Associates and applicants vide letter dated 16.12.2013 requested non-applicant bank to provide valuation report which would be done by M/S D.S. and Associates as conveyed vide letter dated 16.11.2013.

6. 112(e) That non-applicant No.1 bank got the valuation of assets and receipt of valuation conducted by M/s D.S. and Associates was submitted to the applicants and further pleaded that thereafter applicants immediately on the valuation which was done by M/s D.S. and Associates submitted to non-applicant No.1 OTS proposal of Rs.28.50 crores along with OTS schedule of payment. It is pleaded that non-applicant No.1 bank vide letter dated 4.11.2014 without personal hearing and giving an opportunity to the applicants to put forth their case of OTS in an unilateral and capricious manner submitted that OTS of Rs. 28.50 crores was too low and not acceptable.

7. 112(f) That it is submitted that the applicants had also asked non-applicant No.1 bank and its official to provide copy of latest valuation report vide letters dated 1.10.2014 and 3.10.2014 but no copies provided to applicants. It is pleaded that the applicants had submitted OTS on the basis of the valuation done by M/s D.S. and Associates and also justified OTS submitted by giving reasons for submitting Rs. 28.50 crores as one time settlement. It is pleaded that applicants thereafter again on 10.12.2014 submitted OTS by substantially enhancing the same to Rs.37.50 crores and also submitted therein that a buyer has approached the applicants on dated 7.12.2014 to buy the unit at village Taliwal and agricultural land at village Taliwal for Rs.31.25 crores. It is pleaded that reasons for substantial enhancing of OTS from Rs. 28.50 crores to Rs. 37.50 crores was also submitted on dated 10.12.2014. It is further pleaded that said revised proposal of Rs.37.50 crores which was submitted by applicants was also not considered and was rejected by non-applicant bank in an arbitrary and unilateral manner without giving an opportunity to the applicants to put forth their proposal in person. It is further pleaded that applicants are striving hard to revive the industrial unit and for the same have submitted OTS proposal and have approached various investors to invest in the papers making unit so that its operation could be started but hindrance was created by non-applicant No.1 bank every time whenever proposals were submitted for OTS and revival of applicants company.

8. 112(g) That applicants vide letters dated 28.11.2014, 3.12.2014, 25.12.2014 and 10.3.2015 has submitted application under Right to Information Act to non-applicant No. 1 bank-cum-Public Information Officer to provide the latest valuation report in respect of applicants company assets. It is pleaded that in spite of having written applications under Right to Information Act latest valuation report in respect of assets were not provided by non-applicant No.1 bank and it is further submitted that latest valuation report was not submitted to applicants company even in spite of submission of application under Right to Information Act but non-applicant No.1/bank in an application for early hearing filed before the Hon'ble Court clearly mentioned extract of latest valuation report of some of the property of the applicants company. It is pleaded that on the basis of extract of latest valuation report submitted by non-applicant No.1/bank revised OTS dated 10.12.2014 was submitted for Rs.37.50 crores and said OTS was also not considered in a just and proper manner and it was rejected vide letter dated 18.12.2014 by non-applicant No.1. It is pleaded that rejection of OTS submitted by applicants have been rejected without any basis and criteria and without looking into and without giving an opportunity of personal hearing to the applicants

company and OTS has been rejected in contravention of guidelines of RBI which are binding on non-applicant No.1.

9. 112(h) That it is submitted that non-applicant No. 1 bank vide latest valuation report carried out fixed reserve price of assets, plant and machinery of the applicants unit at village Taliwal, Tehsil Haroli District Una as Rs. 27.50 crores. It is pleaded that reserve price of House No. 1086 Sector 7 Panchkulla (Chandigarh) was not disclosed by non-applicant No. 1 bank in application filed for early hearing moved before the Hon'ble Court. It is further pleaded that applicants company since 2011 after industrial unit was closed down due to non-cooperative attitude of non-applicant No.1 bank and fire incident. It is pleaded that applicants deployed 10-12 guards every day and are also lightening the entire industrial premises as well as boundary by way of generators in order to ensure that there should be no theft in the industrial unit. It is further pleaded that assets, plant, machinery are installed in the industrial establishment of applicants company at village Taliwal, Tehsil Haroli District Una and non-applicant No.1 bank till date even after assessing the reserve price has not bothered to make detailed inventory of assets, plant and machinery stores. It is further pleaded that non-applicant No. 1 is instrumental in closing down of unit of applicants company at village Taliwal, Tehsil Haroli District Una which was installed for manufacturing of papers and till date valuation of two properties i.e. House No. 1086 Sector-7 Panchkulla (Chandigarh) and agricultural land at Khangesra in the name of Ramesh Kumar Saini and Smt. Shashi Bala have not been provided. It is pleaded that non-applicant No. 1 bank on dated 29.12.2014 has provided the valuation report of the properties, assets but in respect of two properties still valuation report has not been provided. It is also pleaded that applicants company vide letter dated 20.3.2015 has also written letter to non-applicant No. 1 that they are spending nearly Rs.5,00,000/- (Rupees five lacs only) every month in order to ensure that there should be no theft in the industrial unit and to keep secure the applicants company assets.

10. 112(i) That it is submitted that applicant have filed a reference before the Board of Industrial Financial Reconstruction at New Delhi under the provisions of Sick Industrial Company Special Provisions Act 1985 and said reference was registered as Reference No. 79 of 2013 (corrected as 79 of 2012 taking judicial notice on the basis of record placed on record). It is pleaded that on dated 3.12.2014 (corrected as 3.11.2014 taking judicial notice on the basis of record placed on record) BIFR deregistered the reference made by applicants company and applicants company against the BIFR order dated 3.12.2014 (corrected as 3.11.2014 taking judicial notice on the basis of record placed on record) passed by BIFR in Reference No. 79 of 2012 on 3.12.2014 (corrected as 3.11.2014 taking judicial notice on the basis of record placed on record) have filed an appeal before the Appellate Authority for Industrial and Financial Reconstruction New Delhi (AAIFR) and said appeal has been registered as AAIFR Appeal No. 13 of 2014 (corrected as 13 of 2015 taking judicial notice on the basis of record placed on record). It is also pleaded that at present the issues regarding the applicants company being a Sick Industrial Company under the Sick Industrial Special Provisions Act is pending adjudication before the Appellate Authority for Industrial and Financial Reconstruction New Delhi and if the appeal is allowed and order of BIFR dated 3.12.2014 (corrected as 3.11.2014 taking judicial notice on the basis of record placed on record) de-registering the reference will be set aside and the applicant will stand automatically registered in BIFR and provisions of Sick Industrial Company Special Provisions Act would have an overriding effect. It is pleaded that notices in appeal have been issued and is now listed on dated 27.5.2015.

11. 112(j) That non-applicant No.1 bank has filed an Original Application before the Debt Recovery Tribunal-I at Chandigarh and applicants company has also filed a suit for recovery/counter claim against non-applicant bank. It is also pleaded that said suit/counter

claim are also pending for adjudication and present writ petition was filed prior to the filing of suit and counter claim before the Debt Recovery Tribunal. It is also pleaded that appeal against the order of BIFR stand filed and notices have been issued to the non-applicant bank and if appeal is allowed then applicants company will be registered under BIFR. It is pleaded that order of BIFR deregistering the applicants company will have no force and applicants on registration in BIFR all proceedings will be abided as per provisions of Sick Industrial Special Provisions Act and non-applicant bank are harassing the applicants company by threatening them that they would sell the residential house situated at House No. 1086, Panchkulla, Chandigarh without even prior proceedings towards realization of the value of Industrial establishment i.e. paper unit at village Taliwal, Tehsil Haroli District Una H.P. which is primary security and non-applicant bank wants to make applicant No. 2 homeless and without any shelter.

12. 112(k) That it is submitted that applicants company still wants to revive its industrial establishment at village Taliwal, Tehsil Haroli District Una H.P. and applicants company has buyer and even investors who are ready and willing to buy and run the industrial establishment unit at village Taliwal Tehsil Haroli District Una H.P. provided non-applicant bank sits with open and listen to the problem of the applicants company and extended hands towards finalizing of OTS on the basis of realistic distress value of the assets and Rs. 48.39 crores has also been invested by promoters of the applicants company and promoters money have also gone down on account of act conduct and deed and non-cooperative attitude and malafide intention of non-applicant No.1 bank.

13. 112(l) That act, conduct of non-applicant No.1 bank is violative of Article 14 of Constitution of India and the Tandon Core Committee Report and Reserve Bank of India Guidelines has not been followed and in the month of December 2010 the term loan accounts/cash credit limits were regular and applicants company was not in default. It is pleaded that applicants company had paid Rs. 408 lac as on 31.12.2010 and in spite of all these things non-applicant No. 1 bank rather than extending a helping hand to the applicants company for its revival in fact by not releasing the sanctioned limits of loan and cash credit limit ensured that industrial establishment should close down. It is further pleaded that in fact non-applicant No. 1 bank, its officials are responsible for closing down of industrial establishment of applicants and the unit operated for barely about nine months and non-applicant No.1 started demanding exorbitant repayments.

14. Applicants also sought following amendments in relief clause. E(i) Direct respondent No. 1 bank to reconsider the one time settlement proposal on realistic base and to grant an opportunity of hearing to the applicants company to put forth their case for OTS.

15. E(ii) Quash and set aside letter dated 18.12.2014 whereby rejected OTS proposal.

16. E(iii) Direct the respondent bank to allow the applicant to bring a better buyer in respect of the properties/assets and also in respect of the properties not mentioned in Annexure P-47.

17. E(iv) Direct respondent No. 1 bank to bear expenses of security guards, generators being run at the industrial premises at village Taliwal, Tehsil Haroli District Una H.P. amounting to Rs.5,00,000 per month in view of the facts that symbolic possession under SARFASI has already been taken by respondent No.1 bank.

18. E(v) To direct respondent No.1 bank to provide the guidelines for submitting of one time settlement as applicable to it and to follow these guidelines.

19. E(vi) Direct respondent No. 1 not to take any further action for recovery till the decision of proceedings pending before AIFR.

20. E(vii) In alternative respondent No. 1 may be directed to proceed against the principal security i.e. land, building and factory premises at the first instance.

21. Per contra reply filed on behalf of non-applicant bank pleaded therein that present amendment application filed with a view to delay the decision of civil writ petition. It is pleaded that applicants have violated the financial discipline of the bank and did not adhere to the payments schedule. It is pleaded that unit is not functioning. It is pleaded that power of unit was cut off in February 2011 by H.P. State Electricity Board for non-payment of dues to the tune of ` 64 lacs and a sum of Rs.101,69,57,370/- were due from applicants to the bank as on dated 27.5.2011. It is pleaded that notice dated 28.5.2011 was issued to the applicants under Section 13 (2) of SARFESI Act and applicants are not legally entitled to invoke the writ jurisdiction of High Court as alternative efficacious and speedy remedy is available to the applicants to approach the Debt Recovery Tribunal in accordance with the provisions of Act. It is pleaded that OA No. 124 of 2012 for recovery of Rs.1161527277.95 was filed before the Debt Recovery Tribunal (I) Chandigarh on dated 29.12.2012 and proceedings are pending before the Debt Recovery Tribunal Chandigarh. It is pleaded that an amount of Rs.179,59,40,719.80 was due in March 2015 from applicants company and presently an amount of Rs.179,67,14,362.38 is due on dated 30.4.2015. It is pleaded that after adjusting the sale proceeds of properties sold in village Baltana Zirakpur namely one commercial shop sold for Rs.21 lacs and second property namely residential house sold for Rs.51 lacs on dated 14.3.2015 and properties were auctioned on dated 14.3.2015 and pursuant thereto the sale certificate was issued in favour of auction purchaser after receipt of the entire auction money. It is pleaded that applicants resisted the taking over the factory in village Talhiwal on dated 19.1.2015 with help of local sympathizers including ladies and further pleaded that huge outstanding amount against the applicants could only be recovered by sale of residential house in Panchkulla and factory, land, building including plant and machinery situated at Tahliwal which too would be insufficient to satisfy the amount outstanding to non-applicant bank. It is further pleaded that disputed facts are involved and thereafter one time settlement request has been turned down. It is pleaded that amount due could only be recovered by way of sale of properties of applicants including residential house. It is pleaded that applicants are not entitled for amendment in writ petition. Prayer for dismissal of application sought.

22. Applicants also filed rejoinder pleaded therein that applicants intended to bring on records subsequent events which are essential for resolving the real controversy intere se the parties and to avoid multiplicity of litigation. It is pleaded that outcome of entire proceedings would depend upon the ultimate order which would be passed by appellate authority under Sick Industrial Companies (Special Provision) Act 1985. It is pleaded that non-applicant bank is not adhering to the guidelines and principles laid down by Reserve Bank of India for one time settlement and non-applicant bank cannot be allowed to take advantage of his own act omission and commission. It is pleaded that proceedings are pending before appellate authority under Sick Industrial Companies (Special Provision) Act 1985.

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

24. Following points arise for determination in this civil writ petition:-

1. Whether application filed under Order 6 Rule 10 read with Section 151 CPC and Rule 13 of H.P. High Court Writ Jurisdiction Original Sides Rules 1987 and under Article 226(1) of Constitution of India is liable to be accepted as per grounds mentioned in application?
2. Final Order.

Findings on point No.1

25. It was held in case reported in ***2012(10 JT SC 97 titled Abdul Rehman vs. Mohd. Ruldu*** that Court should allow all amendments which would be necessary for determining the real controversy between the parties provided that amendment should not cause injustice or prejudice to the opposite party. Following principles should be followed in dealing with application for amendment of pleadings. (1) That all amendments will be generally permissible when they are necessary for determining the real controversy inter se the parties. (2) That party cannot be allowed to change the subject matter of controversy. (3) That inconsistent and contradictory amendments should not be permitted. (4) That amendment should not cause prejudice to other side which could not be compensated in terms of costs. (5) That amendment which is barred by law should not be allowed. The power of amendment is granted to Court in larger interest and to give full justice to parties. ***(See AIR 1978 SC 484 titled M/s Ganesh Trading Co. vs. Moji Ram)*** Since proposed amendment is just explanation of subsequent events Court is of the opinion that proposed amendment is essential in order to dispose of civil writ petition properly and effectively and to impart substantial justice inter se parties.

26. Submission of learned Advocate appearing on behalf of the non-applicants that present application has been filed with mala fide intention to delay the disposal of civil writ petition and on this ground application filed under Order 6 Rule 17 CPC be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that opportunity to file reply to proposed amendment will be granted to non-applicants and Court is of the opinion that no prejudice will be caused to non-applicants if proposed amendment is allowed as proposed amendment is only explainary in nature relating to subsequent events. Court is also of the opinion that non-applicant can be compensated with heavy costs for filing the proposed amendment at the belated stage. In view of above stated facts point No. 1 is answered in affirmative.

Point No.2 (Final Order)

27. In view of above stated CMP No. 5525 of 2015 is allowed and proposed amendments as sought in CMP No. 5525 of 2015 are allowed in the ends of justice. Costs to the tune of Rs.3000/- (Rupees three thousand only) also imposed which will be paid to non-applicant No. 1 i.e. State Bank of India. Observations made in this order will not effect the merits of civil writ petition in any manner and will strictly confine for the disposal of CMP No. 5525 of 2015. CMP is disposed of.

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

Rikhikesh son of Shri Narain Dass ….Revisionist
Versus
Om Parkash ….Non-Revisionist

Civil Revision No. 17 of 2015
Order Reserved on 22nd May 2015
Date of Order 3rd June, 2015

Code of Civil Procedure, 1908- Order 21 Rule 32- A counter-claim was filed for specific performance of the contract which was decreed- application for execution of the decree was filed- objections were filed pleading that Execution Petition is not maintainable and the decree is not executable in view of the instructions issued by the govt. - held that, decree

had attained finality and it cannot be nullified by taking recourse to administrative instructions. (Para-7)

For the Revisionist: Mr. G.R. Palsara, Advocate
For the Non-Revisionist: Mr. Devender K. Sharma, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Order:- Present revision is filed against the order dated 15.1.2015 passed by learned Civil Judge (Senior Division) Mandi in Execution Petition No. 223 of 2013 titled Om Parkash vs. Rikhikesh.

2. Brief facts of the case as pleaded are that Om Parkash filed execution petition under Order 21 Rule 32 CPC against revisionist pleaded therein that counter claim No. 43 of 2008 filed in Civil Suit No. 53 of 2003 was decreed by learned trial Court on dated 2.8.2008 and thereafter appeal was filed and learned Additional District Judge FTC Mandi District Mandi affirmed the judgment and decree passed by learned trial Court and dismissed the civil appeal No. 53 of 2008 on dated 21.2.2012 titled Rikhikesh vs. Om Parkash. It is pleaded that Rikhikesh filed a suit for partition and injunction relating to suit land. It is pleaded that suit filed by plaintiff was resisted and contested by defendant by way of filing written statement and by way of filing counter claim. Counter claim was filed for specific performance of contract dated 27.11.1996. It is pleaded that learned trial Court dismissed the civil suit and decreed the counter claim No. 43 of 2008. It is pleaded that Rikhikesh did not comply the judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court and prayer for execution of judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court sought by way of filing execution petition. It is proved on record that thereafter Rikhikesh filed objections under Section 47 of CPC in execution petition pleaded therein that execution petition is not maintainable and is not executable. It is pleaded that relinquish deed could only be executed by relative as per instructions of the Government and further pleaded that Om Parkash and Rikhikesh are not relatives but are only co-sharers and hence decree passed by learned trial Court could not be executed. It is pleaded that judgment and decree could not be executed by way of appointing the Reader. Prayer for acceptance of objection petition sought before Executing Court.

3. Per contra reply filed to the objections petition on behalf of Om Parkash pleaded therein that execution petition is maintainable and decree passed by learned trial Court is executable. It is pleaded that instructions issued by the Government could not override statute. It is pleaded that deficient court fee already stood deposited. It is pleaded that decree could be executed by way of appointing Reader of Court to execute the decree and prayer for dismissal of objections petition sought in execution petition.

4. Thereafter learned trial Court on dated 15.1.2015 dismissed the objections filed by objector under Section 47 of CPC and appointed the Reader of Court to execute the decree passed by learned trial Court. Feeling aggrieved against the order passed by learned trial Court dated 15.1.2015 revisionist filed the present revision petition.

5. Court heard learned Advocate appearing on behalf of the revisionist and learned Advocate appearing on behalf of the non-revisionist and also perused the record carefully.

6. Following points arise for determination in this revision petition:-

1. Whether revision petition filed by revisionist under Section 115 of CPC is liable to be accepted as mentioned in memorandum of grounds of revision petition?
2. Final Order.

Findings on Point No.1

7. Submission of learned Advocate appearing on behalf of revisionist that in view of instructions issued by Financial Commissioner Himachal Pradesh to the Registration Officers judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court could not be executed is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that Rikhikesh filed civil suit No. 53 of 2003 titled Rikhikesh vs. Om Parkash for partition and injunction. It is also proved on record that thereafter Om Parkash filed the counter claim No. 43 of 2008 pleaded therein that Rikhikesh had executed an agreement dated 27.11.1996 in favour of Om Parkash. It is proved on record that learned trial Court dismissed the suit filed by Rikhikesh and decreed the counter claim filed by Om Parkash. It is proved on record that thereafter Rikhikesh filed civil appeal No. 53 of 2008 and same was disposed of by learned Additional District Judge Fast Track Court Mandi on dated 21.02.2012 titled Rikhikesh vs. Om Parkash. Learned first Appellate Court framed following points for determination. (1) Whether plaintiff being joint owner and in joint possession of suit land is entitled to the partition of the suit land and to the equitable relief of injunction. (2) Whether there is a lawful agreement dated 27.11.1996 Ext.DA inter se the parties and the plaintiff agreed to relinquish his share in the suit land in favour of the defendant as the defendant has agreed to construct a retaining wall for the protection of the plaintiffs land. (3) Whether impugned judgment and decree dated 2.8.2008 passed by learned trial Court are liable to be set aside. It is proved on record that thereafter learned first Appellate Court decided point No. 1 and 3 against Rikhikesh and decided point No. 2 in favour of Om Parkash. Learned first Appellate Court dismissed the appeal filed by Rikhikesh. It is proved on record that judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court attained the stage of finality. There is no evidence on record in order to prove that judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court were set aside by Hon'ble High Court of H.P. in RSA. Both learned trial Court and learned first Appellate Court have held that lawful agreement dated 27.11.1996 Ext.DA was executed inter se the parties and both Court held that Rikhikesh had agreed to relinquish his share in the suit land in favour of Om Parkash. It is also proved on record that Om Parkash agreed to construct a retaining wall for protection of plaintiff's land. There is recital in order sheet of learned Civil Judge (Senior Division) Mandi dated 25.3.2015 that relinquishment deed already stood executed and learned Advocate appearing on behalf of Om Parkash had given the statement that counter claim decree has been duly satisfied and he intended to withdraw the execution petition as fully satisfied. Statement was given by learned Advocate on dated 25.3.2015 before the Executing Court. It is held that judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court could not be nullified by way of administrative instructions issued by Under Secretary (Revenue) Government of H.P. It is held that judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court could be set aside only by Hon'ble High Court of H.P. in RSA or by Hon'ble Supreme Court of India in SLP. There is no evidence on record in order to prove that judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court were set aside by Hon'ble High Court of H.P. in RSA or were set aside by Hon'ble Supreme Court of India in SLP. In view of above stated facts it is held that there is no illegality and irregularity in the order of learned Executing Court. It is further held that learned Executing Court had

not failed to exercise the jurisdiction so vested in learned Executing Court. It is held that learned Executing Court had not exercised the jurisdiction not vested in learned Executing Court by law. It is further held that learned Executing Court has passed the order in accordance with law. In view of above stated facts, point No. 1 is answered in negative against the revisionist.

Point No.2 (Final Order)

8. In view of my findings on point No.1 revision petition is dismissed. Order of learned Executing Court is affirmed. All pending application(s) if any also disposed of. No order as to costs File of learned Executing Court be sent back along with certified copy of this order forthwith. Civil Revision petition is disposed of.

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

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

Versus

Om Parkash ...Respondent.

Cr. Appeal No.: 253 of 2008
Reserved on: 28.5.2015
Date of Decision : 03.06.2015

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1120 grams of charas- prosecution witnesses deposed in tandem and harmony- sample was taken on 14.5.2006 and was deposited on 19.5.2006- sample of 25 grams was taken at the spot but its weight was found to be 19.3711 grams in the laboratory- held that, variation in the weight of the sample leads to an inference that sample analysed was not connected to the sample taken at the spot. (Para-9 and 10)

For the Appellant: Mr. M.A.Khan, Addl. Advocate General.
For the respondent: Mr. Virender Singh Rathore, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, *Judge*

This appeal is directed against the judgement of acquittal rendered on 15.11.2007 by the learned Special Judge (Court No.II), Kangra at Dharamshala, H.P. in Sessions Case No. 30-D/06 whereby the learned trial Court acquitted the respondent for his having committed offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act.

2. The prosecution story, in brief, is that on 14.5.2006 at about 7.10 p.m. SI Om Parkash, ASI Ranbir Singh HC Madan Mohan and C Anil Kumar were present at Kalapul for arranging a naka under rapat No. 10. At that time, the accused was seen by the police party. On seeing the police party, accused ran back, but was apprehended by the police after a chase. In the presence of two witnesses Om Parkash and Suresh Kumar, the accused has disclosed his name to the police to be Om Prakash. SI Om Parkash then gave his personal search to the accused but nothing incriminating was found on his personal search. On search of accused, Bag Ex. P-3, carried by him was checked and on its checking

a yellow coloured plastic bag Ex. P-4 was found in it, which on checking was found to be containing charas Ex. P-5 in the form of tikkis. After weighing the charas so recovered from the possession of the accused, it was found to be 1120 grams. Two samples of 25 grams each of the contraband were separately taken for the purpose of analysis which were kept inside the matchboxes and thereafter both these match boxes were separately sealed in two cloth parcels with seal D and the remaining bulk of charas had been separately sealed in a cloth parcel with seal D. NCB forms in triplicate Ex. PW-3/B were filled in and sealed with seal impression D. All the documents were signed by the witnesses at the site of the occurrence. Rukka Ex. PW-2/A was prepared at the spot. FIR comprised in Ex. PW-2/B was registered. Site plan comprised in Ex. PW-11/D was also prepared. The accused was arrested under memo Ex. PW-11/F. The case property was produced by SI Om Parkash before ASI Surjit Kumar, who had re-sealed the sample and bulk of charas with his own seal 'A' and had also affixed six seals 'A' on NCB form. Separate seal impression of seal "A" on a piece of cloth was taken which is Ex. PW-3/C and thereafter all the case property after re-sealing had been handed over to MHC of police Station, concerned. Special report comprised in Ex. PW-4/A was prepared by the SHO and was sent to SP Kangra through HC Balbir Chand which was handed over by him to HC Subhash Chand, the then reader of SP, Dharamshala, who entered the same in the register. On 18.5.2006 MHC Anil Kumar, Police Station, Dharamshala had sent the sample of charas, one NCB form, one docket and samples of seal 'A' and 'D' to CTL Kandaghat through HHC Bir Singh, who had deposited the same to CTL Kandaghat. Chemical examiner report is comprised in Ex. PW-11/J and receipt of all the items aforesaid is comprised in Ex. PW-5/A.

3. After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court. The trial Court charged the accused for his having committed offence punishable under Section 20 of the NDPS Act to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 11 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C. the accused was given an opportunity to adduce evidence in defence and he chose not to adduce any evidence in defence.

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

6. The State of H.P. is aggrieved by the judgement of acquittal, recorded by the learned trial Court. Shri M.A.Khan, Additional Advocate General, has concertedly and vigorously contended that the findings of acquittal, recorded by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of conviction and concomitantly an appropriate sentence be imposed upon the accused/respondent.

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

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

9. Even though, the prosecution witnesses have deposed in tandem and in harmony in proof of each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, hence portraying proof of unbroken and un-severed links, in the entire chain of the circumstances, therefore, it is argued that when the prosecution case stands established, it would be legally unwise for this Court to acquit the accused. Besides, it is canvassed that when the testimonies of the official witnesses unravel the fact of theirs being bereft of any inter-se or intra-se contradictions, hence, consequently they too enjoy credibility.

10. The genesis of the prosecution version has been proved by the depositions of the official witnesses. The depositions of the official witnesses, in concerting to prove the prosecution case, are undiscardable in the event of theirs depositions not suffering from the taint of inter-se or intra-se contradictions. However, in the event of blatant or open discrepancies occurring in the depositions of the prosecution witnesses an apt conclusion would be drawable by this Court that their testimonies are imbued with the vice of incredibility. The upsurging of preponderant, blatant and stark discrepancies are embedded in the depositions of PW-7, PW-10 and PW-11 wherein they have disclosed the fact of sample of charas weighing 25 grams each having been on 14.5.2006 separately sealed in separate match boxes at the site of occurrence, in sequel to the recovery of contraband from the conscious and exclusive possession of the accused. The sample had come to be deposited on 14.5.2006 in the police Malkhana and an apposite entry qua deposit thereof was recorded in the Malkhana register. PW-2, who had recorded the entry in the Malkhana register qua deposit of the case property has also deposed that he had on 18.5.2006 sent the parcels for examination to the chemical examiner, Kandaghat, alongwith sample of seal and NCB forms through constable Bir Singh. The certificate appended to the report of the chemical examiner comprised in Ext.PW-11/J bespeaks the fact that the sample had been deposited on 19.5.2006 by the official concerned and on weighment it was found to be 19.3711 grams. The communication in the certificate appended to the report of the Chemical Examiner qua the variant weight of the sample as received by him, for analysis in the laboratory concerned viz.a.viz the weight which it bore at the time of its having been separated from the bulk as allegedly recovered from the conscious and exclusive possession of the accused at the site of occurrence, gives latitude or fillips a deduction that the sample on which opinion was returned by the Chemical Examiner in Ext.PW-11/J, is neither relatable nor connectable to the case property, as allegedly recovered from the conscious and exclusive possession of the accused, at the site of occurrence.

11. Furthermore, the oral testimonies of PW-2 and PW-11 underscore the fact that case property had been resealed by ASI Surjeet Kumar and on its resealing it had come to be deposited by him in the Malkahana. Besides, both communicate in their respective testimonies that ASI Surjeet Kumar had deposited the case property alongwith NCB forms and sample of seals, in the Malkhana concerned. However, the revelation in Ext.PW-2/E, the abstract of Malkhana Register, belies the oral testimonies of PW 2 and 11, qua the fact of ASI Surjeet Kumar after his having resealed the case property, his having deposited the same alongwith NCB forms and the sample of seals in the Malkhana concerned inasmuch, as, the factum of deposit of case property in the Malkhana concerned has been depicted therein to be at the instance of both Om Prakash and Surjeet Kumar. Ext.PW-2/E hence, undermining the oral testimonies of PW-2 and PW-11 qua the fact as deposed by them, sequels the concomitant inference that the case property had, besides passing through the hands of ASI Surjeet Kumar had also passed through the hands of S.I. Om Prakash, who may have with an oblique motive even after its initial resealing by ASI Surjeet Kumar undone the initial resealing and resealed it. Moreover, with documentary evidence

comprised in Ext.PW-2/E communicating the fact of NCB forms having been not deposited with the MHC, constrains an inference that the case property as transmitted through an official witness for its examination in the laboratory concerned was transmitted without it being accompanied by the NCB forms for facilitating the chemical analyst to collate the seal impression depicted in the NCB forms to be borne as such on the parcel sent for examination with the seal impressions borne on the parcel. In absence of transmission of NCB forms alongwith the official who carried the sample parcel for examination to the laboratory concerned, obviously precluded and deterred the chemical analyst to collate the seal impressions embossed on the NCB forms with the seal impression carried or borne on the sample parcel, for facilitating an inference that the opinion rendered on the sample parcel sent for analysis to the chemical examiner was qua the property recovered at the site of occurrence from the alleged conscious and exclusive possession of the accused. A further sequel thereof is that the opinion rendered on the sample hence cannot be construed to be relatable or connectable to the case property. The aforesaid pervasive infirmities and discrepancies pervading the prosecution case acquire enormity, with an obvious sequel of the prosecution case hence suffering from the vice of incredibility or prevarication.

12. Fortificatory accentuation to the aforesaid inference is lent by the factum of a conscious and deliberate omission on the part of the Investigating Officer to associate independent witness in the proceedings relating to search, seizure and recovery of contraband, even when there is portrayal in Ext.PW-2/C, of the police, having prior information qua consumption of contraband by tourists at Bhagsunag hence affording ample, abundant and sufficient time and opportunity to the Investigating Officer to solicit the participation of independent witnesses in the proceedings relating to search, seizure and recovery of contraband. Even when besides as deposed by PW-5, 7, 10 and 11 there being a thick habitation in the close vicinity of the site of occurrence hence, as such, despite availability of independent witnesses in close proximity to the site of occurrence , the non-solicitation of their participation by the Investigating Officer in the apposite proceedings, appears to have been goaded by a palpable and oblique motive on his part to smother the truth qua the genesis of the prosecution case or to falsely implicate the accused.

13. In view of above discussion, the learned trial Court is to be concluded to have appreciated the evidence in a mature and balanced manner and its findings, hence, do not necessitate interference. The appeal is dismissed being devoid of any merit and the findings rendered by the learned trial Court are affirmed and maintained. Records be sent back.

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

CWP No. 9521 of 2014 alongwith CWP No. 9539 of 2014 and CWP No. 9922 of 2014.
Date of Decision: 3.6.2015

CWP No. 9521 of 2014.

Miss Tanuja Bhatia …. Petitioner.
Vs.
H.P.University and others …. Respondents.

CWP No. 9539 of 2014.

Miss Chanchal Upreti …. Petitioner.
Vs.
H.P.University and others …. Respondents.

CWP No. 9922 of 2014.

Miss Anika Kumari …. Petitioner.

Vs.

H.P.University and others …. Respondents.

Constitution of India, 1950- Article 226- Petitioners are pursuing their studies in the St. Bedes College, Shimla- petitioners had obtained 8 marks whereas they were required to obtain 10 marks for obtaining admission in higher classes- a representation was made which was allowed by respondent No. 3 and the internal marks were changed- respondent No. 1 did not accept the recommendation of respondent No. 3- it was contended that there is a specific bar regarding the revision of internal assessment- held, that there is no provision in the statute for the revision/review of internal assessment- therefore, respondent No. 1 had rightly refused to accede to the request of respondent No. 3- petition dismissed.

For the petitioner(s): Ms. Archana Dutt, Advocate.

For the respondents: Mr. Jiya Lal Bhardwaj, Advocate for University in all the petitions.

Mr. K.D.Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate for respondent No.3 in all the petitions.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)*:*

Since all the writ petitions emanate out of a common impugned order comprised in Annexure P-4, hence, they are liable to be disposed of by a common order.

All petitioners are pursuing their studies in the St.Bedes College, Shimla. They are prosecuting studies in BBA final semester. The teachers supervising the studies of the petitioners carried out their internal assessment. In the initial internal assessment carried out by the supervising teachers qua the progress in studies of the petitioners, the petitioners obtained eight marks whereas they were enjoined to obtain a minimum 10 marks so as to render them qualified for obtaining admission to the higher class. The supervising teachers of the petitioners in the respondent No.3 college having not awarded them the minimum marks to render them qualified or eligible to obtain admission in the higher class, constrained the petitioners to move the respondent No.3 for enhancing the marks previously meted to them qua their internal assessment carried out by the teachers supervising the studies of the petitioners in the semester concerned. The motion or appeal made by the petitioners to the authority concerned for the purpose aforesaid aroused approbation of the authority concerned sequelling preparation of Annexure R-3/1. The respondent No.3 on revising the internal assessment of the petitioners forwarded a communication comprised in Annexure R-3/1 to respondent No.1 for permission being accorded to beget change in the internal assessment of the petitioners in consonance with the manifestation in annexure R-3/1. However, the respondent No.1 responded by relying upon Annexure P-5/A expressing therein its inability to accede to the request of respondent No.3 comprised in Annexure R-3/1. The constraint, which was projected by respondent No.1 to not accept the request of the respondent No.3 comprised in Annexure R-3/1, led the petitioners to institute CWP No. 5853, 5865, 5868 of 2014. This Court while disposing of the above said writ petitions rendered a direction to respondent No.1 to decide the representations made by the petitioners herein to them for not accepting the request made to it by respondent No.3 comprised in Annexure R-3/1. The reasons which beset the respondent No.1 to reject the

representations of the petitioners preferred before it by the petitioners, is entrenched in the fact of the revision of their internal assessment being impermissible. The learned counsel for the petitioners has impeached the decision arrived at by respondent No.1 on the representations made by the petitioners on the short score of the relevant provisions/rules of the University, which have been elucidated in paragraph 3 of the reply of respondent No.1 and which stands extracted hereinafter:-

> "The evaluation of BBA students shall consist of external as well as internal evaluation. The external evaluation will be from 75 marks and internal evaluation shall be from 25 marks. Internal evaluation shall be based on class test, assessment, class participation and attendance of the student. It is recommended that the system of internal assessment can be introduced for the batch of BBA to be admitted in 1996. The candidate has to pass in both internal assessment as well as the written examinations."

omitting to divulge a specific bar against the revision of internal assessment, as such, the decision of respondent No.1 constituted in Annexure A-2 is contended to be untenable. However, the said argument has no sinew or force in the face of an obvious lack of or omission of an explicit enunciation in the hereinabove extracted relevant provisions of the University statute qua bestowment of an inherent vested right in the petitioners to seek review/revision of internal assessment as previously carried out by respondent No.3. Even the submission of the learned counsel that with their being a reticence in the hereinabove extracted university ordinance qua availability of right of revision of internal assessment as initially carried out by respondent No.3, as such, an implied right is vested in the petitioners to seek revision of their internal assessment as previously carried out, is rudderless and without force, in the face of a right in the petitioners to seek reassessment or revision of internal assessment as previously carried out being necessarily enjoined to be expressly or explicitly enunciated in the relevant statute for hence its being invokable at the instance of the petitioners. However, lack of an explicit vestment, in the relevant provisions of the apt statute, of an inherent right in the petitioners to claim review or revision of internal assessment, as previously carried out, pronounces upon the fact that such a right was not thought fit nor contemplated to be vested in the petitioners. As such, the statute being silent qua availability of such a right to the petitioners obviously communicates the fact that no such right as claimed by the petitioners was intended to be foisted upon the petitioners. As a corollary, for reiteration, reticence in the rule qua the existence or availability of a right as claimed by the petitioners cannot facilitate the contention as addressed by the learned counsel for the petitioners nor can tantamount to availability of an implied right in the petitioners to claim revision or review of internal assessment. Moreover, given the fact that the right to obtain revaluation of marks secured by a candidate in examinations finds explicit expression in the apt provisions of the relevant statute, concomitantly then review or revision of internal assessment too ought, to have found explicit expression in the apt statute. Lack of explicit expression in the relevant rules/statute of a right of revision/ reassessment of internal assessment being available to the petitioners only garners an apt inference that no right of revision of marks previously accorded to a candidate in internal assessment was permissible. Consequently, the decision arrived at by the respondent No.1 in Annexure P-4 is vindicable. Besides the decision of respondent No.1 in refusing to accede to the request of respondent No.3 in its communication comprised in Annexure R-3/1, is, tenable Accordingly, all the petitions are dismissed. However, it is open to respondent No.3 to give internal assessment to the petitioners subsequent to their hitherto assessment carried out by the teachers supervising the studies of the petitioners and thereafter their result may be declared by respondent No.1. No costs.

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

Tilak Raj son of Sh. Amar Nath ....Revisionist

Versus

Gram Panchayat Barsar ....Non-Revisionist

Civil Revision No. 24 of 2014
Order Reserved on 21st May 2015
Date of Order 3rd June, 2015

Code of Civil Procedure, 1908- Section 80 (2)- Plaintiff filed an application to institute the suit against Gram Panchayat without serving a notice- it was recorded in the resolution that plaintiff was creating obstruction on the public road- Naib Tehsildar (Settlement) mentioned that road was in existence since long time- Gram Panchayat had spent Rs. 7,15,000/- upon the road- Panchayat was repairing the road for the benefit of public - no urgent and immediate relief was required by the plaintiff, therefore, application was rightly dismissed. (Para-6 and 7)

For the Revisionist: Mr. B.S. Chauhan, Advocate
For the Non-Revisionist: Mr. Sunny Dhatwalia, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present revision is filed against the order dated 21.2.2014 passed by learned Civil Judge (Junior Division) Barsar in CMA No. 58 of 2014 titled Tilak Raj vs. Gram Panchayat Barsar filed under Section 80(2) of Code of Civil Procedure for permission to institute the suit without issuance of notice under Section 80 CPC to Gram Panchayat Barsar.

2. Brief facts of the case as pleaded are that revisionist Tilak Raj filed application under Section 80(2) CPC pleaded therein that revisionist is co-owner in possession of Abadi deh land along with other co-sharers and is owner in possession along with his brother over a portion of land mentioned as ABCD in Annexure 'A' situated in immovable land comprised in Khata No. 981 min, Khatauni No. 1033 min, Khasra No. 1798 land measuring 0-17-06 hectares as per copy of Nakal Khatauni Bandobast Jadid Sani for the year 2009-10 situated in Tikka Barsar Tappa Panjgran Tehsil Barsar District Hamirpur H.P. It is pleaded that Gram Panchayat Barsar Tappa Panjgran Tehsil Barsar District Hamirpur H.P. is stranger to the suit land and Gram Panchayat Barsar started construction of road for vehicles with cement and concrete over the point ABCD as shown in Annexure A which is courtyard of the revisionist and his brother Baghirath. It is pleaded that Gram Panchayat Barsar has accumulated the construction material nearby the suit land and Gram Panchayat is adamant to construct the short road through the suit land which is in possession of revisionist. It is pleaded that if permission is not granted under Section 80(2) CPC to institute the suit then non-revisionist would carve out the road over suit land and in that eventuality revisionist would suffer irreparable loss and injury and same would amount to denial of justice. It is pleaded that matter is urgent in nature and prayer for acceptance of application filed under Section 80(2) CPC sought.

3. Per contra reply filed on behalf of Gram Panchayat Barsar through its Pardhan pleaded therein that application under Section 80(2) CPC is not maintainable and further pleaded that revisionist is estopped from filing application under Section 80(2) CPC

by his own act and conduct. It is pleaded that matter is subjudice before Deputy Commissioner Hamirpur District Hamirpur H.P. It is pleaded that revisionist is not owner nor in possession over the suit land mentioned in site plan ABCD. It is further pleaded that in fact over the land mentioned in site plan as ABCD there exists a road which leads to Jaure Amb from point 'A' and Rajput Basti from point 'B'. It is pleaded that revisionist intentionally and willfully trying to block the public road. It is pleaded that non-revisionist i.e. G.P. Barsar is maintaining the said road since the time immemorial and had invested an amount to the tune of Rs.7,50,000/- (Rupees seven lacs fifty thousand only) since 2009-2010 till up to date. It is pleaded that revisionist intentionally and willfully trying to block the passage in front of his room and non-revisionist i.e local Gram Panchayat had also passed the resolution on dated 11.12.2012 and sent the same to Naib Tehsildar (Settlement) and as per report of Naib Tehisildar (Settlement) revisionist in connivance with his wife Sushma is trying to encroach upon the road. It is pleaded that on dated 16.5.2013 the complaint was sent to Sub Divisional Magistrate Barsar and another complaint was also filed by general public against the revisionist to Deputy Commissioner Hamirpur and inquiry was conducted by Inquiry Officer and as per inquiry report submitted by Inquiry Officer revisionist had blocked the passage in front of his room. It is pleaded that revisionist is causing great inconvenience to the Panchayat as well as to the general public at large. It is pleaded that in fact the Gram Panchayat is repairing the road for the benefit of general public at large. It is pleaded that revisionist intends to create inconvenience to the general public and further pleaded that there exists three metre wide road in front of the room of revisionist. It is pleaded that revisionist has filed the application with malafide intention just to harass the Gram Panchayat and general public at large. Prayer for dismissal of application filed under Section 80(2) CPC sought.

4. Court heard learned Advocate appearing on behalf of the revisionist and learned Advocate appearing on behalf of the non-revisionist and also perused the record carefully.

5. Following points arise for determination in this revision petition:-

1. Whether revision petition filed by revisionist under Section 115 of CPC is liable to be accepted as mentioned in memorandum of grounds of revision petition?
2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of revisionist that portion ABCD is used by revisionist as his courtyard and same is in exclusive possession of revisionist and revisionist has no other courtyard except the present courtyard situated in Abadi Deh land and on this ground revision petition filed by revisionist be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused site plan ABCD placed on record. In site plan road has already been shown in existence in portion ABCD. Even there is prima facie evidence on record that resolution was passed by Gram Panchayat Barsar on dated 15.8.2013 and there is recital in resolution that revisionist is creating obstruction upon the public road. Even in report of Naib Tehsildar (Settlement) placed on record it is specifically mentioned that road is in existence in suit land and there is also recital in report of Naib Tehsildar (Settlement) placed on record that road is in existence since long time. There is also prima facie evidence on record that Panchayat had already spent an amount of Rs. 7,50,000/- (Rupees seven lacs fifty thousand only) upon the road since 2009 till date. It is prima facie evidence on record that suit land is situated in Abadi Deh. It is also proved on record that no partition of Abadi Deh land took place till date. It is well settled law that Abadi Deh land is in ownership of all residents of

village who used to pay the land revenue. It is also proved on record that suit land i.e. Abadi Deh is joint between the owners. It is also well settled law that no co-owner can claim exclusive right in joint property till the joint property is not partitioned in accordance with law. It is proved on record that in Abadi Deh land interest of general public is involved. It is prima facie proved on record that Panchayat is repairing the road for the benefit of general public. It is well settled law that when there is conflict between the interest of individual and interest of general public then interest of general public always prevails. It is well concept of law that *necessitas publica major estquam privata.* (Public interest is greater than private interest.) In present case public exchequer to the tune of Rs.7.50 lacs (Rupees seven lacs fifty thousand only) is involved and suit property is public property, owned by residents of village jointly and welfare of all villagers is also material in present case. Even as per Section 193 of Himachal Pradesh Panchayati Raj Act 1994 no suit against any Panchayat would lie unless a notice under Section 80 of Code of Civil Procedure 1908 duly served.

7. Court is of the opinion that in present petition interest of general public is involved. Court is of the opinion that at this stage case of urgent and immediate relief is not proved by revisionist. It is held that there is no illegality and irregularity in the order of learned trial Court. It is further held that learned trial Court had not failed to exercise the jurisdiction so vested under law. It is also held that learned trial Court had not exercised the jurisdiction not vested in it by law. It is further held that learned trial Court has passed the order in accordance with law. In view of this, point No. 1 is answered in negative against the revisionist.

Point No.2 (Final Order)

8. In view of my findings on point No.1 revision petition is dismissed. Order of learned trial Court is affirmed. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of revision petition filed under Section 115 of CPC. All pending application(s) if any also disposed of. File of learned trial Court be sent back along with certified copy of this order forthwith. No order as to costs. Civil Revision is 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.

LPA No.68 of 2014 alongwith LPA No.69 of 2014.
Judgment reserved on : 30.05.2015.
Date of decision: June 04, 2015.

1. LPA No.68 of 2014.

Ashok Singh and others .....Appellants.
Versus
Ved Parkash and others .....Respondents.

2. LPA No.69 of 2014.

Ashok Singh and others .....Appellants.
Versus
Sushil Kumar and others .....Respondents.

Constitution of India, 1950- Article 226- Appellants were appointed as Panchayat Sahayaks- their appointments were quashed and set aside- an advertisement was issued for filling up 9 posts of Panchayat Sahayaks- a communication was sent to Sub Regional Employment Officer, Ex-servicemen Cell, Hamirpur – respondent appeared for interview- a communication was sent by respondent No. 4 to respondent No. 3 requesting him to issue

appointment letter- appointments were not given by respondent No. 3- private respondent approached the High Court pleading that suitability of the ex-serviceman was to be adjudged only by Ex-servicemen Cell and thereafter department is to offer appointment letters to the candidates- as per letter dated 17.8.1987 ex-servicemen once interviewed by State Level Selection Committee are not required to be subjected to any future interview for which they have been nominated - once the private respondents are found eligible, they could not have been subjected to further test- they were rightly held entitled for the appointment by the Writ Court. (Para-10 to 21)

For the Appellants	:	Ms.Ranjana Parmar and Mr.Naresh Kaul, Advocates, in both the appeals.
For the Respondents	:	Mr.Ramakant Sharma, Advocate, for respondent No.1, in both the appeals. Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr.Kush Sharma, Deputy Advocate General, for respondents No.2, 4 and 5 in both the appeals. Nemo for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Since common question of law and facts arises for determination, therefore, both the appeals are taken up together for disposal.

2. All the private parties are Ex-servicemen. The appellants are those Ex-servicemen, who were appointed as Panchayat Sahayaks and their appointments have been quashed and set aside by the learned writ Court and respondent No.2 has been directed to issue appointment letters to the private respondents in place of these appellants.

3. Facts of the case are that respondent No.2 issued an advertisement for filling up of nine posts of Panchayat Sahayaks out of which three posts were reserved for Ex-servicemen category for Nurpur Panchayat Samiti. Communication in this regard dated 10.08.2011 was also sent to respondent No.3 i.e. Sub Regional Employment Officer, Ex-servicemen Cell, Hamirpur.

4. In response to this communication, the private respondents appeared for the interview on 30.08.2012 along with requisite documents before the State Level Selection Committee. The respondent No.4 sent a communication to respondent No.3 on 07.09.2012 requesting him to issue appointment letters to the private respondents for the post of Panchayat Sahayak to be appointed on contract basis. The private respondents submitted their joining on 17.09.2012, however, they were not given appointment by respondent No.3.

5. This resulted in private respondents approaching this Court with a grievance that as per the letters dated 06.11.1985, 17.08.1987 and 31.03.1990 issued by the State of Himachal Pradesh, the suitability of Ex-servicemen is to be adjudged only by the Ex-servicemen Cell and thereafter it is incumbent upon the department to offer appointment letters to the candidates.

6. Respondents No.2 and 4 filed their joint reply wherein they supported the claim of the private respondents by stating that in terms of the letter dated 17 August, 1987, the private respondents were required to be accepted by the employer for appointment of the said post.

7. Respondent No.3 filed a separate reply wherein it was stated that the selection to the post of Panchayat Sahayak was to be regulated by the Himachal Pradesh Panchayati Raj (Appointment and Condition of Service of Panchayat Sahayaks) Rules, 2008 and not by the Ex-servicemen Cell. It was also stated that respondent No.4 was never informed about the three posts to be filled up from the category of Ex-servicemen.

8. Appellants herein also filed a detailed reply wherein it was averred that the posts in question were to be filled up as per the statutory rules as amended from time to time and since they were duly qualified and had submitted their applications strictly as per the notification dated 10.08.2011 before the cut-off date and they were duly interviewed on 25.04.2012. Having qualified they were given appointment letters pursuant to which they have joined their duties on 26.09.2012, 20.09.2012 and 25.09.2012 respectively.

9. The learned writ Court allowed the writ petitions by holding that the appointments of the appellants were not in accordance with the rules readwith notifications (ibid) and, therefore, quashed their appointments. Aggrieved by the decision, the appellants have approached this Court by filing the present appeals.

10. The moot question required to be determined in these appeals is whether there is any conflict between the statutory rules and the instructions issued vide letters dated 06.11.1985, 17.08.1987 and 31.03.1990.

11. The State Government has laid down the procedure for notification of vacancies reserved for Ex-servicemen or a dependent or physically handicapped as per letter dated 08.03.1973 contained in Handbook on Personnel Matters, Vol.-1 (Second Edition) para 7.13, which reads as under:-

> *"7.13.1 Ex-servicemen and dependents: The ex-servicemen (and eligible dependents) should get their names registered at the nearest Employment exchange. The Employment Exchange will dispatch duplicate registration cards to the Ex-servicemen cell established in the Directorate of Employment and Training, Himachal Pradesh, Shimla (now Directorate of Sainik Welfare, Hamirpur). There is a State Selection Committee which interviews the Ex-servicemen (including eligible dependents of Ex-servicemen killed or disabled for civil service in action) for various post and prepares a panel of eligible candidates. The Departments should send requisition in respect of reserved vacancies for Ex-servicemen to the Cell which will sponsor the names of Ex-servicemen for the reserved post. The names sponsored by the Cell are considered to have been selected for the reserved posts. The Departments have to issue appointment letters to the Ex-servicemen candidates sponsored by the Cell without any interview/ test."*

12. Similarly, para 18.4.1 contained in Handbook on Personnel Matters, Vol.-1 (Second Edition) lays down the procedure to be followed by ex-servicemen or their dependents for applying against reserved posts, which reads as under:-

> *"(a) Ex-servicemen and their dependents should get their names registered at the nearest Employment Exchange. The exchange has to make an entry in the index card regarding the fact that the applicant is an Ex-serviceman or dependent of an Ex-serviceman as the case may be. The exchange will send duplicate registration card to the Ex-servicemen's Cell in the Directorate of Employment, Govt. of H.P. After an interview by a State Selection Committee, panels of eligible candidates for different categories of posts/services are prepared. Govt. Departments/ Corporations etc. who have to fill a reserved vacancy send a requisition to the Ex-servicemen's Cell simultaneously while sending requisitions to the Employment Exchanges, Public Service Commission*

in respect of vacancies not reserved for Ex-servicemen. The Ex-servicemen Cell sponsors names from the panel maintained by it in accordance with the requisition. The candidate so sponsored is to be appointed by the Department/ Corporation without any further interview/ test and such appointment is to be made within 15 days of the date of sponsorship by the Ex-servicemen's Cell. (b) Vacancies filled through State Public Service Commission on All India basis are advertised through the Press too and the eligible Ex-servicemen or their dependents, as the case may be, should obtain prescribed application forms from the Public Service Commission and then submit the form duly completed to the Commission."

13. It would be pertinent to take note of letter dated 17.08.1987 (Annexure R-1) governing the recruitment of Ex-servicemen by the Employers against Class-III and IV vacancies. Text of letter dated 17.8.1987 reads as under:-

"I am directed to refer to Labour Commissioner-cum-Director of Employment, H.P. letter No. DET, EMP (XS-CELL) 881/61-IV, dated the 14th July, 1987, addressed to you and copy among others endorsed to this department on the above cited subject and to state that the existing procedure as laid down by the Government for the selection of Ex-servicemen for employment in civil services/posts under the State Government is in order and there is no ambiguity in it. All Class-III posts/services where the recruitment is to be made against reserved vacancies for Ex-servicemen are exempted from the purview of the Commission. Accordingly the ex-servicemen once interviewed by the State Level Selection Committee constituted by the Government for the purpose in the Labour and Employment Department are not required to be subjected to future interview/test by the Department to which they are nominated by the Special Ex-servicemen Cell functioning in the aforesaid department. The State Level Selection Committee after examining/ensuring the suitability of the Ex-servicemen for appointment to Class-III and IV posts on the basis of their record of Military service drawn up a panel of those suitable candidates. The panel so drawn is maintained by the special Ex-servicemen Cell which nominate one candidate for one reserved post from this panel to the departments as per their requisition and the department concerned has to accept the candidate for appointment and issue appointment letter to the candidate accordingly. This procedure is also covered under the provisions of Rule 4 (1) of the Demobilized Armed Forces Personnel (Reservation of Vacancies in Himachal Non-Technical and Technical Services) Rules, 1972 and 1985. Accordingly there is no scope for any ambiguity or doubt about the implementation of Government instructions."

14. It is more than clear from the text of the letter dated 17.08.1987 that Ex-servicemen once interviewed by the State Level Selection Committee constituted by the Government for the purpose in the Labour and Employment Department are not required to be subjected to any future interview/test by the department to which they are nominated by the Special Ex-servicemen Cell functioning in the department.

15. As per the notification dated 31.03.1990 appointment letters are to be issued within 15 days to the persons selected by the Ex-servicemen Cell for the posts reserved for Ex-servicemen. A categorical reference to earlier letter dated 06.11.1985 also finds mention in this letter and the relevant text reads as follows:-

"I have been directed to say on the aforesaid subject that in accordance with the clearly given in letter No.GAD-E (C) 17-1/84 dated 6.11.1985, of the General Administration Department of the Government, the appointment letters

be issued within 15 days to the persons selected by the Ex-servicemen Cell for the posts reserved for the ex-servicemen. It has been brought to the notice of the Government that these orders are not being followed in some departments. Some Departments do not issue the appointment letters to the ex-servicemen till the time selection is made for the unreserved and other categories. This is totally wrong. All departments are requested to strictly follow the above orders. It is pertinent to clarify here that in the case of posts to be filled by direct recruitment, according to the orders of the Government, if necessary, after the approval of the Finance Department, as soon as the notification is sent to Public Service Commission or Employment Exchanges at that time itself, Ex-servicemen Cell, Hamirpur may be requested to sent the names of the selected candidates for the posts reserved for ex-servicemen. And as soon as the names are sent by the ex-servicemen, the selected candidates be issued appointment letter within 15 days.

All offices be made aware of the aforesaid orders and they be strictly followed."

16. This Court on 29.10.2014 passed the following orders:-

"Keeping in view the dispute involved in these appeals, we deem it proper to array The Secretary Panchayati Raj and Rural Development, H.P. as party respondent in the writ petitions as well as in the present LPAs. Ordered accordingly. The said respondent shall figure as respondent No. 7 in the writ petitions and respondent No. 5 in the LPAs. The Registry to carry out necessary corrections in the cause title.

Issue notice to the newly arrayed respondent. Mr. Romesh Verma, learned Additional Advocate General waives notice on behalf of the said respondent. Short reply be filed within four weeks. List on ***16th December, 2014.****"*

17. In compliance to the aforesaid order, the Secretary (Panchayati Raj) has filed affidavit, relevant portion whereof reads thus:-

"2. In this regard it is submitted that the procedure laid down by the State Government for notification of vacancies reserved for Ex-Servicemen as per letter dated 08.03.1973 contained in Hand Book on Personal Matters and letter dated 17.08.1987 governing the Recruitment of Ex-Servicemen by the employers against Class-III and IV vacancies, shall be applicable.

3. That in the present case recruitment/selection/ appointment to the post of Panchayat Sahayak was done under the provisions of H.P. Panchayati Raj (Appointment & Condition of Service of Panchayat Sahayak) Rules, 2008. But, the selection to the post reserved for Ex-Servicemen was to be done in accordance with procedure laid down by the State Government for notification of vacancies and governing the recruitment of Ex-Servicemen by employers against Class-III and IV vacancies reserved for them."

18. Now, in case we revert back to the rules, it would be seen that Rule-15 lays down the procedure for removing difficulties and reads thus:-

"If any difficulty arises in the interpretation of implementation of any of the provision of these rules, the matter may be referred to the State Government for clarification and guidance, who will be competent, to do anything to remove such difficulty by issuing an order not inconsistent with provisions of the Act."

19. Indisputably, under para 15 of the rules ibid it is the State Government which has the final say in matters relating to the interpretation of the rule.

20. Now, the State Government has clarified the position with respect to the rules and it has been specifically stated on affidavit that the recruitment/selection/appointment would be done under the provisions of the Act and Rules. But, the selection insofar as the posts reserved for Ex-servicemen is concerned, the same shall be done in accordance with the procedure laid down by the State Government in the notifications issued from time to time as has already been referred to hereinabove.

21. In this view of the matter, we have no difficulty in concluding that it was the private respondents, who had been appointed as per the procedure being followed by the State Government. The instructions issued vide notifications referred hereinabove would show that the same do not in any manner supplant the statutory rules and only supplements the same which is legally permissible.

22. Consequently, no fault can be found in the judgment rendered by the learned writ Court. Accordingly, the appeals are without merit and, therefore dismissed, leaving the parties to bear their own costs. The Registry is directed to place a copy of this judgment on the file of connected matter.

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

Court on its own motion ……Petitioner.
Vs.
State of Himachal Pradesh and others …..Respondents.

CW PIL No. 02 of 2015
Reserved on : 11.05.2015
Date of decision: 4.6.2015

Constitution of India, 1950- Article 226- A letter was written to the High Court stating that there are 30 adult inmates housed in the State Home for Destitute Women at Mashobra- there is no Sweeper available between 5 p.m. to 10 a.m- there is no nurse to look after the mentally sick persons- there is no boundary wall around the Home- old age pension is not being provided to the inmates and their relatives had not been contacted- held, that it is responsibility of the State to provide necessary succor to the inmates- basic rights of the inmates are required to be protected by the State- inmates cannot be segregated on the basis of their domicile or citizenship- direction issued to provide fencing around the building, to pay disabled/old age pension, to appoint Sweeper, nurse and washerman - efforts be made to contact their nearest relatives. (Para-3 and 4)

For the petitioner: None.
For the respondents: Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

The Court has taken cognizance of the letter, dated 22nd December, 2014, whereby the plight of inmates of State Home for Destitute Women at Mashobra, Distt.

Shimla, has been highlighted. There are about 30 adult inmates housed in the State Home for Destitute Women at Mashobra, Distt. Shimla. There is 6 years old boy also. The inmates are not provided with Sanitary Napkins. There is no Sweeper available between 5 p.m. to 10 p.m. There is no nurse to look after the mentally sick persons. There is no female nurse appointed at the State Home. There is no provision for psychological counseling. There is no boundary wall around the Home. They are neither provided newspapers nor magazines. Two minor girls aged 14 to 17 are also housed there. The inmates are not provided any disability pension. The inmates are not provided with old age pension, though they are 60 years old. The close relations of the inmates have not been contacted till date.

2. In the reply filed, it is admitted that on 31.01.2015, 34 inmates were enrolled in the State Home, which comprises of 32 adults, 1 minor girl, named Asha. Daughter of one of the inmate, namely, Smt. Sunita has now been shifted to Balika Ashram, Durgapur on 17.01.2015. Smt. Leela, Aya has been transferred from Children Home, Tutikandi to Nari Sewa Sadan, Mashobra. According to the averments contained in the reply, the inmates being mentally retarded are not able to handle and use the Sanitary Napkins. One daily waged Sweeper is working from 10:00 a.m. to 5:00 p.m. and the need for extra Sweeper shall be considered after assessing the situation. Since the staff sanctioned to this institution is not trained to attend/look after mentally ill women, who have been admitted in the Nari Niketan, the department has taken up the matter with the Health Department to shift the mentally ill inmates of Nari Niketan to Hospital for Mental Health and Rehabilitation, Boileauganj, Shimla. The inmates are got examined at IGMC. The Psychiatrists from IGMC, Shimla are visiting the State Home monthly. The trainer has been provided in the State Home, Mashobra to provide training on Cutting and Tailoring, Embroidery and making of soft toys to the inmates. A sum of Rs.24,56,900/- for providing and fixing of fencing around the building of Nari Sewa Sadan, Mashobra has been procured from the Executive Engineer, HPPWD Division, Theog, Distt. Shimla and the money would be sanctioned soon. Case of Neelam was pending for grant of old age pension. Damitri, being not bonafide Himachali, was not found eligible for old age pension. Case of Kamla for old age pension was being considered. Six inmates were produced before the District Medical Board for assessment of their disability on 27.02.2015 for granting disabled relief allowance after obtaining the disability certificate. Few inmates have been shifted to Old Age Home Basantpur. The efforts were being made to restore their kith and kin on the addresses mentioned by the inmates. Five inmates, namely, Saraswati Pal, Shayama Payari, Deepali, Muskanand Pooja Sahu have been restored to their kith and kin during the years 2012, 2013 and 2014. One inmate, namely, Ms. Bimla Devi was sent for vocational training in Vardhman Mills Baddi.

3. We are of the considered view that the prevailing conditions in the Aashram are not habitable. It is the duty of the State to provide all the basic amenities to the inmates taking into consideration the difficulties faced by them. Few of the inmates are mentally retarded, some are disabled. There is only one Sweeper available between 10:00 a.m. to 5:00 p.m. There is no female nurse appointed at the State Home. There is no provision for psychological counseling. There is no boundary wall around the Home. They are neither provided newspapers nor magazines. Few inmates have not been provided old age pension. Few inmates are denied the old age pension, though they are 60 years old. The close relations of the inmates have not been contacted till date. It is the responsibility of the State to provide necessary succor to the inmates, whether bonafide Himachali or not. It is humane problem and has to be tinkered with sympathy. The basic rights of the inmates are required to be protected by the State being a welfare State. All the inmates of the Ashram belong to one group and they cannot be segregated only on the basis of their domicile or citizenship. They are there due to adverse circumstances beyond their control. The basic needs of *bonafide* and *non-bonafide* Himachalis are the same. The action of the respondents of

denying the old-age pension and disability pension to the *non-bonafide* inmates of the Ashram is unreasonable and arbitrary.

4. Accordingly, we issue the following mandatory directions to the respondents:

1. The respondents are directed to fix the fencing around the building of Nari Sewa Sadan (State Home for Destitute Women at Mashobra, District Shimla, H.P.) within a period of three months from today.

2. Kiran, one of the inmates be paid the disability allowance/pension within a period of three weeks as per the disability certificate. Similarly, Damitri, even if not bonafide Himachali, is entitled to Old Age pension.

3. Kamla, one of the inmates be also paid the Old Age pension as per the affidavit, within a period of three weeks

4. Six inmates as per the reply, who have been produced before the Medical Board on 27.02.2015 be also paid the disability relief allowance/disability pension regularly.

5. A Sweeper be appointed between 5:00 p.m. to 10:00 p.m on regular basis. A Staff Nurse be also appointed to look after the inmates and, if necessary, by way of deputation/secondment basis from any Government run hospital.

6. The respondents are directed to provide Sanitary Napkins to all the inmates and they be also taught the basics how to use and handle the same.

7. The inmates be provided with neat and clean clothes every day and the Washer man be appointed to wash their clothes on day- to-day basis.

8. The Medical Superintendent, IGMC is directed to ensure that the Psychiatrist visits the Ashram fortnightly. The attendant staff be also appointed within a period of eight weeks from today to facilitate the inmates.

9. The efforts be made to find out the next kith and kin of inmates by constituting a committee by the Superintendent of Police, Shimla within a period of two weeks from today.

10. The Principal Secretary (Health), Government of Himachal Pradesh is directed to get the diet chart for the inmates prepared within a period of three weeks from today and all the inmates shall be provided the food as per the chart prepared by the dietitian.

11. The State Government is also directed to provide necessary vocational training to the inmates and also provide them atleast one newspaper in English and one in vernacular and one magazine.

12. The District Welfare Officer, Shimla i.e. respondent No.7 is directed to make surprise visit to State Home for Destitute Women at Mashobra, District Shimla, every month to supervise and ensure that all the basic facilities and amenities are provided to the inmates.

13. The Chief Secretary, Government of Himachal Pradesh shall be personally responsible to implement the directions in letter and spirit.

5. In the light of the aforesaid observations/directions, the petition stands disposed of, so also the pending application(s), if any. The Umang Foundation is awarded costs of Rs. One lakh to be utilized only for the welfare of the inmates of the Ashram.

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

Court on its own motion ……Petitioner.

Vs.

The Principal Secretary (Social Justice & Empowerment) and ors. …..Respondents.

CW PIL No. 18 of 2011
Reserved on : 11.05.2015
Decided on : 04.06.2015

Constitution of India, 1950- Article 226- State had not created any post of psychiatric in district hospital- direction issued to the State to create post of psychiatric in all district hospital- to increase rehabilitation grant, to provide protective electric heaters, neat and clean good quality towels and to provide necessary grant for taking cured to their houses.

(Para-8)

For the petitioner: Ms. Archana Dutt, Advocate as Amicus Curiae.

For the respondents: Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 to 12.
Mr. Hamender Chandel, Advocate, for respondent No. 13.

The following judgment of the Court was delivered:

Rajiv Sharma, J.

According to definition clause 2 (l) of the Mental Health Act, 1987, "mentally ill person" means a person who is in need of treatment by reason of any mental disorder other than mental retardation. Clause 2(q) of the Act provides "psychiatric hospital" or "psychiatric nursing home" means a hospital or a nursing home established or maintained by the Government or any other person for the treatment and care of mentally ill persons and includes a convalescent home established or maintained by the Government or any other person for such mentally ill persons.

2. We have gone through the various affidavits filed in sequel to the directions issued by this Court from time to time.

3. It is stated in the affidavit filed by the Secretary (Health), Government of Himachal Pradesh that no post of Psychiatrist was created in any District Hospital. However, efforts have been made to recruit the Medical Officers having undergone their Post Graduation Degree/Diploma/adequate experience in the field of Psychiatry through Walk-in-interviews. It is also stated that regular meetings of the State Mental Health Authority are held from time to time to discuss various issues relating to the Mental Health Act. It is also stated that the department is already providing short term rehabilitation to those diagnosed

with mental ailment through Himachal Hospital of Mental Health & Rehabilitation, Shimla. The rehabilitation of fully cured patients is out of the purview of the Health Department.

4. Learned Amicus Curiae has highlighted in the written submissions made at page No. 195 of the paper-book that the inmates of Nari Sewa Sadan who are suffering from mental diseases be shifted to H.H. Mental Health and Rehabilitation Centre, Shimla.

5. The Director, Women and Child Development, H.P., Shimla has filed the affidavit, dated 19th December, 2011. According to her, the Social Justice & Empowerment Department is running a Nari Niketan at Mashobra, District Shimla. The State Government has framed the rules for admission of inmates in the State Home (Nari Nekaten). As per rules, only from the following categories women are given admission in the State Home:

1. Unattached women and orphan girls who are in moral danger and in whose favour the Courts have passed orders to lodge them in the State Home.

2. Young widows including deserted wives.

3. Hard cases which are not covered by the above categories but in the opinion of the Director deserve admission.

Following measures have been provided to rehabilitate the women:

1. By providing various types of training in institutions enabling them to earn their livelihood after they are discharged from the home;

2. Rehabilitation grant of Rs.10,000/- per woman;

3. Marriage grant in case of woman desired to get married @ Rs.11001/-.

6. Learned Amicus Curiae has also highlighted in the written submissions made at page 227 of the paper-book that some of the inmates in the mental hospital are improving and their health condition is better now and they can be sent back to their homes. The details of such persons have been given in the written submissions. It has also been highlighted that there is shortage of Class-IV employees in the hospital. There is also dearth of Special Attendants.

7. The Principal Secretary (Health), Government of Himachal Pradesh, Shimla in his affidavit, dated 16th October, 2012 has stated that the department was in the process of creating facilities for rehabilitation of such inmates of the hospital, who have been cured of their mental illness and have no takers/carers by providing space in the lower storey of the building which is lying vacant and is altogether separate from hospital wards. The process for furnishing the space and making arrangement for diet as well as social counseling of the inmates is going on and will be completed shortly. The help of NGOs. was also solicited. The Rogi Kalyan Samiti at Himachal Hospital of Mental Health and Rehabilitation, Shimla has been constituted and registered under the Himachal Pradesh Societies Registration Act, 2006. It is stated that 12 bedded rehabilitation wing has been created in the hospital for housing these inmates who may be cured, but have no place to go. The Rogi Kalyan Samiti is now authorized to look after the patients in the Rehabilitation Wing apart from the regular patients. The Nari Niketan at Mashobra, District Shimla is not a licenced home under the Mental Health Act, 1987.

8. We are satisfied with the action taken by the respondents towards the implementation of the Mental Health Act, 1987 by providing necessary infrastructure.

However, we are of the considered opinion that the following mandatory directions are still required to be issued for further betterment of the persons suffering from mental ailment:

1. The Principal Secretary (Health) to the Government of Himachal Pradesh is directed to sanction, create and fill up the posts of Psychiatrist in all the District Hospitals in the State of Himachal Pradesh within a period of three months from today.

2. The Director, Women and Child Development, Himachal Pradesh is directed to ensure that mentally ill patients are admitted in Mental Health and Rehabilitation Centre, Boileauganj, Shimla. The rehabilitation grant for woman be increased from Rs.10,000/- to Rs.50,000/-, the marriage grant in case of woman desired to get married be increased from Rs.11001/- to Rs.51001/- within three months from today.

3. The Director, Women and Child Development, Himachal Pradesh is directed to ensure that the sufficient protective electric heaters are provided to the inmates in the Ashram during the Winter season alongwith adequate quilts and blankets.

4. The Director, Women and Child Development, Himachal Pradesh is also directed to ensure that the inmates are provided neat and clean good quality towels and bed sheets and pillow covers on day-to-day basis.

5. It is made clear that in future no woman suffering mental ailment would be admitted in Nari Niketan at Mashobra, District Shimla and all out efforts should be made to admit them either in Psychiatric Wards of general Hospitals or in the Mental Health and Rehabilitation Centre, Boileauganj, Shimla.

6. The steps be taken to send the inmates who have been cured to their homes by providing necessary conveyances by giving the grant depending upon the distance from the institution to the destinations.

7. The posts of Class-IV be increased at H.H. Mental Health and Rehabilitation Centre, Shimla to the extent of 30%.

8. Sufficient posts of attendants be sanctioned, created and filled up within a period of three months to assist the inmates at H.H. Mental Health and Rehabilitation Centre, Shimla

9. The Principal Secretary (Health) is directed to provide clothing and footwear to the inmates of Himachal Pradesh Hospital for Mental Health and Rehabilitation four times in a year subject to weather conditions.

10. All the Superintendents of Police in the State of Himachal Pradesh are directed to strictly comply with Section 23 of the Mental Health Act, 1987 and every person who is taken into protection and detained under this Section shall be produced before the nearest Magistrate within a period of 24 hours and thereafter the Magistrate shall pass appropriate orders as per Section 24 of the Mental Health Act, 1987.

9. In the light of the aforesaid observations and directions, the petition stands disposed of, so also the pending application(s), if any.

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

Court on its own motion ……Petitioner.

Vs.

The State of Himachal Pradesh and others …..Respondents.

CW PIL No. 30 of 2011
Reserved on : 11.05.2015
Date of decision: 04.06.2015

Constitution of India, 1950- Article 226- A letter was received by the High court highlighting the difficulties being faced by blind and deaf students- reply filed by the State shows that there are shortcomings in the implementation of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 - University directed to provide necessary amenities- direction also issued to provide basic facilities required for blind and deaf students in the school and to appoint the requisite number of teachers, to enhance their scholarship, to provide them screen readers, screen magnifiers, speech recognition software, Text-to-speech software, optical character recognition software, large monitors, hand held magnifiers and standalone reading machines. (Para-10 to 20)

Case referred:

Government of India through Secretary and another Vs. Ravi Prakash Gupta and another (2010) 7 Supreme Court Cases 626

For the petitioner: Ms. Rita Goswami, Advocate as Amicus Curiae.

For the respondents: Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

According to the report of WHO of 2012, 15 millions visually impaired persons live in India out of 35 millions in the world. It is a staggering figure. Moreover, it is a wake up call for all of us to come together to take steps to recognize their basic human rights to live with dignity. It is their fundamental right and basic human right to be housed, protected and provided with all the basic amenities, i.e., food, clothing, special health care, provision for compulsory and free education and avenues for employment.

2. The Court has taken cognizance of the letter, dated 29.07.2011, whereby the difficulties faced by three blind and deaf students in the educational institutions either run by the State of Himachal Pradesh or by the H.P. Council of Child Welfare, have been highlighted. In the letter, it is also emphasized that the provisions of Persons with Disabilities Act, 1995 are not being followed scrupulously.

3. The respondents-State has filed a detailed reply. According to the averments made in the reply, there are nine institutions for children with special abilities, visually impaired, hearing impaired, orthopedically impaired and mentally retarded children. The stand of the respondents-State in the affidavit, dated 8th September, 2011, was that the Government is providing free education to disabled children having 40% disability or more

from the academic session 2001-02 at all levels of education right from their enrolment in the school till passing out from University, including technical & professional courses in all Government Institutions for persons with disabilities. The Education Department has identified four locations in the State where proper hostel facilities in running condition exists and where the physically challenged children for 10+1 and 10+2 will get education with other students and will also be given specialized education through special educators.

4. The petitioner has filed a detailed rejoinder to the reply filed by the respondent-State. It is specifically mentioned in paragraph No. 4 of the rejoinder that the respondents have failed to fulfill the special requirements of the blind students. The necessary facilities like books in Braille, audio books in digital format (DAISY), special DAISY players for audio books in digital format, Braille papers and special slates for writing in Braille have not been provided. It is also stated that there are 80 deaf and 20 blind girls studying in the school at Sundernagar. There is no subject teacher appointed for blind students. There are only two permanent teachers in the school for blind girls, one is Braille teacher and the other is Craft teacher. These teachers are not eligible to teach any subjects like English, Hindi, Social Studies, Mathematics, Science, Music and Arts etc. It is also stated that only one permanent teacher is appointed for deaf students that is speech impairment teacher. There is one JBT, one TGT and one Special Educator on contract basis for imparting teaching to the deaf students. These teachers teach 80 students from class 1st to 10th standard daily which is not possible. There is no teacher to teach the subject of Science and Art to the deaf students. Apart from this, one Vocational Instructor, one Craft teacher and two speech therapists are also there, who are not eligible to teach main subjects. The Special School at Sundernager lacks basic facilities for blind and deaf students like tables and chairs for them in their rooms to study before and after school time and holidays, a library with children's magazines, news papers, magazines in Braille and magazines in Audio format for blind students. Similarly, in Special School for deaf and blind boys at Dhalli, 87 deaf and 30 blind children students studying from Class 1st to 10th standard. There was no qualified principal in the School. There was no science laboratory for deaf and blind students in the School. There was no science teacher to teach blind and deaf students. There was no Art teacher for deaf students and also no Music teacher for blind students has been appointed. There was no digital library for blind students, no Baraille magazines are subscribed and no newspapers or magazines are made available to deaf students. There was only one TGT, one JBT and one Braille teacher for blind's section. They have to teach all subjects to the students varying from class 1st to 10th standard. There is no modern vocational course in the centre and only out dated courses like candle and chalk making are being run.

5. A counter affidavit was filed by the Chief Secretary. According to the averments made in the counter affidavit, the H.P. Board of School Education has provided helpers to 60 students. The matter with regard to fee waiver was under process by the H.P.U. for carrying out necessary amendments in the ordinances and prospectus. The efforts were being made to provide the requisite facilities before 30th October, 2012, positively. A Special Educator for the benefit of such students in GSSS, Portmore, Shimla was appointed. An estimate was submitted by the HPPWD for a sum of Rs.5,63,69,500/- against which the Government Department has also released an amount of Rs.4,12,48,000/- on 08.04.2011 and 07.04.2012 for construction of hostel at Sundernagar. The details of teachers at Sundernagar have also been given in the affidavit. There is also a reference to the advertisement for filling up the posts. The details of the teachers appointed at Dhalli have been given in paragraph No. 9 of the affidavit.

6. The latest affidavit was also filed by the Deputy Secretary, Social Justice & Empowerment, Government of Himachal Pradesh, whereby it has been specifically mentioned that the scholarship has been provided for the physically challenged students and separate scholarship has been provided to hostellers after completion of all the codal formalities as per the details given in paragraph No. 4 of the affidavit.

7. The advance society is the one which is sensitive towards the children with special needs. It is our fundamental duty to show them path and to preserve their dignity and respect. All out efforts should be made to assimilate them in the main stream and there should not be feeling amongst the disabled children that they are left alone on lonely island.

8. What emerges from the facts enumerated hereinabove, is that still there are shortcomings towards the implementation of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 by the respondents-State for care of the children with special need.

9. Their Lordships of the Hon'ble Supreme Court in **Government of India through Secretary and another** Vs. **Ravi Prakash Gupta and another** (2010) 7 Supreme Court Cases 626 have held that the object of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is to (i) integrate persons with disabilities into social mainstream, (ii) lay down a strategy for comprehensive development and programmes and services and equalization of opportunities for persons with disabilities, and for their education, training, employment and rehabilitation amongst other responsibilities, (iii) give effect to proclamation on full participation and equality of people with disabilities in Asian and Pacific regions. Their Lordships have held as under:

> *"22. We have examined the matter with great care having regard to the nature of the issues involved in relation to the intention of the legislature to provide for integration or persons with disabilitiets into the social mainstream and to lay down a strategy for comprehensive development and programmes and services and equalization of opportunities for persons with disabilities and for their education, training, employment and rehabilitation amongst other responsibilities. We have considered the matter from the said angle to ensure that the object of the Disabilities Act, 1995, which is to give effect to the proclamation on the full participation and equality of the people with disabilities in the Asian and Pacific regions, is fulfilled."*

10. The Himachal Pradesh University, the H.P. Board of School Education, Dr. Y. S. Parmar University for Horticulture and Forestry, CSK, H.P. Krishi Vishvavidyalaya, Palampur, District Kangra, the Himachal Pradesh Public Service Commission and Service Selection Board have failed to provide amanuensis to the blind and low vision students as per Section 31 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. There is no material placed on record that the Himachal Pradesh University has carried out the amendments in the ordinance and prospectus for providing fee waiver to the persons with disability. Accordingly, the Himachal Pradesh University, Dr. Y. S. Parmar University of Horticulture and Forestry, H.P. Krishi Vishvavidyalaya, Palampur, District Kangra, the H.P. Board of School Education, Himachal Pradesh Public Service Commission and Himachal Pradesh Subordinate Services Selection Board, Hamirpur, H.P. are directed to ensure that amanuensis are provided to all the students with special needs/candidates appearing in respective examinations as per Section 31 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The aforesaid three Universities are directed to carry out

necessary amendments in the respective ordinances and prospectus for providing free education to the children with special needs and the Himachal Pradesh Public Service Commission & the Himachal Pradesh Subordinate Services Selection Board, Hamirpur are also directed to amend their regulations accordingly within a period of six weeks from today.

11. Under Article 21-A of the Constitution of India, the State is required to provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. The children with special needs falls in separate class altogether. It is the duty of the State to provide free and compulsory education to the children with special needs up to University level and all the professional courses in all the educational institutions under Articles 21/21-A of the Constitution of India. It is also the duty of the State to provide financial support to these children by increasing their scholarships, stipends from time to time taking into consideration the price rise/inflation under Article 41 of the Constitution of India.

12. We have gone through the affidavits and the suggestions made by the learned Amicus Curiae. There is dearth of professional teachers in two Schools. The functional posts are required to be filled up. Ordinarily the Court cannot issue directions for sanctioning and creation of posts, but extraordinary situations require extraordinary measures.

13. The respondents-State has also failed to provide the children in Special School at Sundernager and at Dhalli the basic facilities required for blind and deaf students like tables and chairs for them in their rooms to study before and after school time and holidays, a library with children's magazines, news papers, magazines in Braille and magazines in Audio format for blind students as per Section 27 (e) and (f) of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Consequently, there shall be direction to the State of Himachal Pradesh to provide the abovementioned facilities in these institutions, if not already provided within a period of three months.

14. According to the norms prescribed by the Union of India, the following posts are required for blind School: Principal, Special Educator, Trained Graduate Teacher, Assistant Teacher, Braille Teacher, Mobility Teacher, Therapist, Medical Doctor (Part Time), Warden, Cook & Helper, Accountant, Sweeper-cum-Chowkidar and Aya (one for every fifteen children).

15. We are of the considered view that there must be teachers to teach the subjects of Science, Craft and Speech Impairment Therapy to the visually impaired and deaf children and atleast two TGT (Arts) and TGT (Science) teachers to teach blind and deaf students. Besides, Mobile Instructors at Sundernagar and Dhalli, two more posts of JBT hearing impairment and TGT hearing impairment, one post of Braille teacher, JBT (Visually Impaired), TGT (Visually Impaired), Arts and TGT (Visually Impaired), Science are required to be created immediately. These posts should be filled up on regular basis. Accordingly, we direct the respondents to create abovementioned posts within a period of three months and to complete the selection process within a period of six months from today.

16. The respondent-State is also directed to construct the buildings as per the details given in paragraph No. 6 of the affidavit, dated 28th September, 2012 sworn by the Chief Secretary, Government of Himachal Pradesh, within a period of one year, if not already constructed.

17. Ms. Rita Goswami, learned Amicus Curiae has also stated that the facilities which have been provided to the children with special needs having more than 40% disability at all levels of education from the time of enrolment in the Government Schools till

the passing out from the University, including technical & professional courses in all Government institutions be also extended to the Himachal Pradesh University, Dr. Y.S. Parmar University for Horticulture and Forestry, Solan and CSK, Himachal Pradesh University at Palampur Indira Gandhi Medical College, Shimla and Dr. R.P.G.M.C. at Tanda from the current session.

18. There is merit in her contention. The children with special needs having more than 40% disability studying in these institutions are also entitled to free education as per the policy norms adopted by the State Government. Accordingly, we direct the Himachal Pradesh University, Dr. Y. S. Parmar University for Horticulture and Forestry and Chaudhary Sarwan Kumar, Himachal Pradesh Krishi Vishwa Vidayala through their respective Registrars to provide free education to these children for all the courses run by them.

19. The amount of scholarships paid to the visually impaired deaf and dumb students from class 1st to 5th be increased from Rs.350/- to Rs.500/-, from class 6th to 8th be increased from Rs.400/- to Rs.600/-, from class 9th to 10th be increased from Rs.450/- to Rs.750/-, for Senior Secondary be increased from Rs.500/- to Rs.1000/-, for BA/BSc./B.Com etc. be increased from Rs.550/-/- to Rs.1500/-, for BE/B.Tech/MBBS/LL.B./B.Ed. & other be increased from Rs.650/- to Rs.1750/- and for hostellers, the same be increased proportionately to Rs.1500/-, Rs.2000/- and Rs.3000/-, respectively in view of the inflation.

20. The respondents in addition to the facilities to be provided, as directed hereinabove, are also directed to provide additional assistive technology to the visually impaired children to hone their skills to be self dependent. The respondent-State is also directed to provide three of the following facilities, i.e., screen readers, screen magnifiers, speech recognition software, Text-to-speech (TTS) software, optical character recognition (OCR) software, large monitors, hand held magnifiers and standalone reading machines.

21. The respondent-State is also suggested to enact law for providing free and compulsory education to the children with special needs up to University level and professional courses in all the educational institutions including Universities within a period of six months from today.

22. Accordingly, the present petition is disposed of in view of the directions issued hereinabove. The Umang Foundation is awarded costs of rupees one lac. The same shall be used exclusively for the welfare of the children with special needs.

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

CWP No. 1098 of 2015 a/w CWP Nos. 3238 of 2014, 1099, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1124, 1617, 1622, 1624, 1658, 1743, 1744, 1745, 1748, 1749, 1750, 1755, 1756, 1757 and 1758 of 2015.
Judgment reserved on: 27.5.2015
Date of Decision: June 04, 2015.

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1. CWP No. 1098 of 2015

Desh Raj …Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya …Respondent.

2. <u>CWP No.3238 of 2014</u>
Narotam Chand ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

3. <u>CWP No. 1099 of 2015</u>
Suresh Kumar ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

4. <u>CWP No. 1102 of 2015</u>
Karam Chand ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

5. <u>CWP No. 1103 of 2015</u>
Surjit Kumar ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

6. <u>CWP No. 1104 of 2015</u>
Kishori Lal ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

7. <u>CWP No. 1105 of 2015</u>
Harbhajan Singh ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

8. <u>CWP No. 1106 of 2015</u>
Uttam Chand ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

9. <u>CWP No. 1107 of 2015</u>
Santosh Kumar ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

10. <u>CWP No. 1108 of 2015</u>
Malkiat Singh ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

11. <u>CWP No. 1109 of 2015</u>
Rohit Kumar ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

12. <u>CWP No. 1110 of 2015</u>
Parvesh Kumar ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

13. <u>CWP No. 1124 of 2015</u>

Ramesh Kumar ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

14. <u>CWP No. 1617 of 2015</u>

Subhash Chand ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

15. <u>CWP No. 1622 of 2015</u>

Bir Singh ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

16. <u>CWP No. 1624 of 2015</u>

Pawan Kumar ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

17. <u>CWP No. 1658 of 2015</u>

Kashmiri Devi ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

18. <u>CWP No. 1743 of 2015</u>

Uttam Chand ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

19. <u>CWP No. 1744 of 2015</u>

Gurdass Ram ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

20. <u>CWP No. 1745 of 2015</u>

Dev Raj ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

21. <u>CWP No. 1748 of 2015</u>

Pritam Chand ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

22. <u>CWP No. 1749 of 2015</u>

Kamaljit Singh ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

23. <u>CWP No. 1750 of 2015</u>

Ramesh Chand ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

24. CWP No. 1755 of 2015
Achhar Singh ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

25. CWP No. 1756 of 2015
Parvinder Singh ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

26. CWP No. 1757 of 2015
Ashok Kumar ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

27. CWP No. 1758 of 2015
Joginder Singh ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

Constitution of India, 1950- Article 226- Petitioners are beldars who were placed beyond the parent cadre by way of secondment- it was contended that consent of the petitioners was not obtained prior to their transfer- respondent contended that Statute did not provide for obtaining consent for placement on deputation/secondment/foreign service- Statute did not provide that the consent of the employee need to be taken - willingness of posting beyond the cadre need not be expressly sought and can be implied – where the employees had joined without any reservation they are not entitled for any relief but where employees had approached the Court immediately after the passing of the order, they are entitled to the relief. (Para-11 to 17)

Case referred:

Kaviraj and others vs. State of Jammu and Kashmir and others (2013) 3 SCC 526

For the petitioner (s): M/s Dushyant Dadwal and Ajay Kumar Dhiman, Advocates, in respective petitions.
For the respondent(s) : M/s L. N. Sharma and B.M. Chauhan, Advocates, in respective petitions

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Since these petitions can be disposed of by a common judgment, therefore, they are being taken up together for disposal.

2. This batch of writ petitions can be categorized into two sets. One set pertains to the cases where the petitioners were sent on secondment and have joined without raising any objection. This set comprises of the following writ petitions:

CWP Nos. 1617, 1622, 1624, 1658, 1743, 1744, 1745, 1748, 1749 and CWP No. 1750 of 2015.

3. The second set of petitions is those where the petitioners immediately on the issuance of order of secondment, approached this Court and obtained interim relief. This set comprises of the following writ petitions:

CWP Nos. 1098 of 2015, 3238 of 2014, 1099, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1124, 1755, 1756, 1757 and 1758 of 2015.

4. It is not in dispute that in all these cases the petitioners are beldars whose services have been placed beyond the parent cadre by way of secondment.

5. The challenge to these orders of secondment is common to both sets of petitions and it is alleged that the impugned order(s) is/are illegal, arbitrary and unconstitutional on the ground that the petitioners consent was not obtained before ordering their transfer on secondment basis.

6. In response to the petition, the respondents have filed the reply wherein it has been alleged that the Government of Himachal Pradesh in accordance with the provisions of Section 9 of the H.P. Universities of Agriculture, Horticulture and Forestry Act, 1986 (for short 'Act') has constituted a Council for Education and Research to be called "The Himachal Pradesh Council of Agricultural, Horticultural and Forestry Education and Research", (for short 'Council'), who in its meeting held on 28.7.2012 had vide item No. 13 decided that the total core strength of the University be fixed at 1403 which includes the core strength of category 'D' staff as 250 only. It is pointed out that the University is facing acute financial crisis and has therefore to reduce its establishment cost.

7. As per the decision of the Council, the respondent University declared 200 category 'D' and 'C' employees surplus and sent list of 185 category 'D' employees and 15 category 'C' employees to the Additional Chief Secretary (Agriculture) to the Govt. of H.P. in the first phase. Out of the above list, 175 category 'D' and 10 category 'C' employees had been placed on secondment basis with the various departments of H.P.

8. Thereafter, since the working strength of the category 'D' employees in the University happens to be more than the fixed core strength of 250 and there was again communication from the Government to reduce the establishment cost, 289 more category 'D' employees were declared surplus in the second phase, out of which 146 employees have been ordered to be placed on secondment basis with the various departments of the Government. As per the requirement of Engineer-in-Chief (Project), IPH Department, Fatehpur, District Kangra, vide his letter dated 15.1.2015, 39 category 'D' employees including the petitioners had been placed on secondment basis with the Swan River Flood Management Project, Circle Una, H.P.

9. It is further contended that as per the appointment letter of the petitioners, their service condition are to be governed by the Act, Statutes and Rules/Regulations framed from time to time. There is no provision in the Act and Statute of the University to obtain any consent for placement on deputation/secondment/foreign service. However, as per Clause 7.11 (iv) of the Statutes, Vice Chancellor may send any employee/teacher of the University on deputation/secondment/ foreign service. Since the Unviersity is facing acute financial crisis as such keeping in view this aspect the services of the petitioners had been placed on secondment basis and, therefore, the same is legal and valid and not contrary to the provisions of law.

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

11. Learned counsel for the petitioners would contend that the issue in hand is squarely covered by a judgment rendered by learned Single Judge of this Court in similar case titled ***Bishan Dass vs. Chaudhary Shrawan Kumar, H.P. Krishi Vishvavidyalaya,***

CWP No. 352 of 2015, decided on 15.5.2015 wherein the learned Single Judge has held as follows:

> "Petitioner was appointed as Beldar in the respondent -University in the month of July, 1993. He was regularized on the post of Chowkidar in the year 2007. He is aggrieved by the issuance of office order dated 1.1.2015 , whereby his services have been placed at the disposal of the Ex -Servicemen Corporation, Hamirpur on secondment basis. It is averred in the reply that in sequel to Notification dated 22.12.2012; total cadre strength of University has been fixed at 1403, which includes the core strength of category 'D' staff as 250 only. 6 category 'D' employees including the petitioner have been placed on secondment basis with the Ex-servicemen Corporation, Hamipur. The authority to send an employee/teacher by the University on secondment basis / Foreign Service by the University has been derived from clause 7.11 (iv) of the Statutes.
>
> 2. Petitioner is merely working as a Beldar. It is stipulated in clause 7.11 (v) of the Statutes that the employee at the time of transfer or on Foreign Service / deputation should hold a substantive post in the University. It is in grey area whether the petitioner is holding a substantive post or not, as stipulated in clause 7.11 (v) of the Statutes.
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> 3. It is settled law by now that an employee can not be sent on deputation without his/her consent. The petitioner is working in the respondent University and transferring him to the H.P. Ex-servicemen Corporation, Hamirpur would amount to change in the Department /cadre, which is not permissible under law.
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> 4. Their Lordships of the Hon'ble Supreme Court in Jawaharlal Nehru University v. K.S. Jawatkar, 1989 Supp. (1) Supreme Court Cases 679, have held that contract of service entered into by the respondents was a contract with the appellant university and no law can convert that contract into a contract between the respondent and the Manipur University without simultaneously making it either expressly or by necessary implication, subject to the respondent's consent. In this case, the employee of the university i.e. Jawaharlal Nehru University was transferred to Manipur University without his consent, which was held to be bad in law. Their Lordships have held as under:
>
>> "[7] In this appeal the main contention of the appellant is that the respondent was appointed at the Centre of Post -graduate Studies, Imphal, and when the Centre A as transferred to the Manipur University his services were automatically transferred to that University, and consequently he could not claim to be an employee of the appellant University. The argument proceeds on the assumption that the Centre of Post-graduate Studies at Imphal was an independent entity which existed by itself and was not a department of the appellant University. The submission proceeds on a fallacy. The Centre of Post -graduate Studies was set up at Imphal as an activity of the appellant University. To give expression to that activity, the appellant University set up and organised the Centre at Imphal and appointed a teaching and administrative staff to man it. Since the Centre represented an activity of the appellant University the teaching and administrative staff must be understood as employees

> of the appellant University. In the case of the respondent, there can be no doubt whatever that he was, and continues to be, an employee of the appellant University. There is also no doubt that his employment could not be transferred by the appellant University to the Manipur University without his consent, notwithstanding any statutory provision to that effect whether in the Manipur University Act or elsewhere. The contract of service entered into by the respondent was a contract with the appellant University and no law can convert that contract into a contract between the respondent and the Manipur University without simultaneously making it, either expressly or by necessary implication, subject to the respondent's consent. When the Manipur University Act provides for the transfer of the services of the staff working at the Centre of Post-graduate Studies, Imphal, to employment in the Manipur University, it must be construed as a provision enabling such transfer of employment but only on the assumption that the employee concerned is a consenting party to such transfer. It makes no difference that the respondent was not shown in the list of Assistant Professors of the appellant University or that the provision was not indicated in its budget; that must be regarded as proceeding from an erroneous conception of the status of the respondent. The position in law is clear, that no employee can be transferred, without his consent, from one employer to another. The consent may be express or implied. We do not find it necessary to refer to any case law in support of this conclusion.
>
> [8] Inasmuch as the transfer of the Centre of Post -graduate Studies from the appellant University to the Manipur University could not result in a transfer of the employment of the respondent from the one to the other, it must be concluded that the respondent continues in the employment of the appellant University. The transfer of the Centre of Postgraduate Studies to the Manipur University may be regarded as resulting in the abolition of the post held by the respondent in the appellant University. In that event, if the post held by the respondent is regarded as one of a number of posts in a group, the principle "last come, first go" will apply, and someone junior to the respondent must go. If the post held by him constitutes a class by itself, it is possible to say that he is surplus to the requirements of the appellant University and is liable to be retrenched, But it appears that the respondent has been adjusted against a suitable post in the appellant University and, has been working there without break during the pendency of this litigation, and we cannot, therefore, permit the appellant University to retrench him."

5. Their Lordships of the Hon'ble Supreme Court in State of Punjab v. Inder Singh, in (1997) 8 Supreme Court Cases 372, have held that deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary basis and there should be no deputation without the consent of the person so deputed and would therefore know his right and privileges in the deputation post. Their Lordships have held as under:

[19] Concept of "deputation" is well understood in service law and has a recognised meaning. 'Deputation' has a different connotation in -service law and the dictionary meaning of the word 'deputation' is of no help. In simple words 'deputation' means service outside the cadre or outside the parent department. Deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary basis. After the expiry period of deputation the employee has to come back to his parent department to occupy the same position unless in the meanwhile he has earned promotion in his parent department as per Recruitment Rules. Whether the transfer is outside the normal field of deployment or not is decided by the authority who controls the service or post from which the employee is transferred. There can be no deputation without the consent of the person so deputed and he would, therefore, know his rights and privileges in the deputation post. The law on deputation and repatriation is quite settled as we have also seen in various judgments which we have referred to above. There is no escape for the respondents now to go back to their parent departments and working there as Constables or Head Constables as the case may be."

6. In the case in hand, the transfer of the petitioner ordered by the respondent University without his consent is illegal.

7. Accordingly, the writ petition is allowed. Annexure P-2 dated 1.1.2015, qua the petitioner, is quashed and set aside. Pending applications, if any, also stand disposed of. No costs."

12. On the other hand, learned counsel for the respondents would contend that the ratio of the judgment in ***Bishan Dass*** case (supra) can at best be applicable to the second set of cases where the petitioners had approached the Court immediately on the issuance of the orders of secondment and had obtained the stay but the same would not apply to the category of cases where the petitioners had joined and after joining for years together had not protested and had come to the Court only when interim orders in the case of the recently deputed employees had been obtained.

13. Clause 7.11 (v) of the Statutes of the respondent reads as follows:

"(v) The Vice-Chancellor may send any employee/teacher of the University on deputation/foreign service."

A perusal of the aforesaid provision only goes to show that the Vice Chancellor may send any employee/teacher of the University on deputation/foreign service. But then it is nowhere provided that this power can be exercised without obtaining the consent of the employee/teacher.

14. In ***Kaviraj and others vs. State of Jammu and Kashmir and others (2013) 3 SCC 526***, the Hon'ble Supreme Court was seized of a matter where the writ court had interfered with the posting of the employees to a different department on the ground that before sending them on deputation outside the parent department, their consent was not obtained. The Division Bench in LPA disturbed the said finding. The Hon'ble Supreme Court opined that the view taken by the learned Single Judge was clearly erroneous on the aspect of obtaining consent before deputation. The Hon'ble Supreme Court opined that no statutory rule was brought to its notice requiring the prior consent of an employee before his

deployment against a post beyond his parent cadre. It further held that '*the mere fact that the appellants' consent was not sought before their posting at Government Medical College, Jammu (and/or at the hospitals associated therewith) would not in our view have any determinative effect on the present controversy. Broadly, an employee can only be posted (or transferred) to a post against which he is selected. This would ensure his stationing, within the cadre of posts, under his principal employer. His posting may, however, be regulated differently, by statutory rules, governing his conditions of service. In the absence of any such rules, an employee cannot be posted (or transferred) beyond the cadre to which he is selected, without his willingness/readiness. Therefore, an employee's posting (or transfer), to a department other than the one to which he is appointed, against his will, would be impermissible."*

This squarely answers the proposition as canvassed in the second set of cases.

15. Insofar as the first set of the petitioners, who have already joined the places outside the parent cadre without any objection or demur, even their cases are squarely covered by the ratio of the judgment in ***Kavi Raj's*** case where the Hon'ble Supreme Court held that willingness of posting beyond the cadre need not be expressly sought and can be implied. It was held that *"willingness of posting beyond the cadre (and/or parent department) need not be expressly sought and can be implied. It need not be in the nature of a written consent. Consent of posting (or transfer) beyond the cadre (or parent department) is inferable from the conduct of the employee, who does not protest or contest such posting/transfer".*

16. At this stage it is apt to reproduce para 24 of the judgment wherein both the propositions have been answered in the following terms:

> *"24. Before concluding, it is essential to deal with certain inferences drawn by the learned Single Judge of the High Court. According to the learned Single Judge, prior consent of an employee is imperative, binding, peremptory and mandatory, before he is posted on deputation outside his parent department. No statutory rule has been brought to our notice, requiring prior consent of an employee, before his deployment against a post beyond his parent cadre. The mere fact, that the appellants consent was not sought before their posting at the Government Medical College, Jammu (and/or at the hospitals associated therewith) would not, in our view have any determinative effect on the present controversy. Broadly, an employee can only be posted (or transferred) to a post against which he is selected. This would ensure his stationing, within the cadre of posts, under his principal employer. His posting may, however, be regulated differently, by statutory rules, governing his conditions of service. In the absence of any such rules, an employee cannot be posted (or transferred) beyond the cadre to which he is selected, without his willingness/readiness. Therefore, an employee's posting (or transfer), to a department other than the one to which he is appointed, against his will, would be impermissible. But willingness of posting beyond the cadre (and/or parent department) need not be expressly sought. It can be implied. It need not be in the nature of a written consent. Consent of posting (or transfer) beyond the cadre (or parent department) is inferable from the conduct of the employee, who does not protest or contest such posting/transfer. In the present controversy, the appellants were issued posting orders by the Principal, Government Medical College, Jammu, dated 30.12.1997. They accepted the same, and assumed charge as Senior/Junior House Officers at the Government Medical College, Jammu, despite their selection and appointment as Assistant Surgeons. Even now, they wish to continue to serve against posts, in the Directorate of Medical*

Education. There cannot be any doubt, about their willingness/readiness to serve with the borrowing Directorate. The consent of the appellants is tacit and unquestionable. We are therefore of the view, that the learned Single Judge of the High Court, clearly erred on the instant aspect of the matter."

17. In view of the aforesaid exposition of law, the judgment rendered by the learned Single Judge of this Court in ***Bishan Dass*** case (supra) would only be applicable in cases of employees, who have immediately on the order of their secondment approached this Court but the same cannot be applied to the cases of employees, who have been transferred outside the parent cadre and have already joined there.

18. In view of the aforesaid discussion, the first set of petitions, as detailed above, is dismissed, whereas the second set of petitions is allowed and the impugned order of secondment is quashed and set-aside. Pending application(s) if any also stands disposed of. The parties to bear their own costs. The Registry is directed to place a copy of this judgment on the files of connected matters.

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

Dr. Lalita Bansal …… Petitioner.

Vs.

State of H.P. & ors. ….. Respondents

CWP No. 2821 of 2015-C.
Judgement reserved on: 3.6.2015.
Date of decision: 04.06.2015.

Constitution of India, 1950- Article 226- Petitioner sought a direction to the respondent to issue NOC to the petitioner on the basis of remarks obtained in the All India Post Graduation Medical Entrance Examination 2015- Clause No. 1.9 of the notification is illegal and not applicable to the case of the petitioner- petitioner joined PG courses at Chandigarh- she came to know about her critical pregnancy diagnosed as "HYPEREMESIS GRAVIDARUM"- she was not entitled to any maternity leave - she had no option but to submit her resignation- she requested the respondent to relax the P.G. policy so that she could appear in P.G. examination in future as a sponsored candidate- she applied for no objection certificate but the certificate was not issued in her favour- clause No. 1.9 clearly provided that In-Service Medical Officers who leave the PG/ Diploma course midway shall stand debarred to re-appear in the PG/ Diploma Entrance Examination for next 5 years- held, that provisions relating to admission to PG courses were clear and unambiguous- Court cannot pass any direction to accommodate the petitioner- petitioner had not made any attempt to obtain leave or to withdraw the resignation furnished by her- she made a request to consider her posting in the blood bank at IGMC, Shimla which shows that her condition was not critical - rule cannot be declared unreasonable because it operates harshly in a given case- petition dismissed. (Para-8 to 18)

Case referred:

State of Gujarat vs. Shantilal Mangaldas and others AIR 1969 SC 634

For the petitioner : Mr. Sanjeev Bhushan, Advocate with Mr. Sanjeev Kumar Suri, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Addl. Advocate General, Mr. Vikram Singh Thakur and Mr. Kush Sharma, Dy. Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

By medium of this petition, the petitioner has sought the following relief(s):-

1. That respondents may kindly be directed to issue the NOC to the petitioner for competing under the category of GDO in service group on the basis of the marks obtained in the All India Post Graduation Medical Entrance Examination 2015 (AIPGMEE) for the admission to the PG (MD/MS) degree Course for the academic year 2015-2018.
2. That the clause No. 1.9 of the Notification dated 02-04-2013 and condition No. 3 (1) (vi) of the Prospectus may very kindly be held inoperative in the exceptional case of the petitioner.
3. That the clause No. 1.9 of the Notification dated 02-04-2013 and condition No. 3(1) (vi) of the prospectus may very kindly be held illegal as unconstitutional, arbitrary against the public policy.

The facts in brief may be noticed.

2. On 11.11.2009 the petitioner was appointed as Medical Officer. Thereafter, the petitioner after availing the study leave joined the Post Graduate course for the academic year 2014-2017 at Post Graduate Institute of Medical Education and Research, Chandigarh (PGIMER). On 12.8.2014, the petitioner came to know about her critical pregnancy diagnosed as “HYPEREMESIS GRAVIDARUM”, being on study leave, she was not entitled to any maternity leave and therefore had no option but to submit her resignation.

3. The petitioner vide her letter dated 27.8.2014 requested the respondents to relax the P.G. policy so that she can appear in P.G. examination in future as sponsored candidate on medical and humanitarian grounds.

4. The respondent No. 2 vide notification dated 9.9.2014 issued a notification, wherein it was stated that the State Government is not going to conduct separate Entrance Test for filling up of 50% State quota PG (MD/MS) degree seats in government colleges and the seats for the academic year 2015-2018 would be filled up on the state merit drawn on the basis of marks obtained in All India Post Graduate Medical Entrance Examinations-2015 (AIPGMEE).

5. The petitioner applied through proper channel under the GDO in-service group. On 18.3.2015, the petitioner submitted a representation before respondent No. 2 for grant of no-objection certificate. The respondents on 26.3.2015 circulated the final merit list of PG (MD/MS) degree courses, but the name of the petitioner did not find mention therein.

6. The non-issuance of no-objection certificate by the respondents has been questioned as being illegal, unjust and unreasonable on the ground that it was on exceptional circumstances that petitioner had to leave her MD/MS course in midstream on account of her critical pregnancy and being not entitled to any kind of leave she was compelled to resign.

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

8. Clause No. 1.9 of the notification issued by the government on 2.4.2013 reads as follows:-

"1.9 The In-Service Medical Officers who leave the PG/ Diploma course midway shall stand debarred to re-appear in the PG/ Diploma Entrance Examination for next 5 years. Further if the Medical Officer is on duty or on paid leave, full recovery of the amount for the period of PG/ Diploma course attended would be made."

9. Similarly conditions No. 3, 3.1 and (vi) of the prospectus read as follows:-

"3. ELIGIBILITY & DISTRIBUTION OF SEATS

3.1. (A) HPHS (In-service GDO) Group

(i) 66.6% of the State Quota Seats will be filled-up by in-service Medical Officers. The in-service group will consist of two sub-groups i.e. one sub-group consisting of regularly appointed Medical Officer and second sub-group consisting of Contractual and Rogi Kalyan Samiti appointees. The distribution of seats between regular and those appointed on contract basis including Rogi Kalyan Samiti appointees will be made in the ratio proportionate to their total number as on 31.10.2014. For the academic session 2015-18 the distribution of seats between above two sub-groups will be in the ratio of 2:1.

(ii) The eligibility conditions regarding mandatory period of service (area-wise) in-respect of In-service group will be as under:-

	Area	**Mandatory service period**
I	Chamba-Pangi & Bharmour, Tissa, Lahaul & Spiti-All Medical Blocks, Kinnaur Sangla & Pooh, Nichar (Except Bhabanagar). Shimla-Chirgaon, Nerwa & Tikkar. Mandi-Chohar Valley of Padhar Block.	2 years
II	Kinaur-Bhabanagar of Nichar Block. Kullu-Nirmand & Ani. Mandi-Karsog & Janjelhi. Chamba-Phukhari, Choori, Kihar, Samote. Sirmour-Shillai & Sangrah. Kangra-Mahakal. Shimla-Nankhari, Matiana, Kotkhai & Kumarsain	3 years
III	Other Medical Blocks of the State (excluding the above and below) and NRHM Office.	4 years
IV	Within the limits of Shimla Municipal Corporation, within the limits of Solan Municipal Corporation and within	5 years

	Baddi-Brotiwala-Nalagarh notified area	

(iii) ....

(iv) ....

(v) ....

(vi) The candidates from In-Service Group who leave their PG course in midway shall stand debarred to re-appear in the PG Entrance Examination Counselling for State quota seats next 5 years. Further if the Medical Officer is on duty or on paid leave, full recovery of the amount for the period of PG course attended would be made."

10. Indisputably the aforesaid provisions relating to admission to PG courses are absolutely clear and unambiguous and therefore, this court cannot pass any direction to accommodate the petitioner or else the same would amount to judicial overreach, unless this court otherwise holds these provisions to be illegal, arbitrary and ultra-vires etc.

11. It is clear from the record that the petitioner did not even made a slightest attempt to obtain leave and even in her representation dated 27.8.2014, the petitioner has simply stated that she resigned from the P.G. course on 12th August 2014 on medical grounds. It is further revealed that even no attempt was made by the petitioner to withdraw her resignation which as per own showing came to be accepted only on 22nd August 2014.

12. It is pertinent to note that petitioner vide her aforesaid representation had not sought the leave, but had made a specific request to consider her posting as Medical Officer in the Blood Bank, IGMC Shimla. In case the condition of the petitioner was so critical as alleged then why she sought continuity of her job as a Medical Officer at Shimla that too within three days of the acceptance of her resignation. If the petitioner was fit enough to work as a Medical Officer at Shimla then why she could not have continued with the PG course at PGI Chandigarh is not forthcoming.

13. The petitioner has then sought to invoke the provisions of FRSR Leave Rules to contend that petitioner being on study leave was not entitled to any leave whatsoever and therefore had no other option but to resign. He has placed reliance upon FR 43 of the aforesaid Rules, which reads as follows:-

"43. Maternity Leave

(1) A female Government servant (including an apprentice) with less than two surviving children may be granted maternity leave by an authority competent to grant leave for a period of (180 days) from the date of its commencement.

(2) During such period, she shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

NOTE :- In the case of a person to whom Employees' State Insurance Act, 1948 (34 of 1948), applies, the amount of leave salary payable under this rule shall be reduced by the amount of benefit payable under the said Act for the corresponding period.

(3) Maternity leave not exceeding 45 days may also be granted to a female Government servant (irrespective of the number of surviving children) during the entire service of that female Government in case of miscarriage including abortion on production of medical certificate as laid down in Rule 19:

`Provided that the maternity leave granted and availed of before the commencement of the CCS(Leave) Amendment Rules, 1995, shall not be taken into account for the purpose of this sub-rule.

(4) (a) Maternity leave may be combined with leave of any other kind.

(b) Notwithstanding the requirement of production of medical certificate contained in sub-rule (1) of Rule 30 or sub-rule (1) of Rule 31, leave of the kind due and admissible (including commuted leave for a period not exceeding 60 days and leave not due) up to a maximum of (two years) may, if applied for, be granted in continuation of maternity leave granted under sub-rule (1).

(5) Maternity leave shall not be debited against the leave account."

14. The interpretation sought to be given by the petitioner is erroneous because what sub-rule(5) of Rule 43 contemplates is that maternity leave shall not be debited against the leave account, meaning thereby that maternity leave is a special benefit extended to pregnant woman employee during pregnancy and has no connection with any other kind of leave. The maternity leave as dealt with in rule-43 is a self contained provision and has not been subjected to the conditions applicable to any other leave including extra-ordinary leave.

15. The learned counsel for the petitioner would then contend that clause No. 1.9 of the notification dated 2.4.2013 and conditions No. 3 (1) (vi) of the prospectus be declared inoperative in case of the petitioner or in the alternative the same be held to be unconstitutional, arbitrary and against the public policy.

16. It is more than settled that a rule cannot be declared unreasonable merely because in a given case, it operates harshly.

17. In **State of Gujarat** vs. **Shantilal Mangaldas and others AIR 1969 SC 634,** it has been held as follows:-

"52. It was urged that in any event the statute which permits the property of an owner to be compulsorily acquired by payment of market value at a date which is many years before the date on which the title of the owner is extinguished is unreasonable. This Court has, however, held in Smt. Sitabati Debi v. State of West Bengal, (1967) 2 SCR 949 that a law made under clause (2) of Article 31 is not liable to be challenged on the ground that it imposes unreasonable restrictions upon the right to hold or dispose of property within the meaning of Art. 19 (1) (f) of the Constitution. In Smt. Sitabati Debi's case, (1967) 2 SCR 949 an owner of land whose property was requisitioned under the West Bengal Land (Requisition and Acquisition) Act, 1948, questioned the validity of the Act by a writ petition filed in the High Court of Calcutta on the plea that it offended Article 19 (1) (f) of the Constitution. This Court unanimously held that the validity of the Act relating to acquisition and requisition cannot be questioned on the ground that it offended Article 19 (1) (f) and cannot be decided by the criterion under Article 19 (5). Again the validity of the statute cannot depend upon whether in a given case it operates harshly. If the scheme came into force within a reasonable distance of time from the date on which the declaration of intention to make a scheme was notified, it could not be contended that fixation of compensation according to the scheme of Section 67 per se made the scheme invalid. The fact that considerable time has

> elapsed since the declaration of intention to make a scheme, cannot be a ground for declaring the section ultra vires. It is also contended that in cases where no reconstituted plot is allotted to a person and his land is wholly appropriate for a public purpose in a scheme, the owner would be entitled to the value of the land as prevailing many years before the extinction of interest without the benefit of the steep rise in prices which has taken place all over the country. But if Section 71 read with Section 67 lays down a principle of valuation it cannot be struck down on the ground that because of the exigencies of the scheme, it is, not possible to allot a reconstituted plot to an owner of land covered by the scheme."

18. It is equally settled that merely because a law causes hardship, it cannot be interpreted in a manner so as to defeat its object. A plea of inconvenience and hardship is a dangerous one and is only admissible in construction where the meaning of statute is obscure. It is trite law that where the meaning of any provision is clear and explicit, but if any hardship or inconvenience is felt, it is for the authorities to take appropriate steps to amend the provision and not for the courts to virtually legislate under the guise of interpretation. Hard cases make bad law and the plea of hardship and inconvenience has been said to be a dangerous and a misleading one and if acceded to, would lead the court to forbidden territories.

19. The learned counsel for the petitioner has not been able to show as to how the aforesaid provisions can be held to be unconstitutional or even arbitrary being against the public policy. As already observed this is a matter which can only be considered by the respondents and this court has no authority to declare that the clauses and the conditions as referred to herein above, be not applied to the case of the petitioner.

20. 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. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Kansara Mayur ……Appellant.
Vs.
State of Himachal Pradesh …..Respondent.

Cr. Appeal No. 4030 of 2013
Reserved on: 03.06.2015
Date of decision: 04.06.2015

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2.3 k.g of charas in a bag held in right hand- PW-1 stated that Investigating Officer had stopped the ongoing vehicles and had asked the occupants of the vehicles to become witness- it is not believable that occupants would not have become independent witnesses to support the arrest, search and seizure- place of apprehension is a busy Highway and police could have easily associated independent witness- no entry was made in the malkhana register regarding the taking out of the property for production in the Court and re-deposit of the property in malkhana- entries are required to be made in malkhana register at the time of taking out of the property and depositing the same in malkhana- held that these circumstances created doubt regarding the prosecution version- accused acquitted. (Para-12)

For the appellant : Mr. Chaman Negi, Advocate.
For the respondent: Mr. P.M. Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

This appeal is instituted against the judgment, dated 05.01.2013, rendered by the learned Special Judge (II), Mandi, District Mandi, H.P. in Sessions Trial No. 2 of 2012, whereby the appellant-accused (hereinafter referred to as 'the accused' for the sake of convenience), who was charged with and tried for an offence punishable under Section 20(b)(ii)(c) of the ND & PS Act, was convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default of payment of fine to further undergo simple imprisonment for a period of one year.

2. Case of the prosecution, in a nut-shell, is that on 15.10.2011, police party was present at Suki Bain NH-21. Accused came from Pandoh side having a bag in his right hand. On seeing the police party, he turned back and tried to run away. The police party suspected the accused carrying some contraband. Police party gave their personal search to accused and thereafter, search of light maroon and yellow bag was conducted, which was being carried by the accused in right hand. It contained envelope in which black material in the shape of *chapattis*, sphere and stick was found, which on smelling was found to be cannabis/*charas.* It weighed 2 kg. 300 grams. It was sealed with seal H at 10 places. NCB form in triplicate was prepared and seal impression H was affixed on it. Sample seal was taken on piece of cloth. *Rukka* through Constable Kashmir Singh was sent, on the basis of which, FIR No. 248/10, dated 15.10.2011, under Section 20 of NDPS Act was registered against the accused. The contraband was deposited with MHC. It was sent to FSL, Junga. The report was received. Thereafter, the challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 11 witnesses to support its case. The accused was also examined under Section 313 of the Cr. P.C. He pleaded innocence. He was convicted and sentenced, as noticed hereinabove. Hence, this appeal.

4. Mr. Chaman Negi, learned counsel for the appellant has vehemently argued that the prosecution has failed to prove the case against the appellant.

5. Mr. P. M. Negi, learned Deputy Advocate General, supported the judgment, dated 05.01.2013.

6. We have heard the learned counsel for the parties and gone through the judgment and records, carefully.

7. PW-1, HC Vijay Kumar has deposed that on 15.10.2011 at about 8:50 a.m., they were present near Suki Bain. Accused came from the Pandoh side. He was carrying a light maroon and yellow coloured raxine type bag. He got frightened on seeing the police. He tried to run away. He was apprehended. There was no *abadi* in the vicinity. Investigating Officer stopped the ongoing vehicle and asked the occupants of the vehicle to become witness, but none of them come forward. The Investigating Officer associated him and Constable Dhameshwar. Police gave the search of the police party to the accused. Bag of the accused was checked. It contained *charas.* It weighed 2 kg. 300 grams. *Charas* was put in the polythene bag and polythene bag was put in a cloth parcel. Parcel was sealed with 10 impressions of seal H. Form NCB-1 was filled in triplicate at the spot. *Charas* was seized

vide seizure memo Ex. PW1/C. Rukka was prepared. It was sent through Constable Kashmir Singh to the Police Station. FIR was registered. Investigating Officer completed the investigation. During the course of recording of his statement, one sealed parcel sealed with 10 impressions of seal H, six impressions of seal A and six impressions of seal of FSL were produced. Seals were intact and legible. The parcel was opened. PW-1 Vijay Kumar identified the same. In his cross-examination, he admitted that they had set up *nakka* and they were stopping the vehicles. They had stopped about 5-7 vehicles. No challan was issued.

8. PW-2, Constable Kashmir Singh also deposed the manner, in which the accused was apprehended, search, seizure, sealing and other codal formalities were completed on the spot. He took the *rukka* to the Police Station.

9. PW-3, HHC Thakur Singh, deposed that Additional SHO Sardari Lal had handed over one cloth parcel sealed with ten impressions of seal H, six impressions of seal A alongwith NCB-1 form in triplicate, sample seals A and H and seizure memo to him on 15.10.2011. He made an entry in the *malakhana* register at Sr. No. 1279, Ex. PW3/A. He deposited the same in the *malakhana.* Re-seal memo Ex. PW3/B was signed by him. He sent the parcel, NCB-1 form in triplicate, sample seals A and H, copy of FIR and seizure memo to FSL, Junga for analysis on 17.10.2011 through Constable Kesar Singh vide RC No. 215/11, copy of which is Ex. PW 3/C. He deposited all the articles in FSL and handed over the receipt to him on his return. The case property remained intact till it remained in his custody. In his cross-examination, he has admitted that he has not obtained the signatures of the person depositing the case property. PW-4, HC Girdhari Lal is a formal witness. PW-5, Sardari Lal, Additional SHO, has deposed that PSI Sanjeev Kumar handed over one parcel sealed with 10 impressions of seal H alongwith sample seal H and NCB-1 form in triplicate on 15.10.2011 at 2:40 p.m. He re-sealed the parcel with six impressions of seal A. He obtained the seal impression on separate pieces of cloths. He filled the columns No. 9-11 of NCB-1 form Ex. PW-3/D.

10. PW-6, ASI Surinder Kumar, PW-7 Inspector Surinder Pal are formal witnesses. PW-8, Constable Kesar Singh, deposed that HHC Thakur Dass handed over one parcel sealed with ten impressions of seal H and six impressions of seal A, copy of FIR, NCB-1 form in triplicate, sample seals H and A and copy of seizure memo with the direction to carry them to FSL, Junga for analysis. He took the case property to FSL, Junga. He deposited all the articles at FSL Junga on the same day and handed over the receipt to MHC on his return.

11. PW-10, SI Sanjeev Kumar deposed the manner in which the accused was apprehended on the spot, the *charas* was seized, the sealing procedure was completed by him and seal was handed over to Vijay Kumar after use. He prepared *rukka* Ex. PW10/A. He also prepared the site plan Ex. PW10/B. Accused was arrested vide arrest memo Ex. PW1/D. In his cross-examination, he admitted that Sukki bain falls on National Highway. He was not aware that there was dumping site at Kawari. PW-11, LHC Mast Ram is a formal witness.

12. The accused was apprehended on National Highway. According to PW-1, HC Vijay Kumar, the Investigating Officer stopped the ongoing vehicles and he asked the occupants of the vehicles to become witness. It is not believable that if the vehicles had been stopped by PW-10, SI Sanjeev Kumar, the occupants would not have become independent witnesses to support the arrest, search and seizure. The police have ample powers to take action against the persons who are not willing to help in their investigation. The National Highway-21 is a busy Highway. The police could easily associate independent witnesses. Moreover, when the *nakka* has been laid and the vehicles were being checked. It is not one

of those cases where the recovery was effected from an isolated or secluded place. The recovery has been made from the National Highway and, in these circumstances, the police ought to have associated the independent witnesses being available. The case property was deposited in the *malkhana* by the Additional SHO on 15.10.2011 alongwith NCB-1 form and sample seals H and A. These were sent to FSL, Junga for chemical examination through PW-8, Constable Kesar Singh. He deposited the same at FSL, Junga. The case property has been produced while recording the statement of PW-1, HC Vijay Kumar. Vijay Kumar has identified Ex.-P1. There is no entry in the *malkhana* register when the case property was taken out for being produced in the Court. Similarly, there is no entry when the case property was re-deposited in the *malkhana*. Moreover, it has not come in the evidence, who has produced the case property in the Court. An entry is required to be made when the case property is taken out from the *malkhana* for production the Court in Form-19. Similarly, entry is required to be made when the case property is taken back and re-deposited in the *malkhana*. There is neither any entry at the time of taking out of the case property nor at the time of re-depositing of the same. There is no DDR report also prepared at the time of producing the case property in the Court and when it was taken back to be re-deposited in the *malkhana*. Thus, it casts doubt whether it was the same case property which was recovered from the accused and sent to FSL, Junga and produced in the Court or some other case property was produced in the Court without there being any corresponding entries at the time of taking out and re-deposit in the *malkhana* register. Consequently, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

13. Accordingly, in view of the observations and discussions made hereinabove, the appeal is allowed. The accused is acquitted of the charge framed against him. He be released immediately, if not required in any other case. The Registry is directed to prepare the release warrant and send it to the concerned Superintendent of Jail.

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

Kashmir Singh and others. …Appellants.

Versus

State of Himachal Pradesh …Respondent.

Cr.A. No. 60/2012
Reserved on: 3.6.2015
Decided on: 4.6.2015

Indian Penal code, 1860- Sections 302 and 323 read with Section 34- Complainant was thrashing the paddy in his courtyard- houses of the deceased and accused are adjoining to each other- there was a passage between the houses- accused had stacked Bajri on the passage due to which the walls of the house of the complainant were damaged as a result of dampness- complainant asked the accused to remove Bajri but the accused started quarreling with the complainant- accused also assaulted the deceased and 'B'- matter was reported to the police, when the complainant party returned home from the police station, they found that deceased had died- record showed that complainant was asking the accused to remove Bajri immediately at 10:00 P.M, which led to a sudden fight- therefore, case would fall under Exception (4) of Section 300 of IPC- prosecution had also not explained the injury received by the accused- role of accused 'K' and 'N' was not established- appeal partly allowed. (Para-21 to 23)

For the appellants: Mr. Manoj Pathak, Advocate.
For the Respondent: Mr. Ramesh Thakur, Asstt. A.G.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 6.1.2012/10.1.2012 rendered by the Additional Sessions Judge (1), Kangra at Dharamshala in Sessions Case No.6-P/2010, whereby the appellants-accused (hereinafter referred to as the "accused" for convenience sake), who were charged with and tried for offence punishable under section 302 and 323 read with section 34 of the Indian Penal Code have been convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- and in default of payment of fine, they were further ordered to undergo simple imprisonment for a period of six months for offence under section 302 IPC. They were also convicted and sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 1,000/- and in default of payment of fine, they were further ordered to undergo simple imprisonment for one month for offence punishable under section 323 of the Indian Penal Code. Both the sentences were ordered to run concurrently.

2. Case of the prosecution, in a nutshell, is that PW-2 Madan Lal was working as a Driver at Baddi. He came to his home at Lahru on 21.10.2009. He was threshing the paddy in their courtyard. Accused were in their houses. House of accused Kashmir Singh, uncle of Madan Lal, was adjoining to the house of Prem Dass. There was a passage in between the houses of complainant and accused Kashmir Singh. Accused had stacked Bajri on the passage besides the house of complainant, due to which the walls of house of Madan Lal got damaged due to dampness. Madan Lal asked accused Kashmir Singh and aunt to remove the Bajri. However, all the accused persons started quarreling with Madan Lal. First of all, accused Gulzar started quarreling with complainant Madan Lal and at that time, father of complainant, Bhagwan Dass, uncle Prem Dass and brother Man Chand also reached on the spot. Thereafter, accused Gulshan carrying hockey stick assaulted the complainant. Accused Gulzar carrying danda also assaulted the complainant. The other accused started beating the complainant with fist and kick blows. Complainant received injuries on his left shoulder, back and other parts of the body. The incident was witnessed by Rajinder Kumar, Karam Chand and Deepo Devi. Accused also assaulted Bhagwan Dass and Prem Dass with hockey stick, danda and fist blows. Madan Lal, Man Chand and their father went to the Police Station, Bhawarna and Rapat Ex.PW-11/A was lodged against the accused. Thereafter, complainant party returned from the Police Station to their home and their medical examination was conducted at C.H.C. Bhawarna. They found their uncle Prem Dass has died. Thereafter, complainant party again went to the Police Station, Bhawarna and told the police about the death of Prem Dass. FIR Ex.PW-2/A was registered at Police Station, Bhawarna. Police visited the spot. Photographs were taken. Investigating Officer prepared inquest report. Dead body was taken for post-mortem to Sub Divisional Hospital, Palampur. PW-12 Dr. K.L. Kapoor conducted the post-mortem. Danda Ex.P-1 and hockey stick Ex.P-2 were taken into possession by the policevide memo Ex.PW-2/B. I.O. also lifted blood from the verandah and put it in a plastic container. 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 14 witnesses in all to prove its case against the accused. Statements of accused under Section 313 Cr.P.C. were recorded. Accused Kashmir Singh has admitted his relationship with the complainant party. He has denied that any Bajri was kept on the passage. Accused Gulshan has admitted his

relationship with the complainant party. He has admitted that complainant Madan Lal had provoked the accused party to remove the Bajri. He has denied that he was armed with hockey stick and assaulted the complainant. Accused Gulzar has admitted relationship with complainant Madan Lal, however, denied that he was armed with danda. Accused Nirmala Devi has admitted her relationship with the complainant party. She has denied the case of the prosecution. Learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, the present appeal.

4. Mr. Manoj Pathak, learned counsel for the accused, has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. Ramesh Thakur, learned Assistant Advocate General has supported the judgment passed by the trial Court.

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

7. PW-1 Dr. Anjali Gupta has medically examined Bhagwan Dass on 22.10.2009. She issued MLC Ex.PW-1/A. She has also examined Man Chand and issued MLC Ex.PW-1/B. She has also examined Madan Lal and issued MLC Ex.PW-1/C.

8. PW-2 Madan Lal has testified that he reached at Lahru on leave on 21.10.2009. He was thrashing the paddy in their courtyard. Accused were present in their house. Their house, his uncles Kashmir Singh and Prem Dass houses were adjacent to each other. There was a passage in between his and Kashmir Singh's house. Family of Kashmir Singh had kept Bajri on the passage besides their house. Due to this, wall of their house was damaged due to dampness. He asked his uncle and aunt to remove the Bajri. However, Kashmir Singh, Nirmala Devi, Gulshan and Gulzar started quarrelling with him. First of All, Gulzar started altercation with him. In the meantime, his father Bhagwan Dass, uncle Prem Dass and brother Man Chand also reached. All of the accused started beating them with hockey stick and danda. Gulshan was having hockey stick and Gulzar was having dada with him. They beat them with hockey stick and danda. Other accused gave them beating with fist and kick blows. He sustained injuries on left shoulder, back and other parts of the body. All of them sustained injuries. Rajinder Kumar, Karam Chand and Deepo Devi reached the spot. They rescued them. He alongwith his father and brother went to the Police Station. They lodged report at 2.30 A.M. His medical examination was also conducted. When they came back, they found that Prem Dass has died. FIR Ex.PW-2/A was registered at his instance. Police recovered hockey stick Ex.P-1 and danda Ex.P-2 and took the same into possession vide memo Ex.PW-2/B. In his cross-examination, he has deposed that the quarrel continued for half an hour.

9. PW-3 Dr. Navneet Chauhan has examined accused Kashmir Singh. He noticed the following injuries on the person of Kashmir Singh:

1. Abrasion over the forehead with brownish clotted blood.
2. Abrasion over left forearm lateral aspect with brownish clotted blood.

He issued MLC Ex.PW-3/A qua accused Kashmir Singh.

He also examined Gulzar Singh and noticed the following injuries on his person:

1. Clotted brownish blood in right nostril.
2. Tenderness left foot with no evidence of fracture.

He issued MLC Ex.PW-3/B qua accused Gulzar Singh.

He also examined accused Gulshan and noticed the following injuries on his person:

1. Abrasion over right hand, dorsum with clotted brownish black blood.
2. Tenderness over left shoulder. No evidence of any fracture.

He issued MLC Ex.PW-3/C qua accused Gulshan.

Accused Nirmala Devi was also examined by PW-3 Dr. Navneet Chauhan and he noticed the following injuries on her person:

1. Tenderness left elbow posterior aspect. No evidence of any fracture.
2. Contusion over left side of forehead with bluish discolouration.

He issued MLC Ex.PW-3/D qua accused Nirmala Devi.

10. PW-4 Man Chand has testified that on 21.10.2009, he, Bhagwan Dass and Madan were thrashing the paddy at about 10.00 P.M. Their houses were adjacent to each other, i.e. Bhagwan Dass, Prem Dass and Kashmir Singh. There was a passage in between the houses of Kashmir and Bhagwan. Bhagwan Dass is his father. During those days, Bajri was kept by his uncle Kashmir Singh besides the wall of their house. The wall of the house was damaged. His brother Madan Lal asked Nirmala Devi to remove the Bajri. Then Gulzar came out and started exchanging hot words with his brother. He alongwith his father and uncle Prem Dass also reached there. Gulzar was carrying danda. Gulshan was carrying hockey stick. All of them started beating them. Accused Kashmir and Nirmala gave fist and leg blows while Gulzar and Gulshan gave them beatings with danda and hockey stick. On hearing noise, Karam Chand, Deepo Devi and Rajinder, their neighbours also came there. They rescued them from the clutches of the accused. He received injuries on his head and chest. His father, brother and uncle also received injuries. He alongwith his father and brother went to the Police Station. When they came back to their home, they found uncle has died. In his cross-examination, he has admitted that no quarrel has taken place between 5.00 P.M. to 10.00 P.M. According to him, accused kept them beating for one hour. He has also admitted that people gathered on the spot and they separated them and thereafter they went to their respective houses.

11. PW-5 Shambu Ram has deposed that he remained Pradhan of Gram Panchayat, Jatnula in the year 2009. Police had come to the house of Bhagwan Dass and Kashmir Singh on 22.10.2009. Police took photographs. Police also took blood stains and put the same in a plastic container and sealed the same with seal impression 'A'. He produced the seal in the Court. Police also seized one danda and one hockey stick vide seizure memo Ex.PW-2/B. He signed the same.

12. PW-6 Deepo Chaudhary has deposed that she knew Prem Dass, Kashmir Chand and Bhagwan Dass. Her house is on the back side of their house. All these persons were brothers and they were '***Dever***' (brother-in-law) in relationship. She did not remember the date though it was around one and half years ago. It was around 9-10 P.M., she heard the noise. She alongwith Pappu went to the spot. She saw Bhagwan Dass and Kashmir Chand were arguing with each other and Prem Dass was asking for removing of Bajri. Kashmir Chand was present alongwith his children and wife at the spot and the family of Bhagwan Dass was also present there. She alongwith Pappu persuaded the parties not to quarrel and thereafter they went away. Kashmir Chand's children were not having anything with them. Bhagwan Dass and Prem Dass had not sustained any injuries nor blood was oozing out. She was declared hostile. She was cross-examined by the learned Public Prosecutor. In her cross-examination by the learned Public Prosecutor, she has deposed that Prem Dass died next day of the quarrel.

13. PW-7 Karam Chand has deposed that around two years ago, some incident had happened in their village. However, he had gone to the spot in the morning. He came to know from some lady that Prem Dass and Kashmir Chand had some quarrel during the

previous night. He had not gone to the spot at the time of quarrel during night. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he has deposed that he heard the noise of quarrel coming from the house of Prem Dass, Bhagwan and Kashmir Chand and he went there alongwith Deepo Chaudhary and Rajinder alias Pappu. His house was just behind the house of Bhagwan Dass. He has denied the suggestion that he told the police that accused Gulshan, Gulzar, Kashmir Chand and Nirmala Devi were assaulting Bhagwan, Prem, Madan and Man Chand in the courtyard of Bhagwan Dass. He has also denied the suggestion that accused Gulzar was having Danda and accused Gulshan was having hockey stick and assaulting these persons. He has also denied the suggestion that he alongwith Deepo Chaudhary intervened and saved the injured. He has also denied the suggestion that Bhagwan Dass, Prem Dass, Madan Lal and Man Chand had sustained injuries. He has also denied the suggestion that accused persons assaulted Prem Dass in his presence and caused injury on his head, due to which he died.

14. Statements of PW-8 Purshotam Lal, PW-9 Surjeet Singh, PW-10 Paramjeet Singh and PW-11 Trilok Raj are formal in nature.

15. PW-12 Dr. K.L. Kapoor has conducted post mortem and issued post mortem report Ext. PW-12/B. According to him, accused died due to Hypovolemic shock and respiratory failure secondary to right lung puncture and liver injury secondary to direct trauma to right fractured lower ribs. The time between injury and death was within one hour and post mortem was conducted within less than 24 hours. According to him, the injuries mentioned in PMR could be caused by Danda and hockey sticks.

16. PW-13 Prem Chand has deposed that on 22.10.2009, after registration of FIR, he received the file for investigation. He visited the spot. He took photographs. He prepared the inquest report. The hockey sticks and Danda were taken into possession vide memo Ext. PW-2/B. He got the post mortem of the dead body conducted.

17. Statement of PW-14 Kamal Kumar is formal in nature.

18. What emerges from the analysis of the statements of the witnesses mentioned herein above is that the complainant, accused and deceased are related to each other. PW-2 Madan Lal alongwith his family members was thrashing the paddy. The passage lies between the houses of the accused and complainant party. PW-2 Madan Lal asked them to remove the Bajri lying on the passage. Accused came on the spot. Gulshan gave beatings to them with hockey stick and accused Gulzar gave them beatings with Danda. They received injuries. They went to the Police Station. They came back to their home and found Prem Dass has died. Thereafter, FIR Ext. PW-2/A was registered. Hockey stick Ext. P-1 and Danda Ext. P-2 were taken into possession vide memo Ext. PW-2/B. The cause of death as per PMR Ext. PW-12/B is due to Hypo volumic shock and respirator failure secondary to right lung puncture and liver injury secondary to direct trauma to right fractured lower ribs. The time between injury and death was within one hour and post mortem was conducted within less than 24 hours. According to him, the injuries mentioned in PMR could be caused by Danda and hockey sticks.

19. Accused persons were also medically examined by PW-3 Dr. Navneet Chauhan. She issued MLCs Ext. PW-3/A, Ext. PW-3/B, Ext. PW-3/C and Ext. PW-3/D. It is evident from the MLC's that accused persons have also received injuries, as noticed herein above. The cause of quarrel is stacking of Bajri, which was lying between the houses of the complainant and accused. PW-2 Madan Lal had asked accused party to remove the Bajri. It led to arguments and thereafter the quarrel took place. It was not a pre-meditated act on behalf of the accused. According to PW-2 Madan Lal, quarrel lasted for half an hour and according to PW-4 Man Chand the quarrel lasted for one hour. They were rescued by

Rajinder Kumar, PW-7 Karam Chand and PW-6 Deepo Devi. Rajinder Kumar has not been examined by the prosecution. PW-6 Deepo Devi and PW-7 Karam Chand have not supported the case of prosecution. They were declared hostile and cross-examined by the learned Public Prosecutor. Other independent witness Rajinder Kumar has not been examined.

20. Now, the Court is left with only the statements of closely related witnesses i.e. PW-2 Madan Lal and PW-4 Man Chand. Statements of the related witnesses can be taken into consideration but after due caution and care.

21. Mr. Manoj Pathak, learned advocate for the appellant has vehemently argued that it is not a case of murder. According to him, it was not a premeditated act. It was a sudden fight in the heat of passion. We have already noticed that it was not a premeditated act. The complainant party had asked the accused party to remove the Bajri which led to fight in the heat of passion. It has come in the evidence that complainant was asking the accused to remove the Bajri immediately. It was 10.00 pm at night. It was not expected from the accused to remove the Bajri during night at 10.00 P.M. The complainant party insisted at night the accused to remove the Bajri, which led to a sudden fight, thus the offence would be covered under Exception (4) of Section 300 of the Indian Penal Code as far as accused Gulshan and Gulzar are concerned. The evidence led qua the role of accused Kashmir Singh Nirmala is very sketchy and vague. Even if it is assumed that accused Kashmir Singh and Nirmla Devi have given kick and fist blows, it could not lead to fracture of the ribs of the deceased. Kashmir Singh was 61 years old at the time of recording of his statement under Section 313 CrPC on 26.11.2011 and incident is dated 21.10.2009, thus he was 59 years of age at the time of incident. Nirmala Devi was 56 years at the time of recording of her statement under section 313 CrPC on 16.11.2011 and was 54 years on the date of incident on 21.10.2009. The prosecution has also not explained the injuries received by the accused. The prosecution has not led any evidence to whom beatings were given by accused Kashmir Singh and Nirmala Devi with fist and kick blows. There is only a bald assertion that they started giving beatings with fist and kick blows. Thus, the prosecution has failed to prove the case beyond reasonable doubt as far as accused Kashmir Singh and Nirmala Devi under sections 302 and 323 of the Indian Penal Code is concerned.

22. We have scanned the entire evidence and are of the considered opinion that it is not a case of murder. However, accused Gulshan and Gulzar knew that injuries caused by them to the deceased could cause death. Thus, the case would fall within the ambit of section 304 Part-II of the Indian Penal Code. Accused Gulshan and Gulzar have rightly been convicted under section 323 of the Indian Penal Code for the injuries caused by them to the complainant party as per medical evidence of PW-1 Dr. Anjali Gupta.

23. Accordingly, the appeal is partly allowed. Accused Kashmir Singh and Nirmala Devi are acquitted of the charges framed against them by giving them benefit of doubt. Accused Gulshan and Gulzar are convicted under Section 304 Part-II of the Indian Penal Code, instead of Section 302 of the Indian Penal Code. Conviction of accused Gulshan and Gulzar under section 323 IPC is upheld. Accused Gulshan and Gulzar be produced before the Court on **17.6.2015** to be heard on the quantum of sentence. Fine amount, if already deposited by accused Kashmir Singh and Nirmala Devi be refunded to them. Since both the accused i.e. Kashmir Singh and Nirmala Devi are in jail, they be released forthwith, if not required in any other case.

24. The Registry is directed to prepare the release warrant of accused Kashmir Singh and Nirmala Devi and send the same to the Superintendent of Jail concerned in conformity with this judgment forthwith.

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

Mohinder Kumar .....Petitioner.
Versus
Union of India and others .....Respondents.

CWP No.6161 of 2014.
Judgment reserved on: 26.05.2015.
Date of decision: June 04, 2015.

Constitution of India, 1950- Article 226- Petitioner was appointed as Lower Division Clerk on contract basis- Department invited application for three posts of Lower Division Clerk for which the petitioner also applied- his case was rejected on the ground that he was over age- when his contract was not renewed, he filed an application before Central Administrative Tribunal which was also dismissed - selected candidates were not arrayed as party- this application was not filed before the High court, therefore, it could not be said as to what plea was taken by the petitioner before the Court-in these circumstances, petition dismissed. (Para-5 to 12)

Cases referred:

Prabodh Verma and others versus State of Uttar Pradesh and others AIR 1985 SC 167
Tridip Kumar Dingal versus State of West Bengal and others (2009) 1 SCC 768
Public Service Commission, Uttaranchal versus Mamta Bisht and others (2010) 12 SCC 204

For the Petitioner : Ms.Ranjana Parmar, Advocate.
For the Respondents: Mr.Ashok Sharma, Assistant Solicitor General of India, for respondent No.1.
Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan and Mr.Romesh Verma, Additional Advocate Generals, for respondent No.2
Mr.K.B.Khajuria, Advocate, for respondent No.3 and 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

By medium of this writ petition, the petitioner has questioned the order passed by the Central Administrative Tribunal whereby the petition filed (O.A.No.1387-HP-2013) was dismissed.

2. The facts as set out in the petition are that the petitioner was appointed by respondent No.3 on 20.08.2002 as Lower Division Clerk on contract basis. The respondent-department on 11.12.2012 invited applications for the purpose of appointment of three posts of Lower Division Clerk for which the petitioner also applied. However, his case was rejected on the ground of his being overage. When the contract of the petitioner was not being renewed, he filed writ petition bearing CWP No.6124 of 2012 which ultimately was withdrawn by him on 18.09.2013 with liberty to approach a competent authority. The petitioner thereafter approached the Central Administrative Tribunal, but the Tribunal too dismissed the petition.

3. The petitioner has not cared to place on record the copy of the petition (original application) whereby it could be inferred as to what exactly were the reliefs and the grounds taken in such application. But, insofar as the present petition is concerned, the petitioner has sought regularization of his services and for quashing the order passed by the Tribunal and has further prayed for directions for reinstatement since his services have been terminated in compliance to the impugned order of the Tribunal.

4. In response to petition, respondents No.3 and 4 have filed their reply wherein it has been averred that the petitioner cannot claim regularization as per the regularization policy framed by the State of Himachal Pradesh since the employees of the Institution are governed by the Recruitment and Promotion Rules of the Central Government. It is further averred that since the petitioner was overage, his case could not be considered for regularization. As per the advertisement, the maximum age limit was 28 years as on 01.07.2011 and the petitioner admittedly was more than 28 years on the cut-off date.

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

5. Ms.Ranjana Parmar, learned counsel for the petitioner has vehemently argued that once the age relaxation is prescribed in the Manual on Establishment and Administration for Central Government Offices (in short 'Manual') wherein the age relaxation has been granted to all those casual labourers for absorption in the regular establishment in Group-D. The learned Tribunal ought to have considered this and rendered a finding thereupon.

6. We cannot agree with such submissions. In absence of the original application filed before the Tribunal, we are not in a position to ascertain as to whether this ground was infact taken before the Tribunal. Nonetheless, even in case the present petition is perused, then nowhere in the entire petition has the petitioner made a whisper regarding the applicability of these rules so as to afford a fair chance to the respondents to rebut the same.

7. Further, the contention of the petitioner that the question of relaxation of age was not dealt with by the Tribunal is not supported by the record because the Tribunal in para-10 of its judgment has categorically held as follows:-

> ***".....In so far as relaxation in age is concerned, the relevant selections have not even been called in question by the applicants nor any relief has been claimed in that regard...."***

8. No exception can be taken to this finding of the Tribunal because it cannot be disputed that the selected candidates are necessary parties as they would be only ones, who would be directly affected by the outcome of this litigation. It is also equally settled that no adverse order can be passed against a person, who is not made party to the litigation.

9. In ***Prabodh Verma and others*** *versus* ***State of Uttar Pradesh and others AIR 1985 SC 167*** and ***Tridip Kumar Dingal*** *versus* ***State of West Bengal and others (2009) 1 SCC 768***, it has been held that if a person challenges the selection process, successful candidate or atleast some of them are necessary parties.

10. In ***Public Service Commission, Uttaranchal*** *versus* ***Mamta Bisht and others (2010) 12 SCC 204*** while dealing with the concept of necessary parties and effect of non impleadment of such party in the matter when the selection process is assailed, the Hon'ble Supreme Court observed thus:-

> ***"9. In case Respondent 1 wanted her selection against the reserved category vacancy, the last selected candidate in that category was a***

> ***necessary party and without impleading her, the writ petition could not have been entertained by the High Court in view of the law laid down by nearly a Constitution Bench of this Court in Udit Narain Singh Malpaharia v. Board of Revenue AIR 1963 SC 786, wherein the Court has explained the distinction between necessary party, proper party and pro forma party and further held that if a person who is likely to suffer from the order of the court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice. More so, proviso to Order 1, Rule 9 of the Code of Civil Procedure, 1908 (hereinafter called "CPC") provides that non-joinder of necessary party be fatal. Undoubtedly, provisions of CPC are not applicable in writ jurisdiction by virtue of the provision of Section 141 CPC but the principles enshrined therein are applicable. (Vide Gulabchand Chhotalal Parikh v. State of Gujarat AIR 1965 SC 1153, Babubhai Muljibhai Patel v. Nandlal Khodidas Barot (1974) 2 SCC 706 and Sarguja Transport Service v. STAT (1987) 1 SCC 5.).***
>
> ***10. In Prabodh Verma v. State of U.P. AIR 1985 SC 167 and Tridip Kumar Dingal v. State of W.B.(2009) 1 SCC 768, it has been held that if a person challenges the selection process, successful candidates or at least some of them are necessary parties."***

11. In absence of the selected candidates, it is immaterial as to whether the petitioner is below 40 years or is duly qualified under the Manual.

12. Even otherwise, in absence of the original application filed before the Tribunal, we have no other option, save and except, to draw an adverse inference against the petitioner. After-all, the petitioner was well aware that this Court while adjudicating this petition is only exercising the powers of judicial review and, therefore, it was incumbent upon him to have placed on record the entire material on the basis of which the Tribunal rendered its decision.

13. Having said so, we find no merit in this petition and the same is accordingly dismissed alongwith pending application, if any, leaving the parties to bear their own costs.

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

Shri Ajai Srivastava ……Petitioner.

Vs.

State of Himachal Pradesh and others …..Respondents.

CW PIL No. 01 of 2015
Reserved on : 11.05.2015
Date of decision: 05.06.2015

Constitution of India, 1950- Article 226- A letter was received stating there are 17 inmates in the Old Age Home at Basantpur- out of them, four inmates are severely handicapped- it was prayed that these inmates be given disability/rehabilitation pension, a separate rehabilitation centre should be opened by the State for the helpless disabled persons with facility to provide some vocational training and that inmates suffering from mental illness be

shifted to the Hospital of Mental Health and Rehabilitation- held, that it is the constitutional duty of the State Government to look after the interests of shelter less, disabled, destitute, mentally retarded person by providing them necessary assistance- old age pension has been denied to two persons on the ground that they are not citizens of India - the policy enacted by the State Government to deny the pension on the ground of domicile is arbitrary and unreasonable- direction issued to the State to open separate home for adult disabled and mentally retarded and to check whether basic amenities are being provided- further direction issued to provide vocational training, disability allowance and to release old age pension. (Para-5 to 9)

For the petitioner: Mr. C. N. Singh, Advocate as Amicus Curiae.
For the respondents: Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

The Court has taken cognizance of the letter, dated 29.12.2014, addressed to Hon'ble the Chief Justice by Shri Ajai Srivastava, Honorary Chairman, Umang Foundation, whereby the questions of vital public importance have been raised.

2. In India, 95 million people are above the age of 60 and by the year 2025, nearly 80 million more will be added to this bracket of population. There are about 8 million people who are currently above the age of 80 years. It is the need of hour to provide them with shelter, food, clothing and medical care. The old people are leading isolated lives due to change in value system and of course due to economic considerations. It is the duty of all of us to restore their dignity in their twilight.

3. According to the averments made in the letter, dated 29.12.2014, there are 17 inmates in the Old Age Home at Basantpur, District Shimla, run by the H.P. State Social Welfare Advisory Board. Out of them, four inmates, namely, Mr. Sonam Bahadur, Mr. Surat Ram, Mr. Ram Singh and Ms. Krishna are severely handicapped. They are in the age group of 40-50 years. Both legs of Mr. Sonam Bahadur were amputated after he met with a major fire accident while he was working as a labourer with a Contractor of H.P. State Forest Corporation in District Kullu. He was treated at Indira Gandhi Medical College, Shimla. However, neither the Contractor nor the State Government paid any compensation to him. He is living in the Old Age Home for the last about 13 years. He has also not been paid any disability pension. Mr. Surat Ram had a brain stroke leading to paralysis. He was admitted in the Old Age Home about one year ago. He has also been denied the disability pension. Mr. Ram Singh is living in the Home for the last eight years. He has also been denied the disability pension by the State. Ms. Krishna is mentally retarded. There is no skilled employee to tackle with such persons in the Home. She has also been denied the disability pension. Petitioner has prayed that these inmates be given disability/rehabilitation pension. Petitioner has also prayed that a separate rehabilitation centre should be opened by the State for the helpless disabled persons with facility to provide them some vocational training. It is also prayed that the inmates also need psychological counseling. The petitioner has also prayed that the inmates who suffers from serious mental sickness, should be shifted to the Hospital for Mental Health and Rehabilitation, Boileauganj, Shimla. Petitioner has further prayed that a separate rehabilitation centre is required for the helpless persons with mental retardation.

4. Respondents No. 1, 2, 5, 6 and 8 have filed their replies. According to the averments made in the reply filed by respondents No. 1 to 5 and 6, it is stated that the Old Age Home, Basantpur is being run by the H.P. State Social Welfare Advisory Board, which is a voluntary organization. The State Government provides grant-in-aid to the concerned organization. It is admitted in the reply that there is no separate Home for the adult disabled shelter less and destitute persons in the State. A Home for Mental Retarded adult males has been established at Nahan by the Aastha Welfare Society, Nahan and the Government is providing grant-in-aid to the NGO. Similarly, the efforts are also being made to run Home for Mental Retarded females in the State. But, for the time being, these persons are lodged in the Old Age Home. The feasibility and mechanism for running/opening separate home for shelter less in a need of immediate shelter is under active deliberation/consideration of the State Government. The Secretary, H.P. State Social Advisory Board was directed to provide all the basic facilities to all the inmates lodged in the Home vide letter, dated 21.02.2015. The District Welfare Officer, Shimla was directed to take immediate steps for providing Disability Rehabilitation Allowance/Old Age Pension to all the eligible inmates admitted in the Home and to inspect the said Home regularly. According to the reply, there are 19 inmates lodged in the Old Age Home Basantpur, out of which 14 are old aged inmates and 5 are physically handicapped inmates. Out of 14 old aged inmates, 12 inmates are getting Old Age Pension. Case of one Saleem for grant of Old Age Pension is under consideration. According to the provisions of Social Security Pension Scheme, Old Age Pension/Disability Relief Allowance can only be provided to Bonafide Himachalis. Since Smt. Ganga, an old aged inmate belongs to Nepal and not being a bonafide Himachali, is not eligible for old age pension as per the provisions of Social Security Pension Scheme. Similarly, out of five disabled inmates, one Smt. Meera Wati is getting Widow Pension and disability certificate of two inmates, namely, Smt. Krishna Devi and Sh. Surat Ram has been obtained from the District Medical Board and the cases of these two inmates are being processed for granting Disabled Relief Allowance. Two disabled inmates, S/Sh. Sanam Bahadur and Ram Singh belong to Nepal and are not bonafide Himachalis and as per Social Security Pension Scheme, both are not eligible for getting Disabled Relief Allowance. The Managing Director, H.P. Forest Corporation has been requested to make proper inquiry of the accident relating to Mr. Sonam Bahadur vide letter, dated 21.02.2015. A Counsellor has been appointed by the H.P. Social Welfare Board and the counseling is provided to the needy inmates twice in a month. Regular health check up of all the inmates is conducted once in a month by the Medical Officer, Community Health Centre, Sunni. Medical health check up of four mentally sick/mentally retarded inmates is conducted by the Specialist Medical Officer of Indira Gandhi Medical College & Hospital, Shimla. The relations of the inmates are not known, but the efforts are made to trace out the relations of the inmates with the help of police administration.

5. According to Preamble of The Constitution of India, India is a Sovereign Socialist Secular Democratic Republic. The respondent-State is a welfare State. It is the duty cast upon the respondent-State under Article 41 of the Constitution of India that it shall within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want. It is the constitutional duty of the State Government to look after the interests of shelter less, disabled, destitute, mentally retarded males/females by providing them necessary assistance. Out of 14 old aged inmates, 5 are physically handicapped inmates. Only 12 inmates are getting Old Age Pension. The Old Age Pension has been denied to Smt. Ganga, S/Sh. Sanam Bahadur and Ram Singh only for the reason that they are not Indian citizen. Cases of Smt. Krishna Devi and Sh. Surat Ram are under consideration for granting them Disabled Relief Allowance.

6. All the inmates of the Old Age Home belong to one group and they cannot be segregated only on the basis of their domicile or citizenship. They are there due to adverse circumstances beyond their control. The basic needs of bonafide and non-bonafide Himachalis are the same. The action of the respondents of denying the Old Age Pension/ disability relief allowance to the non-bonafide Himachali inmates of the Old Age Home is unreasonable and arbitrary.

7. We are of the considered view that all the persons lodged in the Old Age Home are entitled to Disabled Relief Allowance/Old Age Pension. There is nobody to look after them and the efforts made by the authorities concerned to trace out their relations are futile. There is no separate Home for the adult disabled shelter less and destitute persons in the State. There is no Home for Mental Retarded females in the State. But, for the time being, these persons are lodged in the Old Age Home. The State Government is seized of the matter and the feasibility and mechanism for running/opening separate home for shelter less is under active deliberation/consideration of the State Government, as noticed hereinabove.

8. The inmates of the Old Age Home have a right to life under Article 21 of the Constitution of India. They are required to be provided with disability relief allowance, Old Age Pension, clothes, nutritive food and vocational training. The basic amenities are required to be provided by the State to all the inmates lodged in the State Home in the State of Himachal Pradesh without any discrimination/segregation.

9. Accordingly, we issue the following mandatory directions to the respondent No. 1:

1. A separate Home for adult disabled shelter less and destitute persons in the State be established within a period of one year.
2. A separate Home for mentally retarded males and females be established within a period of one year from today.
3. Smt. Ganga be released Old Age Pension within a period of three weeks from today.
4. S/Sh. Sanam Bahadur and Ram Singh be provided with Disability Relief Allowance within a period of three weeks from today.
5. Cases of Sh. Saleem, Meera Wati and Krishna Devi be processed within a period of two weeks and the Old Age Pension be released to them.
6. The Principal Secretary (Social Justice & Empowerment), Government of Himachal Pradesh is directed to release adequate funds for the construction of a separate Home for adult disabled shelter less and destitute persons in the State and for the construction of a separate Home for mentally retarded males and females within a period of eight weeks from today.
7. The Director Welfare, Himachal Pradesh, Shimla, i.e., respondent No. 5 is directed to visit the Old Age Home Basantpur, Shimla, Old Age Home Dari, Dharamshala, Old Age Home Bhangrotu, Mandi and Old Age Home Alleo, New Manali, Kullu every month to look into whether the basic amenities are being provided to the inmates lodged therein, if not, the same be made available within a period of two weeks after visiting the Home.

8. The Chief Secretary, Government of Himachal Pradesh is directed to issue necessary directions to the H.P. Civil Supply Corporation to provide adequate *rations* for all the inmates of Old Age Home Basantpur, Shimla, Old Age Home Dari, Dharamshala, Old Age Home Bhangrotu, Mandi and Old Age Home Alleo, New Manali, Kullu at subsidized rates.
9. The Director General of Police is directed to constitute a special team headed by a officer not below the rank of Superintendent of Polcie to find out the relations of the inmates of Old Age Home Basantpur, Shimla, Old Age Home Dari, Dharamshala, Old Age Home Bhangrotu, Mandi and Old Age Home Alleo, New Manali, Kullu
10. The State Government is also directed to provide necessary vocational training to the inmates and also provide them atleast one newspaper in English vernacular and one magazine.
11. The Chief Secretary, Government of Himachal Pradesh shall be personally responsible to implement and execute the directions made hereinabove, in letter and spirit.

10. We place on record our appreciation for the sincere efforts made by the petitioner by bringing to the notice of the Court the conditions prevailing in the Old Age Homes in the State of Himachal Pradesh. The Umang Foundation is awarded costs of rupees one lac. It is made clear that the costs shall only be used for the welfare of disabled, shelter less, destitutes, mentally retarded males/females in the State of Himachal Pradesh.

11. In the light of the aforesaid observations/directions, the petition stands disposed of.

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

Court on its own motion ……Petitioner.
Vs.
State of H.P. and others …..Respondents.

CW PIL No. 03 of 2014
Reserved on : 11.05.2015
Date of decision: 05.06.2015

Constitution of India, 1950- Article 226- Status report filed regarding the condition of various institutions for Mentally Challenged and Differently-abled Children/Adults established throughout the State- report pointed out many deficiencies- direction issued to remove the deficiencies- further, direction issued to establish one institution for mentally retarded children in cluster of three Districts- direction issued to Municipal Council, Nagar Panchayats and the State to accord "No Objection Certificate" to cut/remove the trees for constructing public utility building by imposing necessary condition. (Para-2 to 23)

Cases referred:
Air India Statutory Corporation and others Vs. United Labour Union and others (1997) 9 Supreme Court Cases 377

For the petitioner: Mr. Dilip Sharma, Senior Advocate as Amicus Curiae with Ms. Nishi Goel, Advocate.

For the respondents: Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

The respondents were directed to file the status reports vide orders, dated 23.04.2014, 12.05.2014 and 03.06.2014. In sequel to the directions issued by this Court, the respondents No. 1 to 4 have filed a detailed reply dealing with all the institutions for Mentally Challenged and Differently Abled Children/Adults established throughout the State of Himachal Pradesh. In District Bilaspur, the institution by the name of Chetna Sanstha, Bilaspur is run by the NGO. According to the averments made in this affidavit, the NGO. has removed all the deficiencies pointed out by the learned District and Sessions, Judge, Bilaspur during his visit to the Centre on 10.02.2014. The NGO Chetna runs three Day Care centres at Bilaspur, Ghumarwin and Jhandutta, respectively for mentally challenged children. Eighty mentally challenged children enrolled in these centres. This NGO has engaged twenty staff members including two Drivers. These institutions were also inspected by the District Welfare Officer, Bilaspur on 11.06.2014. The mentally challenged children with disability of 40% and above are admitted in these centres as per PWDs. Act, 1995 and the NGO has prepared guideline for admission in these day care centres. The regular medical checkups have been started in these centres and the last medical checkups of the special children were conducted at Day Care Centres Bilaspur, Ghumarwin and Jhanduta on 13.05.2014, 03.06.2014 and 06.06.2014, respectively. Accordingly, the Chetna Sanstha, Bilaspur, through the District Welfare Officer, Bilaspur is directed to conduct the medical checkups of special children every month and maintain the record of the same.

2. Asha Kiran Viklang Shiksha Sansthan, Kothi, Tehsil Ghumarwin, District Bilasspur is being run by the NGO. According to the averments made in the affidavit, the NGO has removed all the deficiencies pointed out by the learned District & Sessions Judge during his last visit to the NGO centre on 10.02.2014. The rented building cannot be made barrier free, therefore, the NGO has already started the work of its own building at Kothi near Palsoti and the construction of which will be completed within six months and the same will be made barrier free. The NGO has enrolled 20 differently abled children (including 13 mentally challenged and 7 hearing impaired) alongwith 7 staff members. The NGO has provided adequate and proper bedding to the inmates. The personal files of all 20 children with educational profiles and health charts have been maintained. Regular medical checkup of all the children are being done and the latest check up was conducted on 16.05.2014 by the Block Medical Officer, Ghumarwin. Free medicines like calcium, iron and other nutrition supplements etc. are being distributed to the children regularly. The NGO has maintained the Diet Chart. Accordingly, the Asha Kiran Viklang Shiksha Sansthan, Kothi, Tehsil Ghumarwin, District Bilaspur through District Welfare Officer, Bilaspur is directed to ensure that the new building is got constructed, if not already constructed, within a period of six months from today. It must conform all the norms laid down as per The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

3. In District Kullu, the Chander Abha Mahila Kalyan Sarwari, Kullu is being run by the NGO. The District and Sessions Judge, Kullu conducted the inspection on 03.02.2014 and 04.02.2014. The inspection of the institution was conducted by the District

Welfare Officer, Kullu on 17.06.2014. This voluntary organization is providing formal education and residential facility up to senior secondary level for Visually Impaired Children. During the inspection of the institution, the building, kitchen, bed rooms and class rooms found neat and clean. This NGO is registered under The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The NGO also avails grant-in-aid from the GOI under "*Deen Dayal Rehabilitation Scheme"*. The NGO is running the institution properly. The District Welfare Officer, Kullu is directed to visit the Centre every month.

4. Nav Chetna Parents Association for the mentally challenged, Kullu is also run by the NGO. The inspection of the institution was conducted by the District Welfare Officer, Kullu on 17.06.2014. It is a day care institution. The NGO is registered under the Indian Societies Registration Act, 1860. During the inspection of the institution, the building/rooms found neat and clean. The District Welfare Officer, Kullu is directed to visit the institution every month.

5. Now, we will advert to District Shimla. In District Shimla, there is a Home for visually and hearing impaired (boys), Dhalli. It is run by the H.P. Council for Child Welfare, Shimla. The Additional Deputy Commissioner, Shimla has carried out the inspection on 11.06.2014. The Himachal Pradesh Council for Child Welfare has initiated the departmental action as per the procedure against the defaulting staff and have issued warning to all the absentee employees. However, the floors and walls of kitchen and Home need immediate repair. The District Administration has directed the Block Development Officer, Mashobra to prepare the estimates for undertaking immediate repair work. There is scarcity of space for the hostel of both the institutions. The matter was accordingly taken up with the Indian Red Cross Society to hand over the adjoining two buildings to Himachal Pradesh Council for Child Welfare to ease out the space problem. The Indian Red Cross Society agreed and handed over the building to HPCCW on 23.6.2014 on nominal monthly rent of Rs.15,000/-. All the inmates earlier kept in School/home in Dhalli, as mentioned in the report of learned Chief Judicial Magistrate have been shifted to the new Home at Nahan. Regarding establishing separate Home for Mentally retarded females, the Government of Himachal Pradesh has already granted the approval for starting the same through the Prem Ashram Una. It is run by Sister of Charity. Accordingly, we direct the Deputy Commissioner, Shimla to ensure that the floors and walls of kitchen are repaired within a period of three months from today. We also direct the Red Cross Society to hand over the adjoining two buildings to Himachal Pradesh Council for Child Welfare, if not already handed over, within a period of three months from today to be utilized by the Aashram.

6. Learned District & Sessions Judge, Chamba has carried out the inspection of Bal Ashram-cum-Children Home Mehla, Gujjar Ashram Kalsuin on 26.05.2014, 27.05.2014 and 19.06.2014. Bal Ashram-cum-children Home Mehla is run by the HP Council for Child Welfare. There are no Benches and Tables for the inmates to take their meals. The Deputy Commissioner, Chamba is directed to ensure that the Benches and Tables are provided to the inmates of Bal Ashram-cum Children Home Mehla to take their meals.

7. Balika Ashram-cum-Children Home Chilli is also run by the HP Council for Child Welfare. But, the proposed building was to be financed by the NHPC. The Council was required to take up the matter with the Government for the purpose of construction of building by NHPC. Accordingly, the H.P. Council for Child Welfare is directed to take up the matter with the State Government. The Deputy Commissioner, Chamba is directed to process the matter for making the land available to the HP Council for Child Welfare. Thereafter, the NHPC shall construct the building as per the norms within a period of one year from today.

8. The Balika Ashram-cum-Children Home Chamba is being run by the Mahila Kalyan Mandal Chamba. Stock register is maintained regularly in the Ashram. All facilities are being provided to the inmates regularly as per the norms. In Gujjar Ashram Kalsuin, Chamba, rooms, kitchen and bath rooms are regularly cleaned by the Ashram staff. The Ashram is running in Govt. building. But, there is some leakage of roof during rainy season. Benches and tables were not available in the Home. The Deputy Commissioner, Chamba is directed to ensure that the leakage is plugged at Gujjar Ashram Kalsuin, Chamba. Similarly, the Benches and tables be provided to the inmates of the Gujjar Ashram Kalasuin, Chamba. Gujjar Ashram Sahoo, Chamba, is being run in the departmental building. There are some minor leakages from the roof and floor of the Ashram which requires some repairs. Solar system for heating water also needs some repairs. The estimates be prepared and submitted to the Deputy Commissioner, Chamba for taking necessary steps for undertaking the repair work. The Deputy Commissioner, Chamba is directed to ensure the plugging of the leakage. He is also directed to ensure that the proper repairs are undertaken within a period of four weeks from today.

9. Bal Balika Ashram-cum-Children Home Killar, Pangi is being run by the Women & Child Development in Government building, which requires some repairs No Benches and Tables are available in the Ashram. Estimates have been prepared. Accordingly, the Deputy Commissioner is directed to do the needful within a period of three weeks from today.

10. Learned District & Sessions Judge, Hamirpur has visited the Children Home Sujanpur. There is immediate need for minor repair, replacement of the doors of the bath room etc., white wash and painting etc. Accordingly, the Deputy Commissioner, Hamirpur, H.P. is directed to ensure that minor repairs are undertaken, the doors of the bath room are replaced, white washing and painting is undertaken within a period of three months. The Chief Medical Officer, Hamirpur is directed to depute a Medical Officer in the Home for medical examination of the inmates fortnightly.

11. The Balika Ashram, Garli was inspected by the learned District and Sessions Judge, Kangra on 06.02.2014. 14 girls are residing in the Home, out of which, 13 are studying in different classes in Government High School (Girls), Garli and Government Primary School (Girls), Garli. According to the affidavit, dated 20.06.2014, filed by the Deputy Commissioner, Kangra, the construction of the new building for the Balika Ashram has been undertaken and the funds to the tune of Rs.3,14,56,000/- have been provided for this purpose. Accordingly, we direct that the construction of the building will be carried out within a period of one year from today.

12. In District Kinnaur, there is one Children Home, namely, Balika Ashram-cum-Children Home Kalpa. The accommodation was found to be sufficient as per the report of the District and Sessions Judge, Kinnaur, dated 17.06.2014. Sh. Mathura Dass was appointed as Warden. The District Welfare Officer, Kinnaur is directed to ensure that some female Warden is appointed in Balika Ashram-cum-Children Home Kalpa. The Deputy Commissioner, Kinnaur is directed that the repairs of the kitchen and dining hall be undertaken within a period of three weeks. Minor repairs like installing of grills in the upper rooms and plastering work on one of walls be carried out through the Deputy Commissioner, Kinnaur within a period of six weeks from today.

13. In District Kullu, there is a Bal Ashram Kalehali. It was inspected by the learned District and Sessions Judge, Kullu on 29.05.2014 and 16.06.2014. According to the affidavit filed by the Deputy Commissioner, Kullu, dated 22.06.2014. The department has located a suitable piece of Government land to construct a new building. The process to

transfer land in the name of the department has been initiated. The Deputy Commissioner, Kullu is directed to ensure the transfer of the land for the purpose of construction of new building in order to shift the inmates to the new building. The construction of the building be completed within a period of one year.

14. In District Mandi, the learned District & Sessions Judge, Mandi has visited the Divya Manv Jyoti Anathalya Dehar and the Child Care Institution, Sundernagar. The post of Superintendent was lying vacant. The Deputy Commissioner, Mandi is directed to ensure that the Superintendent is appointed within a period of four weeks from today.

15. No shortcomings were found in Bal Ashram-cum-Children Home Tutikandi. The Deputy Commissioner, Shimla has also filed the latest status report on 28.06.2014. He has visited the Bal Ashram-cum-Children Home Tutikandi. According to him, four mentally challenged boys residing in Bal Ashram-cum-Children Home Tutikandi have been shifted to Astha Welfare Society. According to his report, Balika Ashram-cum-Children Home Mashobra, was run by the Department of Social Justice & Empowerment. The existing building was in dilapidated condition. A proposal for construction of new building for this Home is under active consideration of the Government. Consequently, the new building as per the initiative already taken, be completed within a period of one year from today and the Deputy Commissioner, Shimla would be the nodal officer to supervise the construction and its early completion.

16. The inspection of Bal Ashram-cum-Children Home Masli was undertaken by the Committee on 11.06.2014. The inspection of the Bal Ashram-cum-Children Home Saharan was undertaken on 10.06.2014. The inspection of Balika Ashram-cum-Children Home Sunni was undertaken on 11.06.2014. The inspection of Balika Ashram-cum-Children Home Durgapur was undertaken on 11.06.2014 and the inspection of Bal Ashram-cum-Children Home Rockwood was undertaken on 11.06.2014. According to the reports, all the facilities were available. However, the Deputy Commissioner, Shimla and District Welfare Officer, Shimla are directed to visit the Ashrams after every three months to ensure that all the basic amenities are provided to the inmates.

17. In District Una, a Special School-cum-Observation Home, Una has been housed in the newly constructed building at Samoorkalan, Una since 09.02.2006. No discrepancy was found during the inspections carried out by the learned District & Sessions Judge, Una on 06.05.2014 and by the Deputy Commissioner, Una.

18. The Deputy Commissioner, Kangra, H.P. has filed a separate status report in respect of Balika Ashram and Homes run for physically challenged persons/mentally retarded persons at Dari, Saliana and Garli. Home for physically disabled persons at Dari is run by the Department of Social Justice and Empowerment through H.P. State Council for Child Welfare, Shimla. The Home is functioning in Government building. It is manned by a regular Principal alongwith five other supporting staff. The School for mentally challenged children, Saliana is being run by the Palampur Rotary Eye Foundation. An Incharge has been appointed by the Palampur Rotary Eye Foundation to look after the School alongwith nine supporting staff. Balika Ashram, Garli is run by the Directorate of Women and Child Development under the department of Social Justice and Empowerment. This Ashram is manned by an Assistant Superintendent alongwith five other supporting staff. The problem of leakage at Dari Home has been rectified.

19. The status report has also been filed on behalf of the Deputy Commissioner, Shimla under his affidavit, dated 8th July, 2014. He has underlined the initiatives taken for

the improvement in the basic amenities. The measures undertaken be completed within a period of three months from today, if not already completed.

20. All the Deputy Commissioners and the District Welfare Officers are directed to ensure the due compliance of the directions issued hereinabove qua Bal Ashrams/Homes situated in the State of Himachal as per the deficiencies pointed out by the learned District & Sessions Judges in their reports and in the reports filed by the Deputy Commissioners from time to time.

21. The State Government has not provided any separate Home for mentally retarded children. In a welfare State, it is duty of the State to provide institutions for mentally retarded children in cluster of three Districts each. This is a very important duty and cannot be left to be managed by the private bodies. Accordingly, the State of Himachal Pradesh is directed to establish at least one institution for the mentally retarded children in a cluster of three Districts as per the geographical and topographical conditions within a period of one year from today and also by providing teaching and non-teaching staff. The State Government is also directed to ensure opening of a new Aashram/Home for physically challenged children throughout the State of Himachal again in the cluster of three Districts within a period of one year. The necessary funds shall be made available by the State Government for construction of all the institutions for mentally retarded and physically challenged children.

22. The Court while dealing with the matter, has come across various instances, whereby the construction of even public utility buildings is held up for want of "No Objection Certificate" to remove the trees. The public utility buildings are to be treated separately vis-à-vis private buildings. We can take judicial notice of the fact that even the construction/execution of the hospital building has been held up due to No Objection Certificate, not being issued promptly by the statutory authorities. The matters concerning public utility buildings are to be addressed with promptitude to reduce the cost of construction. If the permissions are not accorded for months and years together, the costs escalate and it affects the entire society at large. The needy are also deprived of the basic facilities which are proposed to be provided in the new public utility buildings. We have to maintain the balance between the environment and development. Accordingly, we direct the Municipal Corporation, Municipal Council, Nagar Panchayats and the State of H.P. to accord "No Objection Certificate" to cut/remove the trees for the purpose of executing the construction of public utility buildings within a period of three weeks from today, if necessary by visiting the spot. Stringent conditions can also be imposed while granting "No Objection Certificate" for felling/removing the trees. It is made clear, in larger public interest that if the necessary permission is not accorded within a period of three weeks, the Executing Agency shall be permitted to construct the buildings.

23. We have also taken judicial notice of the reckless manner in which the debris is being disposed of while constructing public parking lot near lift, Shimla. Uncontrolled dumping of debris, that too, without any scientific method is destroying the flora and fauna of the area. The debris rolls down towards rivulet affecting the quality of water. The Engineer-in-Chief, Public Works Department, Government of Himachal Pradesh cannot be oblivious to the glaring illegality repeatedly perpetuated by the contractors throughout the State of Himachal Pradesh in the manner in which the debris is being dumped either in rivulets or simply rolled down to the hills. Accordingly, we direct the Engineer-in-Chief to personally visit the site of public parking lot near lift within 24 hours and to ensure that the debris is not rolled down towards the rivulet. This shall be done by him by issuing order in writing and in case there is any defiance of the orders issued by the Engineer-in-Chief, the construction work shall be stopped forthwith. We also direct the Secretary, Public Works

Department to ensure that the debris is not rolled down into the rivulets/ravine/rivers and hill side causing irreparable damage to the fragile environment and ecology of the area throughout the State of Himachal Pradesh. We authorize the Secretary, Public Works Department to stop the construction forthwith if debris is disposed of without identifying the proper dumping site.

24. Their Lordships of the Hon'ble Supreme Court in **Air India Statutory Corporation and others** Vs. **United Labour Union and others** (1997) 9 Supreme Court Cases 377 have held that the Preamble and Article 38 of the Constitution envision social justice as the arch to ensure life to be meaningful and liveable with human dignity. Their Lordships have further held that social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor etc. from handicaps, penury to ward off distress and to make their life liveable, for greater good of the society at large. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation and constitutional goal. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results. Their Lordships have held as under:

> ***"42. The Preamble and Article 38 of the Constitution envision social justice as the arch to ensure life to be meaningful and liveable with human dignity. Jurisprudence is the eye of law giving an insight into the environment of which it is the expression. It relates the law to the spirit of the time and makes it richer. Law is the ultimate aim of every civilized society, as a key system in a given era, to meet the needs and demands of its time. Justice, according to law, comprehends social urge and commitment. The Constitution commands justice, liberty, equality and fraternity as supreme values to usher in the egalitarian social, economic and political democracy. Social justice, equality and dignity of person are cornerstones of social democracy. The concept of "social justice" which the Constitution of India engrafted, consists of diverse principles essential for the orderly growth and development of personality of every citizen. "Social justice" is thus an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species. Social justice is a dynamic device to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and elevate them to the level of equality to live a life with dignity of person. Social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor etc. from handicaps, penury to ward off distress and to make their life liveable, for greater good of the society at large. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation and constitutional goal. Social security, just and humane conditions of work and leisure to workman are part of his meaningful right to life and to achieve self-expression of his personality and to enjoy the life with dignity. The State should provide facility and opportunities to enable them to reach at least minimum standard of health, economic security and civilized living while sharing according to their capacity, social and cultural heritage.***
>
> ***43. In a developing society like ours, steeped with unbridgeable and ever-widening gaps of inequality in status and of***

> ***opportunity, law is a catalyst, rubicon to the poor etc. to reach the ladder of social justice. What is due cannot be ascertained by an absolute standard which keeps changing, depending upon the time, place and circumstances. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor, the workmen, etc. are languishing and to secure dignity of their person. The Constitution, therefore, mandates the State to accord justice to all members of the society in all facets sof human activity. The concept of social justice embeds equality to flavor and enliven the practical content of life. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results. It was accordingly held that right to social justice and right to health are Fundamental Rights. The management was directed to provide health insurance during service and at least 15 years after retirement and periodical tests for protecting the health of workmen."***

25. In the light of the aforesaid observations/directions, the petition stands disposed of.

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

FAOs No. 109, 110, 111, 112,
120, 128 & 157 of 2008
Date of decision: 05.06.2015

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1. **FAO No. 109 of 2008**
   Himachal Road Transport Corporation ...Appellant
   Versus
   Naresh Kumar & others ...Respondents

2. **FAO No. 110 of 2008**
   Himachal Road Transport Corporation ...Appellant
   Versus
   Ganga Ram & others ...Respondents

3. **FAO No. 111 of 2008**
   Himachal Road Transport Corporation ...Appellant
   Versus
   Indira & others ...Respondents

4. **FAO No. 112 of 2008**
   Himachal Road Transport Corporation ...Appellant
   Versus
   Joginder & others ...Respondents

5. **FAO No. 120 of 2008**
   Himachal Road Transport Corporation ...Appellant
   Versus
   Meena & others ...Respondents

6. **FAO No. 112 of 2008**
Himachal Road Transport Corporation ...Appellant
Versus
Krishan Kumar & others ...Respondents

7. **FAO No. 157 of 2008**
Himachal Road Transport Corporation ...Appellant
Versus
Santosh & others ...Respondents

Motor Vehicle Act, 1988- Section 166- A bus hit a group of persons standing near the vehicle bearing registration No. HP-64-0238, parked on the extreme left side of the road with parking lights on, as a result of which, 7 persons sustained injuries and succumbed to the same- Tribunal held that accident was outcome of the contributory negligence of the drivers of the bus and jeep- accordingly, 50% liability was fastened upon the insurer of the jeep as well as HRTC - it was contended that awards were excessive- On scrutiny, some of the awards were found to be excessive which were ordered to be modified and the excess amount was ordered to be refunded to HRTC. (Para-12 to 27)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

FAOs No. 109 & 112 of 2008

For the appellant : Mr. N.K. Thakur, Senior Advocate with Mr. Ramesh Sharma, Advocate.

For the respondents: Mr. Dalip K. Sharma, Advocate, for respondents No. 1 to 3.
Mr. Rakesh Dogra, Advocate, for respondent No. 4.
Mr. Rajinder Thakur, Advocate, for respondent No. 5.
Mr. Deepak Bhasin, Advocate, for respondent No. 6.

FAO No. 110 of 2008

For the appellant : Mr. N.K. Thakur, Senior Advocate with Mr. Ramesh Sharma, Advocate.

For the respondents: Mr. Dalip K. Sharma, Advocate, for respondents No. 1 & 2.
Mr. Rakesh Dogra, Advocate, for respondent No. 3.
Mr. Rajinder Thakur, Advocate, for respondent No. 4.
Mr. Deepak Bhasin, Advocate, for respondent No. 5.

FAOs No. 111, 120 & 157 of 2008

For the appellant : Mr. N.K. Thakur, Senior Advocate with Mr. Ramesh Sharma, Advocate.

For the respondents: Mr. Dalip K. Sharma, Advocate, for respondents No. 1 to 4.
Mr. Rakesh Dogra, Advocate, for respondent No. 5.
Mr. Rajinder Thakur, Advocate, for respondent No. 6.
Mr. Deepak Bhasin, Advocate, for respondent No. 7.

FAO No. 128 of 2008

For the appellant : Mr. N.K. Thakur, Senior Advocate with Mr. Ramesh Sharma, Advocate.

For the respondents: Mr. Dalip K. Sharma, Advocate, for respondent No. 1.
Mr. Rakesh Dogra, Advocate, for respondent No. 2.

Mr. Rajinder Thakur, Advocate, for respondent No. 3.
Mr. Deepak Bhasin, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

A vehicular traffic accident has given birth to these appeals, thus I deem it proper to deal with all these appeals by this common judgment.

2. These appeals are outcome of the awards made by the Motor Accident Claims Tribunal, Solan (hereinafter referred to as 'the Tribunal') in different claim petitions filed by the claimants for grant of compensation, as per the break-ups given in the respective claim petitions (for short 'the impugned awards')

3. It is averred in the claim petitions that driver, namely, Jagdish Chand, has driven the vehicle-bus bearing registration No. HP-06-2824, rashly and negligently, on 12.10.2005, near Shoolini Guest House, at about 1.30 a.m., hit a group of persons standing near vehicle-Jeep bearing registration No. HP-64-0238, parked on the extreme left side of the road with parking lights on, as a result of which, 7 persons sustained injuries and succumbed to the injuries.

4. The respondents resisted the claim petitions on the grounds taken in the respective memo of objections.

5. The Tribunal, on the pleadings of the parties, framed common issues in all the claim petitions. It is apt to reproduce the issues framed in Claim Petition No. 126-S/2 of 2005:-

1. *Whether the death of deceased had been caused on account of rash/negligent driving of the bus by respondent No. 2? ...OPP*
2. *If issue No. 1 is proved in affirmative, to what amount of compensation, the petitioners are entitled to and from whom? ....OPP*
3. *Whether the petition is bad for misstatement of facts and concealment of material facts, if so, its effect? ...OPR-1*
4. *Whether the accident was cause due to rash/negligent act of driver of the Mahindra Utility and petition against respondent No. 1 is not maintainable? ...OPR-1*
5. *Whether Mahindra jeep was being driven in breach of the policy conditions, if so, its effect? OPR-4*
6. *Relief."*

6. The parties have led evidence in all the claim petitions.

7. The Tribunal, after scanning the evidence, oral as well as documentary, came to the conclusion that the accident was outcome of the contributory negligence of the drivers of the bus and jeep. Accordingly, 50% liability was fastened upon the Himachal Road Transport Corporation (for short 'the HRTC') and 50% liability was fastened upon the insurer of the jeep.

8. The claimants, owner-insured and insurer of the offending jeep and drivers of both the vehicles have not questioned any of the impugned awards, on any count, thus, all the impugned awards have attained finality, so far as the same relate to them.

9. Only, the HRTC has questioned the impugned awards on the ground that the Tribunal has fallen in error in holding that its driver was negligent.

10. Learned Counsel for the appellant-HRTC has frankly conceded that finding recorded by the Tribunal that the accident is contributory, stands proved and is not disputed, but stated that the amount awarded is excessive in all the claim petitions. Further stated, that the Tribunal has fallen in error in applying the multiplier, which is not in accordance with the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104** read with **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120** and prayed that amount awarded be slashed.

11. In this background, I deem it proper to deal with the claim petitions one by one.

FAO No. 109 of 2008

12. The Tribunal, after taking the income of the deceased as Rs. 4,000/- per month assessed the loss of dependency to the claimants to the tune of Rs. 48,000/- per annum and applying the multiplier of '18', held the claimants entitled to compensation to the tune of Rs. 8,64,000/-, under the head, loss of dependency'. The Tribunal has also awarded Rs. 15,000/- under the head 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, thus awarded total compensation to the tune of Rs. 8,84,000/-.

13. Admittedly, the age of the deceased was 22 years at the time of accident. The Tribunal applied the multiplier of '18', which is not in consonance with ***Sarla Verma's*** case, *supra.* The multiplier of '15' was to be applied. Thus, the claimants are held entitled to Rs. 4,000/- x 12 = Rs. 48,000 x 15 = Rs. 7,20,000/- under the head 'loss of dependency', Rs. 15,000/- under the head 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, total compensation amounting to the tune of Rs. 7,40,000/-.

FAO No. 110 of 2008

14. The Tribunal has applied the novel method in assessing the compensation. Admittedly, the age of the deceased was 20 years at the time of accident and was ITI Diploma holder. After completing his diploma, he would have made earnings and also would have his own family after solemnizing marriage within 2-3 years. In today's scenario, even the monthly income of a labourer is not less than Rs. 5,000/-. Therefore, it can safely be held that that the income of the deceased was Rs. 5,000/- per month at the time of accident. After deducting 50% towards his personal expenses, the loss of source of dependency towards the claimants can be said to be Rs. 2500/- per month, in view of the ratio laid down by the apex Court in ***Sarla Verma's*** case, *supra.*

15. The Tribunal has wrongly applied the multiplier of '18'. Admittedly, the age of the deceased was 20 years at the time of accident. Therefore, I am of the considered view that the multiplier of '16 is applicable in the present case. Thus, the claimants are held entitled to Rs. 2500 x 12 = Rs. 30,000 x 16 = Rs. 4,80,000/- under the head 'loss of dependency, Rs.15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, total compensation amounting to the tune of Rs. 5,00,000/-.

FAO No. 111 of 2008

16. The Tribunal, after taking the income of the deceased as Rs. 6,000/- per month and deducting one third towards his personal expenses, assessed the loss of dependency to the claimants to the tune of Rs. 48,000/- per annum and applying the multiplier of '14', held the claimants entitled to compensation to the tune of Rs. 6,72,000/-. The Tribunal has also awarded Rs. 15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs.5,000/- under the head 'funeral and other incidental expenses, thus awarded total compensation to the tune of Rs.6,92,000/-.

17. Admittedly, the age of the deceased was 38 years at the time of accident. The multiplier of '14' applied by the Tribunal is just and appropriate in view of the ratio laid down by the apex Court in ***Sarla Verma's*** case, *supra,* needs no interference. Thus, the claimants are held entitled to Rs. 6,72,000/- under the head 'loss of dependency', Rs. 15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, total compensation amounting to the tune of Rs. 6,92,000/- .

FAO No. 112 of 2008

18. The Tribunal, after taking the income of the deceased as Rs.4,000/- per month assessed the loss of dependency to the claimants to the tune of Rs.48,000/- per annum and applying the multiplier of '18', held the claimants entitled to compensation to the tune of Rs.8,64,000/- under the head 'loss of dependency'. The Tribunal has also awarded Rs.15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs.5,000/- under the head 'funeral and other incidental expenses, thus awarded total compensation to the tune of Rs.8,84,000/-.

19. Admittedly, the age of the deceased was 22 years at the time of accident. The Tribunal applied the multiplier of '18', which is not in consonance with ***Sarla Verma's*** case, *supra.* The multiplier of '15' was to be applied. Thus, the claimants are held entitled to Rs.4,000/- x 12 = Rs.48,000 x 15 = Rs.7,20,000/- under the head 'loss of income', Rs.15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs.5,000/- under the head 'funeral and other incidental expenses, total compensation amounting to the tune of Rs.7,40,000/-.

FAO No. 120 of 2008

20. The Tribunal, after taking the income of the deceased as Rs.7,500/- per month and deducting one third towards his personal expenses, assessed the loss of dependency to the claimants to the tune of Rs.60,000/- per annum and applying the multiplier of '15', held the claimants entitled to compensation to the tune of Rs. 9,00,000/- under the head 'loss of dependency'. The Tribunal has also awarded Rs.15,000/- under the head 'conventional charges, loss of love and affection and loss of consortium' and Rs.5,000/- under the head 'funeral and other incidental expenses, thus awarded total compensation to the tune of Rs. 9,20,000/-.

21. The age of the deceased was 30 years at the time of accident. The multiplier of '15' applied by the Tribunal is just and appropriate in view of the ratio laid down by the apex Court in ***Sarla Verma's*** case, *supra,* needs no interference. Thus, the claimants are held entitled to Rs. 9,00,000/- under the head 'loss of dependency', Rs. 15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, total compensation amounting to the tune of Rs. 9,20,000/- .

FAO No. 128 of 2008

22. The Tribunal, after taking the income of the deceased as Rs. 7,000/- per month and deducting one third towards his personal expenses, assessed the loss of dependency to the claimants to the tune of Rs. 55,800/- per annum and applying the multiplier of '12', held the claimants entitled to compensation to the tune of Rs. 6,69,600/- under the head 'loss of dependency'. The Tribunal has also awarded Rs. 15,000/- under the head 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, thus awarded total compensation to the tune of Rs. 6,89,600/-.

23. Admittedly, the age of the deceased was 42 years at the time of accident. The multiplier of '12' applied by the Tribunal is just and appropriate in view of the ratio laid down by the apex Court in ***Sarla Verma's*** case, *supra,* needs no interference. Thus, the claimants are held entitled to Rs. 6,69,600/- under the head 'loss of dependency', Rs. 15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, total compensation amounting to the tune of Rs. 6,89,600/-.

FAO No. 157 of 2008

24. The Tribunal, after taking the income of the deceased as Rs. 5,000/- per month and deducting one third towards his personal expenses, assessed the loss of dependency to the claimants to the tune of Rs. 48,000/- per annum and applying the multiplier of '15', held the claimants entitled to compensation to the tune of Rs.7,20,000/- under the 'head loss of dependency'. The Tribunal has also awarded Rs.15,000/- under the head 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, thus awarded total compensation to the tune of Rs. 7,40,000/-.

25. Admittedly, the age of the deceased was 32 years at the time of accident. The multiplier of '15' applied by the Tribunal is just and appropriate in view of the ratio laid down by the apex Court in ***Sarla Verma's*** case, *supra,* needs no interference. Thus, the claimants are held entitled to Rs. 7,20,000/- under the head 'loss of dependency', Rs. 15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, total compensation amounting to the tune of Rs. 7,40,000/-.

26. Accordingly, the impugned awards passed in MAC Petitions No. 126-S/2 of 2005, 125-S/2 of 2005 and 123-S/2 of 2005 are modified, as indicated above and the impugned awards passed in MAC Petitions No. 124-S/2 of 2005, 122-S/2 of 2005, 121-S/2 of 2005 and 127-S/2 of 2005, are upheld.

27. The Registry is directed to release the entire compensation amount in favour of claimants, strictly as per the terms and conditions, contained in the impugned awards. The excess amount be released in favour of the appellant-HRTC through cross-cheque.

28. Send down the records after placing a copy of the judgment on each file of the claim petitions.

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

Kehar Singh and another .....Appellants.
Versus
Ashwani Kumar and others ...Respondents

FAO (MVA) No.305 of 2008.
Date of decision: 5th June, 2015.

Motor Vehicle Act, 1988- Section 166- Deceased was aged 19 years at the time of accident – annual income of the deceased was taken as Rs. 15,000/- by the Tribunal- deceased was young person aged 19 years- he was pursuing three years diploma Course in Electrical Engineering and had almost put in two years - by guess work his income can be taken as Rs. 6,000/- p.m.- 50% of the amount is to be deducted towards personal expenses and parents had lost Rs. 3,000/- p.m. as source of dependency - they are entitled to Rs. 3000x12x14= 5,04,000/-, as compensation for loss of dependency and Rs. 30,000/- as funeral charges and compensation for love and affection. (Para-10 and 11)

Cases referred:
Sarla Verma and Ors versus Delhi Transport Corporation and anr. AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and anr. 2013 AIR (SCW) 3120.

For the appellants: Mr. Suneet Goel, Advocate.
For the respondents: Mr.B.C. Verma, Advocate, for respondent No.1.
Respondents No. 2 and 3 ex parte.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *Oral.*

Subject matter of this appeal is the judgment and award dated 8.3.2008, made by the Motor Accident Claims Tribunal, (II), Solan, Camp at Nalagarh in MAC Petition No. 7-NL/2 of 2006, titled *Sh. Kehar Singh and another versus Sh. Ashwani Kumar and others,* whereby compensation to the tune of Rs.2,40,000/- with 9% interest was awarded in favour of the claimants and insurer came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The claimants have lost their son, namely Harpreet Singh, who was 19 years of age at the time of accident, which was caused by Ashwani Kumar, who had driven the vehicle bearing Registration No. CH-28-T-1680 rashly and negligently on 19.4.2006 at about 8 P.M. near Govt. College Nalagarh, on the National Highway-21A.

3. The parents of the deceased filed claim petition for the grant of compensation, as per the break-ups given in the claim petition.

4. Owner, driver and insurer have filed objections and following issues came to be framed by the Tribunal.

(i) Whether the deceased Harpreet Singh died in an accident as a result of rash and negligent driving of the offending vehicle by respondent No.1, as alleged? OPP.

(ii) *If issue No.1 proved in affirmative, whether the petitioners are entitled for the compensation, if so, to what amount ?OPP*

(iii) *Whether the accident took place due to the negligence of the deceased as alleged? OPR 1 and 2.*

(iv) *Whether the petition is bad for non-joinder of necessary parties? OPR-2.*

(v) *Whether the offending vehicle was being used for commercial purposes at the time of the accident, if so, its effect? OPR-3.*

(vi) *Whether the respondent No. 1 was not holding valid and effective driving licence to drive the offending vehicle at the time of accident? OPR-3.*

(vii) *Relief.*

5. The claimants examined as many as five witnesses, namely, Sh. Vishesh Kumar, (PW1), Smt. Surinder Kaur claimant No.2, (PW2), Sh. Kulvinder (PW3), Sh. Bharat Bushan (PW4) and Sh. Rakesh Kumar (PW5).

6. On the other hand, respondents have not examined any witness. Thus, the evidence led by the claimants have remained un-rebutted.

7. The Tribunal held that the driver had driven the vehicle rashly and negligently on the said day and Issues No. 1 and 3 came to be decided in favour of the claimants and against the respondents. Thus the findings returned on these issues have attained finality and are accordingly upheld.

8. The insurer has failed to lead any evidence on issues No. 2 to 6 as such it has failed to discharge the onus. The Tribunal has rightly decided these issues in favour of the claimants and against the insurer. The Tribunal held that the claimants are entitled to Rs.2,40,000/-, which, on the face of it, is meager for the following reasons.

9. Admittedly, the deceased was 19 years of age at the time of accident and the multiplier applicable is "15" in view of the ratio laid down in ***Sarla Verma and Ors versus Delhi Transport Corporation and anr.*** reported in ***AIR 2009 SC 3104*** which has also been followed and affirmed in ***Reshma Kumari and others versus Madan Mohan and anr.*** reported in ***2013 AIR (SCW) 3120***. But the Tribunal has applied the multiplier of "12".

10. The notional income of the deceased has been assessed at Rs.15000/- per annum by the Tribunal. The deceased was a young boy of 19 years, was pursing three years diploma Course in Electrical Engineering, had almost put in two years therein in pursuit of his studies and had a bright career in future. By a guess work, it can be safely said that, he would have been earning, at least, Rs.6000/- per month. The Tribunal has fallen in an error in holding that deceased was earning Rs.15,000/- per annum only.

11. The parents of the deceased have lost, at least, Rs.3000/- per month as source of dependency, thus are entitled to Rs.3000x12x14= 5,04,000/-, as compensation. Viewed thus, the claimants are held entitled to Rs.5,04,000/- + Rs.30,000/- as funeral charges and love and affection, total to the tune of Rs.5,34,000/-., with interest at the rate of 7.5% per annum.

12. Accordingly, amount of compensation is enhanced. The impugned award is modified and appeal is allowed. The insurer is directed to deposit the entire amount of

compensation minus the amount already deposited, within eight weeks from today in the Registry.

13. On deposit, the Registry is directed to release the amount in favour of the claimants strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

14. Accordingly, the appeal is allowed and the impugned award stands modified, as indicated hereinabove.

15. Send down the record forthwith, after placing a copy of this judgment.

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

Master Sachin & others …Appellants.
Versus
Smt. Urmila Chauhan & others …Respondents.

FAO No. 278 of 2008
Decided on: 05.06.2015

Motor Vehicle Act, 1988- Section 166- Deceased was aged 38 years at the time of accident- he was a government servant drawing salary of Rs. 9,610/- p.m before the accident - 1/4th of the amount was to be deducted towards personal expenses- loss of dependency would be Rs. 6,400/- applying multiplier of '14', claimants will be entitled for compensation of Rs. 6,400 x 12 x 14=10,75,200/-- in addition to this they will be entitled for compensation of Rs. 28,000/- under other heads - petitioners are entitled to total compensation of Rs. 11,03,200/-. (Para-10 to 13)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellants: Mr. G.S. Rathore, Advocate.

For the respondents: Nemo for respondent No. 1.
Mr. Ramesh Sharma, Advocate, for respondent No. 2.
Ms. Seema Sood, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is judgment and award, dated 29.02.2008, made by the Motor Accident Claims Tribunal (III), Shimla (for short "the Tribunal") in MACT No. 20-S/2 of 2006/04, titled as Master Sachin and others versus Smt. Urmila Chauhan and others, whereby compensation to the tune of Rs. 7,00,000/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimants (for short "the impugned award").

2. The claimants became the victims of a vehicular accident, when their father, aged 38 years, died in a cruel accident, which was caused by the driver, namely Shri Veer

Singh, while driving taxi, i.e. Maxi Cab, bearing registration No. HP-01 A-3004, rashly and negligently on 03.03.2003, near Kuthar, Tehsil Nerwa, constraining them to file claim petition before the Tribunal seeking compensation to the tune of Rs.25,00,000/-, as per the break-ups given in the claim petition, on the grounds taken therein.

3. The driver, owner-insured and the insurer contested the claim petition on the grounds taken in the respective memo of objections.

4. Following issues came to be framed by the Tribunal on 24.04.2006:

> *"1. Whether on 3.3.2003 near Kuthar the respondent No. 2 was driving the Maxi Cab No. HP-01 A-3004 rashly and negligently and caused the death of Shri Jai Lal? OPP*
>
> *2. If issue No. 1 is proved in the affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP*
>
> *3. Whether insured has committed breach of terms and conditions of the insurance policy? OPR*
>
> *4. Relief."*

5. The claimants, in support of their claim, examined Sapinder Singh as PW-1, Jiwan Lal as PW-2, Varinder Singh as PW-3, and Roshan Lal as PW-4. The owner-insured appeared in the witness box as RW-1.

6. The Tribunal, after scanning the evidence, oral as well as documentary, came to the conclusion that the claimants have lost source of dependency to the tune of Rs.4,000/- per month and awarded compensation to the tune of Rs.7,00,000/- with interest @ 7.5 % per annum vide impugned award.

7. The owner-insured, the driver and the insurer have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

8. The claimants-appellants, by the medium of the appeal in hand, have questioned the impugned award on the ground of adequacy of compensation.

9. Thus, the only question to be determined in this appeal is - whether the amount awarded is just and appropriate? The answer is in negative for the following reasons:

10. Admittedly, the deceased was 38 years of age at the time of the accident. The Tribunal has rightly applied the multiplier of '14', but has fallen in an error in making the deductions and holding that he was contributing Rs. 4,000/- per month to the family, is not legally correct. Admittedly, he was a government employee, drawing salary to the tune of Rs.9,610/- per month before the accident, in terms of the salary certificate, Exhibit PW-2/B.

11. Applying the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120,** one fourth was to be deducted towards his personal expenses. However, keeping in view the fact that the mother of the claimants is also an earning hand and is a party before this Court as the owner-insured of the offending vehicle, at least one third was to be deducted, which has not been done.

12. Accordingly, it is held that the claimants have lost source of dependency to the tune of Rs.6,400/- per month. Viewed thus, the claimants are held entitled to Rs.6,400 x 12 x 14 = Rs.10,75,200/-. The compensation awarded under other heads to the tune of Rs.28,000/- is just and appropriate, needs no interference.

13. Having glance of the above discussions, total compensation to the tune of Rs.10,75,200 + Rs.28,000/- = Rs.11,03,200/- with interest @ 7.5% per annum is awarded in favour of the claimants.

14. Having said so, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

15. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

16. Send down the record after placing copy of the judgment on the Tribunal's file.

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

FAO No. 272 of 2008
a/w FAO No. 276 of 2009
Decided on: 05.06.2015

FAO No. 272 of 2008

Oriental Insurance Company …Appellant.
Versus
Sh. Dinesh Kumar & others …Respondents.

FAO No. 276 of 2009

Oriental Insurance Company Ltd. …Appellant.
Versus
Smt. Raj Kumari @ Anita & others …Respondents.

Motor Vehicle Act, 1988- Section 166- Compensation of Rs. 40,000/- and Rs.1,09,000/- were awarded with interest to the claimants – appeals were preferred against the award - held, that even under no fault liability compensation of Rs.25,000/- has to be awarded, hence amount of Rs. 40,000/- awarded as compensation is reasonable- claimant had suffered injury which had shattered her physical frame and, therefore, compensation of Rs.1,09,000/- awarded to her cannot be said to be excessive, rather, same was not just, however, it was not questioned by victim and it was upheld reluctantly. (Para-3 to 9)

For the appellant(s): Mr. G.D. Sharma, Advocate.
For the respondents: Mr. K.R. Thakur, Advocate, for respondent No. 1.
Mr. Rajiv Rai, Advocate, for respondent No. 2.
Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Both these appeals are outcome of a traffic accident, which was allegedly caused by the driver, namely Shri Jitender Kumar, while driving bus, bearing registration No. HP-20-5665, rashly and negligently, on 05.05.2005, at about 10.30 A.M. at Main Bus Stand, Mandi, in which Shri Dinesh Kumar and Smt. Raj Kumari sustained injuries. Thus, I deem it proper to determine both these appeals by this common judgment.

2. Being victims of the said vehicular accident, injured-Dinesh Kumar filed Claim Petition No. 104 of 2005, titled as Sh. Dinesh Kumar versus Shri Trilochan Singh and others, and injured-Raj Kumari filed Claim Petition No. 103 of 2005, titled as Smt. Raj Kumari versus Shri Trilochan Singh and others, and the Motor Accident Claims Tribunal, Mandi, H.P. (for short "the Tribunal"), after scanning the evidence, awarded compensation to the tune of Rs. 40,000/- and Rs.1,09,000/- with interest @ 7.5% per annum in favour of the claimants-injured respectively, vide separate awards, dated 15.01.2008, (for short "the impugned awards").

3. It is travesty of justice that the claimants-injured are still deprived of the compensation for the last ten years, which is against the purpose of granting compensation.

4. Virtually the insurance company has conducted this case in a way which is against the concept of granting of compensation, is an eye opener for the said insurance company.

5. Only a meager amount of Rs.40,000/- has been awarded in favour of the claimant-injured-Dinesh Kumar in Claim Petition No. 104 of 2005, should not have been questioned by such a reputed insurance company. In terms of the mandate of Section 140 of the Motor Vehicles Act, 1988 (for short "the MV Act"), Rs.25,000/- has to be awarded under 'No Fault Liability'. I wonder why the insurance company has filed appeal in this case.

6. However, I have gone through the record. The impugned award in FAO No. 272 of 2008 is just and proper, needs no interference.

7. In Claim Petition No. 103 of 2005, claimant-injured-Raj Kumari has suffered injuries, which have shattered her physical frame. Not only this, the claimant-injured-Raj Kumari was carrying three-four months pregnancy and suffered miscarriage due to the accident.

8. The insurer has questioned the impugned awards on the ground that the original driver of the offending vehicle was not arrayed as party-respondent in the array of respondents, which has been thrashed out by the Tribunal, needs no interference.

9. The compensation to the tune of Rs.1,09,000/- awarded in favour of the claimant-injured-Raj Kumari, is not just in the given circumstances of the case. But, claimant-injured-Raj Kumari has not questioned the same, is accordingly upheld.

10. Viewed thus, both the appeal are dismissed and the impugned awards are upheld.

11. At this stage, Mr. G.D. Sharma, learned counsel for the appellant(s), stated at the Bar that the insurer has deposited the entire awarded amount in FAO No. 276 of 2009 before the Tribunal. His statement is taken on record.

12. The Tribunal is directed to release the awarded amount to claimant-injured-Raj Kumari strictly as per the terms and conditions contained in the impugned award through payee's account cheque.

13. Registry is directed to release the awarded amount in FAO No. 272 of 2008 in favour of claimant-injured-Dinesh Kumar strictly as per the terms and conditions contained in the impugned award through payee's account cheque. Registry is further directed to release the statutory amount to the appellant in FAO No. 276 of 2009 through cross cheque.

14. Both the appeals are disposed of, as indicated hereinabove.

15. Send down the record after placing copy of the judgment on each of the Tribunal's files.

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

FAO No.308 of 2008 with
FAO No.353 of 2008.
Decided on: 05.06.2015.

1. FAO No.308 of 2008:

Partap Chand and another ...Appellants

VERSUS

Harinder Kumar and another ...Respondents.

2. FAO No.353 of 2008:

The New India Assurance Company ...Appellant

VERSUS

Harinder Kumar and others ...Respondents.

Motor Vehicle Act, 1988- Section 149- Driving Licence of the driver had expired on 13.6.2004 – it was renewed w.e.f. 24.8.2004- accident had taken place on 12.8.2004- held, that licence is valid from the date of renewal – driver did not possess any valid driving licence on the date of accident and the owner had committed breach of the terms and conditions of the licence by employing a driver having no valid driving licence- therefore, insurance company was rightly held liable to pay compensation with a right to recovery. (Para- 6 to 10)

Motor Vehicle Act, 1988- Section 171- Interest is to be awarded from the date of the award and not from the date of Claim Petition. (Para-5)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Ram Babu Tiwari vs. United India Insurance Co.Ltd. & Ors, 2008 AIR SCW 6512

FAO No.308 of 2008:

For the Appellants: Mr.N.K. Thakur, Senior Advocate, with Mr.Rohit Bharoll, Advocate.

For the Respondents:	Mr.Vivek Thakur, Advocate, for respondent No.1. Mr.B.M. Chauhan, Advocate, for respondent No.2.
FAO No.353 of 2008:	
For the Appellants:	Mr.B.M. Chauhan, Advocate.
For the Respondents:	Mr.Vivek Thakur, Advocate, for respondent No.1. Mr.N.K. Thakur, Senior Advocate, with Mr.Rohit Bharoll, Advocate, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Both these appeals are directed against the award, dated 1st April, 2008, passed by the Motor Accident Claims Tribunal, Chamba, (for short, the Tribunal), in Claim Petition No.31 of 2007, titled Harinder Kumar vs. Partap Chand and others, whereby compensation to the tune of Rs.8,93,230/-, with interest at the rate of 9%, from the date of filing of the Claim Petition till realization, was awarded in favour of the claimant-injured, and the insurer was saddled with the liability, with right of recovery, (for short, the impugned award).

2. The owner-insured has questioned the impugned award by the medium of FAO No.308 of 2008 on the ground that the Tribunal has fallen in error in granting the right of recovery in favour of the insurer.

3. The insurer has challenged the impugned award by way of FAO No.353 of 2008 on the ground that the amount awarded is excessive and the amount was to be satisfied by the owner/insured, without asking the insurer to indemnify at the first instance.

4. The claimant-injured has not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to him.

5. Before dealing with the contentions raised by the learned counsel for the insured and the insurer, I deem it proper to hold that the Tribunal has fallen in error in awarding interest from the date of the claim petition under the Heads – 'Loss of amenities of life' 'attendant charges' and 'loss of future income'. In terms of the decisions of the Apex Court in **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787** and **Kavita versus Deepak and others, 2012 AIR SCW 4771,** in an injury case, the interest under these heads is to be awarded from the date of the award and not from the date of Claim Petition. Accordingly, the impugned award needs to be modified to that extent.

6. Coming to the appeal filed by the owner/insured, admittedly, the driver of the offending vehicle though was having a driving licence at the time of accident, which occurred on 12th August, 2004, but that had lost its life on 13th June, 2004 and the same came to be renewed only w.e.f. 24th August, 2004.

7. The Apex Court in **Ram Babu Tiwari vs. United India Insurance Co.Ltd. & Ors, 2008 AIR SCW 6512,** has held that the licence was not valid in case it was not renewed on the date of its expiry and renewed from a subsequent date. It is apt to reproduce paragraphs 13 and 19 of the said decision hereunder:

"13. The question as to whether the owner of a vehicle had taken care to inform himself as to whether the driver entrusted to drive the vehicle was having a licence or not is essentially a question fact. However, in this case, it stands admitted that as on the date of accident, namely, on 27.1.1996, the driver did not hold any licence. Furthermore, it is beyond dispute that he had a licence only for one year and for about 3 years thereafter, he failed and neglected to renew his licence. His licence was renewed only on and from 7.2.1996.

…………… ……………. ……………

19. The principle laid down in Kusum Rai (supra) has been reiterated in Ishwar Chandra & Ors. v. Oriental Insurance Co. Ltd. & Ors. [(2007) 10 SCC 650], referring to sub-section (1) of Section 15 of the Act, this Court stated the law, thus :

> *"9. From a bare perusal of the said provision, it would appear that the licence is renewed in terms of the said Act and the rules framed thereunder. The proviso appended to Section 15 (1) of the Act in no uncertain terms states that whereas the original licence granted despite expiry remains valid for a period of 30 days from the date of expiry, if any application for renewal thereof is filed thereafter, the same would be renewed from the date of its renewal. The accident took place 28-4-1995. As on the said date, the renewal application had not been filed, the driver did not have a valid licence on the date when the vehicle met with the accident.""*

8. Therefore, the driver of the offending vehicle cannot be said to be having a valid and effective driving licence at the relevant point of time and, therefore, the Tribunal has rightly held that the owner had committed breach. In the given circumstances, it can safely be held that the owner has committed the breach for the simple reason that the driver of the offending vehicle was not having any licence, what to speak of valid and effective driving licence, at the relevant point of time. Accordingly, the point raised by the owner-insured is turned down.

9. Coming to FAO No.353 of 2008, filed by the insurer, I wonder why the insurer has filed this appeal. The appeal is devoid of any force for the following reasons. It is beaten law of the land that the insurer has to satisfy the third party claim, and in case the insured commits any breach, the insurer has a right of recovery.

10. I accordingly hold that the Tribunal has rightly granted the right of recovery to the insurer.

11. The second contention raised by the learned counsel for insurer that the amount awarded by the Tribunal is excessive is devoid of any force and needs to be repelled for the reason that the injured suffered 60% permanent disability, remained in hospital and is dependant upon attendant, which facts have been proved by the claimant-injured by leading cogent evidence. The said injury has shattered the physical frame of the claimant-injured and has rendered him a burden on his family forever. Due to the injury sustained by the claimant, his marital prospects have been marred and he cannot get a suitable match for marriage.

12. Having said so, the amount awarded is not excessive in any way, rather is meager. But unfortunately, the claimant has not filed any appeal for enhancement, therefore, the amount of compensation awarded by the Tribunal is upheld, by modifying the rate of interest, as discussed above.

13. Accordingly, the appeal filed by the insurer i.e. FAO No.353 of 2008 is dismissed. The appeal filed by the insured is allowed to the extent that the interest, as awarded by the Tribunal, on the amount awarded under the heads – 'Loss of amenities of life' 'attendant charges' and 'loss of future income', shall be payable from the date of the impugned award.

14. The impugned award is accordingly modified. The Registry is directed to release the amount in favour of the claimant-injured strictly in terms of the impugned award and the excess amount, if any, deposited by the insurer be released in its favour through payees' account cheque. The insurer is at liberty to recover the award amount from the insured.

15. Having glance of the above discussion, FAO No.308 of 2008 is allowed, as indicated above, and FAO No.353 of 2008 is dismissed. A copy of this judgment be placed on the record of connected appeal.

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

FAO No. 450 of 2007 a/w FAOs
No. 106, 107 of 2010 &128 of 2011
Reserved on: 29.05.2015
Decided on: 05.06.2015

1. FAO No. 450 of 2007

Partap Singh Bhagnal …Appellant.
Versus
Smt. Ramkali & others …Respondents.

……………………………………………………………………………………………………

2. FAO No. 106 of 2010

Partap Singh Bhagnal …Appellant.
Versus
Aman Verma & others …Respondents.

……………………………………………………………………………………………………

3. FAO No. 107 of 2010

Partap Singh Bhagnal …Appellant.
Versus
Ramesh Verma & others …Respondents.

……………………………………………………………………………………………………

4. FAO No. 128 of 2011

United India Insurance Company Ltd. …Appellant.
Versus
Sh. Balwinder Singh & others …Respondents.

Motor Vehicle Act, 1988- Section 147- The cover note recorded the date of issue as 21.1.2005 but the effective date of commencement of insurance was recorded as 22.1.2005- accident had taken place on 21.1.2005 at about 3:45 P.M- Insurance Company had never questioned the cover note till the date of accident – held that the date of commencement mentioned in the cover note is the date from which insurer is liable- policy document is to be construed strictly- since insurer was liable only from 22.1.2005, therefore, he is not liable for the accident which had taken place on 21.1.2005. (Para-8 to 28)

Cases referred:
National Insurance Company Limited versus Abhaysing Pratapsing Waghela and others, (2008) 9 Supreme Court Cases 133
Balbir Kaur and others versus New India Assurance Company Limited and others, (2009) 13 Supreme Court Cases 370
New India Assurance Company, Bangalore versus Kareemunnisa, (2009) 16 SCC 241
Oriental Insurance Company Limited versus Porselvi and another, (2009) 15 SCC 116
National Insurance Co. Ltd. versus Sobina Iakai (Smt) and others, with National Insurance Co. Ltd. versus Kerolin P. Marak (Smt) and others, (2007) 7 Supreme Court Cases 786
J. Kalaivani and others versus K. Sivashankar and another, (2007) 7 SCC 792
Vikram Greentech India Limited and another versus New India Assurance Company Limited, (2009) 5 Supreme Court Cases 599

FAO No. 450 of 2007
For the appellant: Mr. Karan Singh Kanwar, Advocate.
For the respondents: Nemo for respondents No. 1, 2 and 4.
Mr. Ashwani K. Sharma, Advocate, for respondent No. 3.
....

FAO No. 106 of 2010
For the appellant: Mr. I.N. Mehta, Advocate.
For the respondents: Mr. Rupinder Singh, Advocate, for respondent No. 1.
Mr. Ashwani K. Sharma, Advocate, for respondent No. 2.
Nemo for respondent No. 3.
....

FAO No. 107 of 2010
For the appellant: Mr. I.N. Mehta, Advocate.
For the respondents: Mr. Rupinder Singh, Advocate, for respondents No. 1 to 3.
Mr. Ashwani K. Sharma, Advocate, for respondent No. 4.
Nemo for respondent No. 5.
....

FAO No. 128 of 2011
For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Nemo for respondents No. 1 and 3.
Mr. Karan Singh Kanwar, Advocate, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

A vehicular traffic accident, which was caused by the driver, namely Pheru Ram @ Vijay Kumar, while driving vehicle, i.e. Tata Sumo, bearing registration No. HP-16-0037, rashly and negligently on 21.01.2005, at about 3.45 P.M. at place Bharoli near Pulwahal, P.S. Rajgarh, in which two persons, namely Beeru Bahadur and Reeta Verma, sustained injuries and succumbed to the injuries and one Balwinder Singh and a minor child, Aman Verma, sustained injuries, has given birth to the appeals in hand, thus, I deem it proper to determine all these appeals by this judgment.

2. The legal representatives/dependents of the deceased have filed two claim petitions, being M.A.C. Petition No. 22 FTC/2 of 2005/06, titled as Smt. Ramkali and another versus Sh. Partap Singh Bhagnal and others (subject matter of FAO No. 450 of 2007), before the Motor Accident Claims Tribunal, Fast Track Court, Solan, H.P. (for short "the Tribunal-I") and MAC Petition No. 07-MAC/2 of 2006, titled as Ramesh Verma and others versus Sh. Partap Singh and others (subject matter of FAO No. 107 of 2010), before Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P. (for short "the Tribunal-II"), for grant of compensation, as per the break-ups given in the respective claim petitions.

3. Claimants-injured have also filed claim petitions, being MAC Petition No. 04-MAC/2 of 2006, titled as Aman Verma versus Sh. Partap Singh and others (subject matter of FAO No. 106 of 2010), before Tribunal-II and M.A.C. Petition No. 8-S/2 of 2008, titled as Sh. Balwinder Singh versus Sh. Kuldeep Chauhan and others (subject matter of FAO No. 128 of 2011), before MACT-II, Solan, District Solan, H.P. (for short "the Tribunal-III") for grant of compensation, as per the break-ups given in the respective claim petitions.

4. The owner-insured, the driver and the insurer have resisted the claim petitions on the grounds taken in the respective memo of objections.

5. Issues were framed in all the four claim petitions. The parties led evidence in support of their respective cases in all the four claim petitions.

6. The Tribunals in three claim petitions, subject matter of **FAOs No. 450 of 2007, 106 and 107 of 2010,** after scanning the evidence, vide separate awards of different dates, held that the insurance contract was not in force on the date of the accident and saddled the insured-owner with liability.

7. The claimants, the driver and the insurer have not questioned the said impugned awards, thus, have attained finality so far it relate to them.

8. Only the insured-owner has questioned these impugned awards by the medium of FAOs No. 450 of 2007, 106 & 107 of 2010 on the ground that the insurance policy was in force, rather effective, on the date of the accident and the Tribunals have fallen in an error in saddling him with liability.

9. Tribunal-III in M.A.C. Petition No. 8-S/2 of 2008, subject matter of **FAO No. 128 of 2011,** held that the insurance policy was effective at the relevant point of time and directed the insurer to satisfy the award.

10. The owner-insured, the driver and the claimants have not questioned the said impugned award on any count, thus, has attained finality so far it relates to them.

11. The insurer has questioned the said impugned award on the ground that the Tribunal-III has fallen in an error in saddling it with liability for the simple reason that the insurance policy was not in force at the relevant point of time, i.e. the date of accident.

12. Neither the claimants nor the respondents in the claim petitions, i.e. the driver, the owner-insured and the insurer have questioned the adequacy of compensation or the factum of rashness or negligence. Thus, the findings returned by the Tribunals on the said issues have attained finality.

13. The only question to be answered in these appeals is - whether the insurance contract was effective on the date of the accident, i.e. 21.01.2005?

14. Learned counsel for the owner-insured argued that the cover note, Exhibit RD-1 in M.A.C. Petition No. 22 FTC/2 of 2005/06,, has been issued before the date of the

accident, as in the bottom of the cover note, the date of issue has been recorded as '21-1-2005', however the effective date of commencement of the insurance has been wrongly recorded as '22-1-2005'.

15. The argument, though attractive, is devoid of any force, for the following reasons:

16. The cover note, Exhibit RD-1, contains the date of commencement and expiry of insurance. It is apt to reproduce relevant portion of the cover note herein:

"............................

3. Effective date of commencement of Insurance for the purpose of the Act	*Time 00-01 AM Date 22-1-2005*
4. Date of Expiry of Insurance	*Date 21-1-2006*

............................"

17. While going through the cover note, one comes to an inescapable conclusion that the cover note contains the date from which the insurance contract was effective. The owner-insured has not questioned the same till the accident occurred or till today. The same effective date of the insurance is recorded in the cover note as well as the insurance policy.

18. The parties are covered by promises, terms and conditions contained in the insurance agreement that includes the cover note and the insurance policy.

19. The Apex Court in a case titled as **National Insurance Company Limited versus Abhaysing Pratapsing Waghela and others,** titled as **(2008) 9 Supreme Court Cases 133,** held that if cover note is issued, the cover note contains the date of commencement, is the date from which the insurer is liable. It is apt to reproduce paras 12, 17 and 22 of the judgment herein:

> *"12. The Motor Vehicles Act, 1988 (for short, "the Act") was enacted to consolidate and amend the law relating to motor vehicles. Chapter XI of the Act provides for insurance of motor vehicles against third party risks. Section 145 of the Act is the definition section; clause (b) whereof defines 'certificate of insurance' to mean:*
>
> > *"145. (b) .... a certificate issued by an authorized insurer in pursuance of sub-section (3) of Section 147 and includes a cover note complying with such requirements as may be prescribed, and where more than one certificate has been issued in connection with a policy, or where a copy of a certificate has been issued, all those certificates or that copy, as the case may be;*
> >
> > ** * *"*
>
> *Clause (d) of Section 145 defines 'policy of insurance' to include 'certificate of insurance'.*
>
> *13. to 16. ....*

17. Indisputably, the first respondent is a third party in relation to the contract of insurance which had been entered into by and between the appellant and the owner of the vehicle in question. We have noticed hereinbefore that a document was produced before the Tribunal. Even according to the appellant, although it was only a Motor Input Advice cum Receipt, it contained the Cover Note No. 279106. We, therefore, have to suppose that a Cover Note had, in fact, been issued. <u>If a cover note had been issued</u> which in terms of clause (b) of sub-Section 1 of Section 145 of the Act would come within the purview of definition of certificate of insurance; it also would come within the purview of the definition of a insurance policy. If a cover note is issued, it remains valid till it is cancelled. Indisputably, the insurance policy was cancelled only after the accident took place. A finding of fact, therefore, has been arrived at that prior to the deposit of the premium of insurance in cash by the owner of the vehicle, the cover note was not cancelled.

18. to 21. ....

22. Yet again in Deddappa v. National Insurance Co. Ltd., (2008) 2 SCC 595 : (2008) 1 SCC (Cri) 517, having regard to the provisions contained in Section 54(v) of the Insurance Act, 1938, in the fact situation obtaining therein, it was opined : (SCC p. 600, para 20)

> *"20. A contract is based on reciprocal promise. Reciprocal promises by the parties are condition precedents for a valid contract. A contract furthermore must be for consideration. (Emphasis added)"*

20. The Apex Court has discussed the same issue in the case titled as **Balbir Kaur and others versus New India Assurance Company Limited and others,** reported in **(2009) 13 Supreme Court Cases 370.** It is apt to reproduce para 11 of the judgment herein:

"11. For the purpose of this case, we would assume that an insurance policy, in law, could be issued from a future date. A policy, however, which is issued from a future date must be with the consent of the holder of the policy. The insurance company cannot issue a policy unilaterally from a future date without the consent of the holder of a policy. Even the said circular letter had not been produced and/ or no material was placed as to why the policy was issued from a later date. It is, however, not necessary for us to delve deep into the matter in view of the limited notice issued by this Court. Respondent No. 3, however, owner of the vehicle has not questioned that part of the order passed by the High Court. He, therefore, accepted the judgment of the High Court. Accordingly, liability to pay the awarded amount by him is not in question."

21. The Apex Court in a case titled as **New India Assurance Company, Bangalore versus Kareemunnisa,** reported in **(2009) 16 Supreme Court Cases 241,** wherein the insurance policy was effective w.e.f. 22.09.1986 at 1.10 P.M., but the accident occurred at 11.30 A.M. on the same day, held that the insurer was not liable. It is apt to reproduce para 3 of the judgment herein:

> *"3. The policy of insurance gives the effective date of commencement as "22-9-1986 .... 1.10 p.m.". Thereafter is printed, "(BOTH DAYS INCLUSIVE)". Relying upon what is in brackets, the Tribunal and the court below came to the conclusion that the Insurance Company was liable even though the accident in question had occurred at 11.30 a.m. on the same day i.e. before the issuance of the policy. The point in question would appear to be covered by the judgment of this Court in Oriental Insurance Co. Ltd. v. Sunita Rathi, (1998) 1 SCC 365, where it has been held that the insurer cannot be held liable when the time of insurance of the policy is mentioned thereon and the accident has occurred before that time."*

22. The Apex Court in another case titled as **Oriental Insurance Company Limited versus Porselvi and another,** reported in **(2009) 15 Supreme Court Cases 116,** wherein the cover note clearly indicated that the insurance policy was valid from 29.5.1996 to 28.5.1997, though it was issued on 28.5.1996, effect of which was not taken into consideration by the High Court, remanded the case for fresh consideration. It is apt to reproduce paras 4 and 5 of the judgment herein:

> *"4. Learned Counsel for the appellant brought to our notice the cover note which clearly indicates that the policy was valid from 29-5-1996 to 28-5-1997 though it was issued on 28-5-1996. A copy of the policy was brought on record. Relevant portion thereof reads as follows:*
>
> *"Effective date of commencement of insurance for the purpose of the Act, from (sic) o'clock on (date) 29-5-1996 to midnight of 28-5-1997."*
>
> *5. A three Judge Bench of this Court in New India Assurance Co. Ltd. v. Sita Bai, (1999) 7 SCC 575 : 1999 SCC (Cri) 1322, inter alia observed as follows:*
>
>> *"6. The correctness and applicability of the judgment in Ram Dayal case {New India Assuirance Co. Ltd. v. Ram Dayal, (1990) 2 SCC 680 : 1990 SCC (Cri) 432} came up for consideration before this Court subsequently in a number of cases. In New India Assurance Co. v. Bhagwati Devi, (1998) 6 SCC 534, a three-Judge Bench of this Court relied upon the view taken in National Insurance Co. Ltd. v. Jikubhai Nathuji Dabhi, (1997) 1 SCC 66, wherein it had been held that if there is a special contract, mentioning in the policy the time when it was bought, the insurance policy would be operative from that time and not from the previous midnight as was the case in Ram Dayal case where no time from which the insurance policy was to*

become effective had been mentioned. It was held that should there be no contract to the contrary, an insurance policy becomes operative from the previous midnight, when bought during the day following, but in cases where there is a mention of the specific time for the purchase of the policy, then a special contract comes into being and the policy becomes effective from the time mentioned in the cover note/the policy itself. The judgment in Jikubhai case has been subsequently followed in Oriental Insurance Co. Ltd. v. Sunita Rathi, (1998) 1 SCC 365, by a three-Judge Bench of this Court also."

23. Applying the test to the instant case, the cover note is on the file, which provides that the insurance policy is valid w.e.f. 22.01.2005 at 00.01 A.M. to 21.01.2006. Thus, the insurance contract was not effective at the time of the accident.

24. The Apex Court in the cases titled as **National Insurance Co. Ltd. versus Sobina Iakai (Smt) and others, with National Insurance Co. Ltd. versus Kerolin P. Marak (Smt) and others,** reported in **(2007) 7 Supreme Court Cases 786,** and **J. Kalaivani and others versus K. Sivashankar and another,** reported in **(2007) 7 Supreme Court Cases 792,** laid down the same principle of law. It is apt to reproduce paras 15 to 19 of the judgment in **Sobina Iakai's case (supra)** herein:

"14. This Court had an occasion to examine the similar controversy in the case of New India Insurance Company v. Ram Dayal, (1990) 2 SCC 680. In this case, this Court held that in absence of any specific time mentioned in the policy, the contract would be operative from the mid- night of the day by operations of the provisions of the General Clauses Act but in view of the special contract mentioned in the insurance policy, the effectiveness of the policy would start from the time and date indicated in the policy.

15. A three-judge Bench of this Court in National Insurance Co. Ltd. v. Jikhubhai Nathuji Dabhi, (1997) 1 SCC 66, has held that in the absence of any specific time mentioned in that behalf, the contract would be operative from the mid-night of the day by operation of provisions of the General Clauses Act. But in view of the special contract mentioned in the insurance policy, it would be operative from the time and date the insurance policy was taken. In that case, the insurance policy was taken at 4.00 p.m. on 25-10-1983 and the accident had occurred earlier thereto. This Court held (at SCC p. 67, para 3) that "the insurance coverage would not enable the claimant to seek recovery of the amount from the appellant Company."

16. Another three-Judge Bench of this Court in Oriental Insurance Co. Ltd. v. Sunita Rathi, (1998) 1 SCC 365, dealt with similar facts. In this case, the accident occurred at 2.20 p.m. and the cover note was obtained only thereafter at 2.55 p.m. The Court observed that the policy

would be effective from the time and date mentioned in the policy.

17. In New India Assurance Co. vs. Bhagwati Devi, [(1998 (6) SCC 534], this Court observed that, in absence of any specific time and date, the insurance policy becomes operative from the previous midnight. But when the specific time and date is mentioned, then the insurance policy becomes effective from that point of time. This Court in New India Assurance Co. Ltd. v. Sita Bai, (1999) 7 SCC 575, and National Insurance Co. Ltd. v. Chinto Devi, (2000) 7 SCC 50, has taken the same view.

18. In J. Kalaivani v. K. Sivashankar, (2007) 7 SCC 792 : JT 2001 (10) SC 396, this Court has reiterated clear enunciation of law. The Court observed that it is the obligation of the Court to look into the contract of insurance to discern whether any particular time has been specified for commencement or expiry of the policy. A very large number of cases have come to our notice where insurance policies are taken immediately after the accidents to get compensation in a clandestine manner.

19. In order to curb this widespread mischief of getting insurance policies after the accidents, it is absolutely imperative to clearly hold that the effectiveness of the insurance policy would start from the time and date specifically incorporated in the policy and not from an earlier point of time."

25. It would also be profitable to reproduce paras 3 to 6 of the judgment in **K. Kalaivani's case (supra)** herein:

"3. The vehicle involved in the accident was in fact covered by a policy of insurance issued by the same insurance company on 8-2-1995 which was to expire by the midnight of 7-2-1996. It was the ill luck of the claimants that the accident took place at 4.30 a. m. on 8-2-1996 which is only four and a half hours after the expiry of the erstwhile policy. On the succeeding day the owner of the vehicle went to the insurance company and got another policy issued in respect of the same vehicle, but which the company specifically indicated the time of commencement of the policy as 10 a. m. on 8-2-1995.

4. The question posed before us is whether the policy issued by the insurance company on 8.2.1998 can be regarded as renewal of the earlier policy.

5. Three decisions have been placed before us. In New India Assurance Co. Ltd. v. Ram Dayal, (1990) S SCC 680 : 1990 SCC (Cri) 432, it was held that in the absence of any specific time mentioned in that behalf, the contract of insurance would be operative from the midnight of the day by operation of the provisions of the General clauses Act,

1897. In National Insurance co. Ltd. v. Jijubhai Nathuji Dabhi, 1997 (1) SCC 66, a three judge bench of this Court approved the legal position adopted in the said decision. However, learned judges observed thus: (SCC p. 67, para 3)

> *"But in view of the special contract mentioned in the insurance policy, namely it would be operative from 4.00 p. m. on 25-10-1983 and the accident had occurred earlier thereto, the insurance coverage would not enable the claimant to seek recovery of the amount from the appellant company".*

This question was again considered by another three-Judge Bench of this Court in New India Assurance v. Bhagwati Devi, (1998) 8 SCC 534, and after following the dictum in the earlier decision that bench has stated thus:(SCC p. 535, para 2)

> *"The principle deduced is thus clear that should there be no contract go contrary, an insurance policy becomes operative from the previous midnight, when bought during the day following. However, in case there is mention of a specific time for its purchase then a special contract to the contrary comes into being and the policy would be effective from the mentioned time. The law on this aspect has been put to rest by this Court. There is, this, nothing further for us to deliberate upon".*

6. Therefore, the position has become now well neigh settled. The court has to look into the contract of insurance to discern whether any particular time has been specified for commencement or expiry, as the case may be, of the policy of insurance. The copies of the erstwhile policy as well as the present policy have been produced for. our perusal, the authenticity of which has not been questioned before us. The erstwhile policy shows that it expired by midnight of 7-2-1996 by specific terms incorporated in the policy. The next policy has clearly indicated that it had commenced only at 10.00 a. m. on 8-2-1996. The interregnum created the void in respect of the vehicle vis-a-vis the insurance company. The unavoidable consequence of it is that the insurance company cannot now be mulcted with the liability in respect of the award granted by the tribunal."

26. Keeping in view the mandate of Chapter XI of the Motor Vehicles Act, 1988 (for short "the MV Act"), the owner-insured is required to get his vehicle insured. The insurance agreement is a contract between the owner-insured and the insurer. In view of the terms and conditions contained in the insurance policy read with the mandate of the said Chapter, the insurer has to indemnify the owner-insured, provided the owner-insured is not in breach, if pleaded and proved by the insurer. Thus, the policy document is an important document, which governs the parties, is to be construed strictly.

27. The Apex Court in a case titled as **Vikram Greentech India Limited and another versus New India Assurance Company Limited,** reported in **(2009) 5 Supreme Court Cases 599,** laid down the same principle. It is apt to reproduce paras 16 to 18 of the judgment herein:

> *"16. An insurance contract, is a species of commercial transactions and must be construed like any other contract to its own terms and by itself. In a contract of insurance, there is requirement of uberimma fides i.e. good faith on the part of the insured. Except that, in other respects, there is no difference between a contract of insurance and any other contract.*
>
> *17. The four essentials of a contract of insurance are, (i) the definition of the risk, (ii) the duration of the risk, (iii) the premium and (iv) the amount of insurance. Since upon issuance of insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the insurance policy, its terms have to be strictly construed to determine the extent of liability of the insurer.*
>
> *18. The endeavour of the court must always be to interpret the words in which the contract is expressed by the parties. The court while construing the terms of policy is not expected to venture into extra liberalism that may result in re-writing the contract or substituting the terms which were not intended by the parties. The insured cannot claim anything more than what is covered by the insurance policy. (General Assurance Society Ltd. v. Chandmull Jain, AIR 1966 SC 1644; Oriental Insurance Co. Ltd. v. Sony Cheriyan, (1999) 6 SCC 451, and United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal, (2004) 8 SCC 644)"*

28. Having said so, the insurance policy was not in existence at the time of the accident and the insurer is not liable to satisfy the award and came to be rightly exonerated by the Tribunals-I and II in the claim petitions, subject matters of FAOs No. 450 of 2007, 106 & 107 of 2010, Tribunal-III has fallen in an error in saddling it with liability.

29. Viewed thus, the appeals filed by the owner-insured, i.e. FAOs No. 450 of 2007, 106 & 107 of 2010 merits to be dismissed and the appeal filed by the insurer, i.e. FAO No. 128 of 2011 is to be allowed and the owner-insured has to satisfy all the impugned awards.

30. Having glance of the above discussion, FAOs No. 450 of 2007, 106 & 107 of 2010 are dismissed, the impugned awards in FAOs No. 450 of 2007, 106 & 107 of 2010 are upheld, FAO No. 128 of 2011 is allowed and the impugned award in FAO No. 128 of 2011 is modified, as indicated hereinabove.

31. The owner-insured is directed to deposit the awarded amount in FAO No. 128 of 2011 before the Registry within eight weeks. Thereafter, the awarded amount in all the claim petitions be released in favour of the claimants strictly as per the terms and conditions contained in the impugned awards.

32. Send down the record after placing copy of the judgment on each of the Tribunal's files.

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

FAO No.317 of 2008 with FAO No.354 of 2008.
Decided on: 05.06.2015.

1. FAO No.317 of 2008:
Sanjokta Devi and others ...Appellants
VERSUS
Himachal Road Transport Corporation and another ...Respondents.

2. FAO No.354 of 2008:
Himachal Road Transport Corporation ...Appellant
VERSUS
Sanjokta Devi and others ...Respondents.

Motor Vehicle Act, 1988- Section 166- Deceased was working as a trained Electrician- therefore, his income can be taken as Rs. 6,000/- p.m. - 50% of the amount was to be deducted towards personal expenses of the deceased- age of the deceased is to be taken into consideration while determining the multiplier- deceased was aged 28 years and multiplier of '13' is applicable- hence, compensation of Rs.4,68,000/- awarded under the head loss of dependency. (Para-6 to 12)

Cases referred:
Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120
Munna Lal Jain and another vs. Vipin Kumar Sharma and others, JT 2015(5) SC 1

FAO No.317 of 2008:
For the Appellants: Mr.V.S. Chauhan, Advocate.
For the Respondents: Mr. N.K. Thakur, Senior Advocate, with Mr.Rohit Bharoll, Advocate, for respondent No.1.
Mr.L.N. Sharma, Advocate, for respondent No.2.

FAO No.354 of 2008:
For the Appellants: Mr. N.K. Thakur, Senior Advocate, with Mr.Rohit Bharoll, Advocate.
For the Respondents: Mr.V.S. Chauhan, Advocate, for respondents No.1 and 3.
Mr.L.N. Sharma, Advocate, for respondent No.4.
Respondent No.2 stands deleted.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Both these appeals are the outcome of award, dated 28th February, 2008, passed by the Motor Accident Claims Tribunal, Solan, (for short, the Tribunal), in Claim Petition No.1-S/2 of 2007, titled Sanjokta Devi and others vs. Himachal Road Transport

Corporation and another, whereby compensation to the tune of Rs.4,04,000/-, with interest at the rate of 9%, from the date of filing of the Claim Petition till realization, was awarded in favour of the claimants, and the owner-HRTC was saddled with the liability, (for short, the impugned award).

2. The claimants have questioned the impugned award by the medium of FAO No.317 of 2008 on the ground of adequacy of compensation, while the owner-HRTC has questioned the same by filing FAO No.354 of 2008 on the ground that the impugned award is excessive.

3. Therefore, the question needs to be answered in these appeals is – Whether the amount awarded by the Tribunal is just and appropriate?

4. After going through the impugned award and the record, I am of the view that the impugned award is inadequate for the following reasons.

5. The Tribunal, after taking into consideration the future earning prospects of the deceased, worked out the monthly income of the deceased as Rs.6,000/-. However, in my opinion, the Tribunal has fallen in error in coming to the conclusion that the claimants lost source of dependency to the tune of Rs.2,000/- per month, after making deductions towards his personal expenses and taking into account the fact that in near future he was to be married.

6. In today's scenario, even an unskilled labourer is earning not less than Rs.6,000/- per month. However, in the case of the deceased, he was a trained Electrician as has been proved on record. Therefore, it can safely be held that at the time of his death, he would have been earning Rs.6,000/- per month.

7. Applying the ratio of the decision of the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** 50% has to be deducted towards personal expenses of the deceased. Accordingly, it is held that the claimants have lost source of dependency to the tune of Rs.3,000/- per month.

8. Coming to the multiplier, the Tribunal, keeping in view the age of the deceased and that of the parents, has applied the multiplier of 15 for the first year and of 14 for the remaining period.

9. The Apex Court in its latest decision in **Munna Lal Jain and another vs. Vipin Kumar Sharma and others, JT 2015(5) SC 1,** has held that while applying the multiplier, only the age of the deceased has to be taken into consideration. It is apt to reproduce paragraphs 12 and 14 of the said decision hereunder:

> *"12. The remaining question is only on multiplier. The High Court following Santosh Devi (supra), has taken 13 as the multiplier. Whether the multiplier should depend on the age of the dependants or that of the deceased, has been hanging fire for sometime; but that has been given a quietus by another three-Judge Bench decision in Reshma Kumari (supra). It was held that the multiplier is to be used with reference to the age of the deceased. One reason appears to be that there is certainty with regard to the age of the deceased but as far as that of dependants is concerned, there will always be room for dispute as to whether the age of the eldest or youngest or even the average, etc., is to be taken. To quote:*
>
> > *"36. In Sarla Verma, this Court has endeavoured to simplify the otherwise complex exercise of assessment of loss of dependency and determination of*

compensation in a claim made under Section 166. It has been rightly stated in Sarla Verma that the claimants in case of death claim for the purposes of compensation must establish (a) age of the deceased; (b) income of the deceased; and (c) the number of dependants. To arrive at the loss of dependency, the Tribunal must consider (i) additions/deductions to be made for arriving at the income; (ii) the deductions to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. We do not think it is necessary for us to revisit the law on the point as we are in full agreement with the view in Sarla Verma."

xxxxxxx xxxxxxxx xxxxxxxxxx

14. The multiplier, in the case of the age of the deceased between 26 to 30 years is 17. There is no dispute or grievance on fixation of monthly income as Rs.12,000.00 by the High Court."

10. Admittedly, at the time of accident, the age of the deceased was 28 years. Therefore, applying the ratio of the decision of the Apex Court in Munna Lal Jain's case (supra), I am of the opinion that multiplier of 13 is appropriate in the present case.

11. Accordingly, the claimants are awarded a sum of Rs.4,68,000/- (Rs.3,000 x 12 x 13) under the head loss of the source of dependency.

12. In addition to this, the Claimants are also held entitled to Rs.30,000/-, i.e. Rs.10,000/- each under the heads 'loss of love and affection', loss of estate' and 'funeral expenses'.

13. Therefore, the claimants are held entitled to Rs.4,98,000/- (Rs.4,68,000 + Rs.30,000), with interest as awarded by the Tribunal.

14. The owner-HRTC is directed to deposit the enhanced amount in the Registry of this Court within a period of six weeks from today and on deposit, the Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned award and after proper identification.

15. FAO No.354 of 2008 filed by the HRTC is dismissed and the appeal filed by the claimants i.e. FAO No.317 of 2008 is allowed, as indicated above. A copy of this judgment be placed on the record of connected appeal.

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

Smt. Savitra Devi & another …Appellants
Versus
Smt. Jaiwanti Devi & others …Respondents

FAO No. 359 of 2007
Date of decision: 5.6.2015

Motor Vehicle Act, 1988- Section 166- Claimants pleaded that deceased was travelling in the vehicle along with apple plants but it was not pleaded that she had hired the vehicle – fare paid was also not specified- insurer had specifically pleaded that deceased was travelling in the vehicle as a gratuitous passenger – no plants were found at the place of the accident- therefore, plea of the Insurance Company that deceased was a gratuitous

passenger has to be accepted as correct – held that the Insurance Company was rightly held liable to make the payment with right to recovery. (Para-9 to 11)

For the appellants : Mr. Sat Prakash, Advocate.
For the respondents: Mr. Naveen K. Bhardwaj, Advocate, for the respondents No. 1(i) to (viii) and No. 2.
Mr. Deepak Bhasin, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*
CMP (M) No. 532 of 2015

The appellants have moved this application for bringing on record the legal representatives of respondent No. 1, who has died during the pendency of this appeal.

2. It is a beaten law of land that the limitation period is not applicable to the claimants for filing claim petition in view of the amendment made in 1994 in the Motor Vehicles Act, 1988, whereby provisions of sub Section (3) of Section 166 of the Act came to be deleted.

3. Having said so, I deem it proper to grant this application. The legal representatives of deceased respondent No. 1 are ordered to be brought on record as party respondents in the claim petition and shall figure as respondents No. 1(i) to 1(vii). The Registry to carry out necessary corrections in the cause title. Learned Counsel for the appellants to file amended memo of parties. The application is disposed of.

FAO No. 359 of 2007

4. Heard.

5. Appellants-insured-owner and driver have questioned the award, dated 21st June, 2007, made by the Motor Accident Claims Tribunal-II, (Fast Track), Kullu, H.P. (hereinafter referred to as “the Tribunal”) in Claim Petition No.17/05, whereby compensation to the tune of Rs.2,26,800/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants-respondents No. 1 & 2 herein and against the appellants-driver and owner-insured (for short, the “impugned award”), on the grounds taken in the memo of appeal.

6. The claimants and the insurer have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

7. The owner-insured and driver have questioned the impugned award on the ground that the Tribunal has fallen in error in granting right of recovery to the insurer.

8. Thus, the only question to be determined in this appeal is - whether the Tribunal has rightly granted right of recovery to the insurer. The answer is in the affirmative for the following reasons:

9. The claimants in para-10 of the claim petition have specifically pleaded that deceased Bimla Devi was traveling in vehicle-Jeep bearing registration No. HP-66-0617 alongwith apple plants. But it is not pleaded whether she had hired the vehicle and what was the fare paid. The appellants-driver and owner have not denied the same, but stated that ‘para-10 of the claim petition needs no reply’. Thus, it is an evasive denial.

10. The insurer has taken a specific plea that the deceased was traveling in the offending vehicle as a gratuitous passenger. The Tribunal, in paras 25 to 27 of the impugned award, has discussed and held that the deceased was not traveling in the offending vehicle as owner of apple plants and no apple plants were seized on the spot. Thus, the driver and owner have failed to prove that the deceased was traveling in the offending vehicle as a owner of apple plants and was not a gratuitous passenger.

11. Having said so, the Tribunal has rightly made discussion in paras 25 to 27 of the impugned award and accordingly, it is held that the insurer has right of recovery.

12. Though, the amount awarded is meager, but the claimants have not questioned the same, is maintained.

13. Accordingly, the appeal is dismissed.

14. The Registry is directed to release the award amount in favour of claimants, strictly as per the terms and conditions, contained in the impugned award.

15. Send down the records after placing a copy of the judgment on the file of the claim petition.

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

Secretary (Home) & others …Appellants.
Versus
Smt. Shanti Devi & others …Respondents.

FAO No. 299 of 2008
Decided on: 05.06.2015

Motor Vehicle Act, 1988- Section 166- Deceased was working in the police department- last salary drawn by him was Rs.7,500/--Rs.8,000/-- 1/4th of the amount was to be deducted towards personal expenses- deceased was aged 34 years and multiplier of '16' was applicable- thus, claimants are entitled for Rs. 9 lakh under the head 'loss of dependency'.

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellants: Mr. Vikram Thakur, Deputy Advocate General.
For the respondents: Mr. Anupinder Rohal, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This appeal is directed against the judgment and award, dated 13.03.2008, made by the Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr (for short "the Tribunal") in M.A.C. Petition No. 66 of 2006, titled as Smt. Shanti Devi and others versus Secretary Home and others, whereby compensation to the tune of Rs.9,79,000/- with

interest @ 9% per annum from the date of the petition till its realization came to be awarded in favour of the claimants (for short "the impugned award").

2. The claimants have not questioned the impugned award on any ground, thus, has attained finality so far it relates to them.

3. Appellants-respondents in the claim petition have questioned the impugned award, by the medium of this appeal, on the ground that the amount awarded is excessive.

4. I have gone through the claim petition, record and the evidence and am of the considered view that the claimants have proved by leading evidence that the driver, namely, Shri Prem Kumar, had driven the offending vehicle, i.e. motorcycle, bearing registration No. HP-25-0682, owned by H.P. Police Department, rashly and negligently on 13.09.2002, at about 3.20 P.M., on the way from Tapri to Purani Tapri and caused the accident, in which deceased-Mangat Ram sustained injuries and succumbed to the injuries.

5. Respondents in the claim petition have not led any evidence in rebuttal of the same and the evidence led by the claimants has remained unrebutted. Viewed thus, the Tribunal has rightly decided issue No. 1 in favour of the claimants and against the respondents-appellants herein. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

6. Before I deal with issue No. 2, I deem it proper to determine issue No. 3.

7. Respondents have failed to prove how the claim petition is not maintainable. The Tribunal has rightly held that the claimants are the victims of the vehicular accident, thus, the claim petition is maintainable. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

8. Mr. Vikram Thakur, learned Deputy Advocate General, argued that the amount awarded is excessive for the reason that the claimants have been paid all service benefits of the deceased, is to be deducted.

9. The argument is misconceived for the reason that claimant No. 1 has lost her husband, thus, has been deprived of her matrimonial home and claimants No. 2 to 5 have lost their father, have been deprived of love and affection of their father and source of dependency.

10. Admittedly, the deceased was working in the Police Department. The claimants have pleaded that the last salary drawn by the deceased was Rs.7,500/- - Rs. 8,000/-. Respondents have not denied the said factum.

11. The Tribunal, after taking the pleadings in view, deducted one third towards his personal expenses and came to the conclusion that the claimants have lost source of dependency to the tune of Rs.5,000/- per month. However, one fourth was to be deducted in view of the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120,** but, as the claimants have not questioned the same, it is accordingly maintained.

12. Admittedly, the age of the deceased was 34 years at the time of the accident. The Tribunal has applied the multiplier of '16', which is on the higher side. In view of the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "the MV Act") read

with the ratio laid down by the Apex Court in the judgments (supra), multiplier of '15' was to be applied. Accordingly, I deem it proper to apply the multiplier of '15'.

13. Accordingly, the claimants are held entitled to Rs.5,000 x 12 x 15 = Rs.9,00,000/- under the head 'loss of dependency'. The Tribunal has rightly awarded Rs.10,000/- under the head 'loss of love and affection', Rs.5,000/- under the head 'funeral expenses', Rs. 2,000/- under the head 'taxi charges' and Rs.2,000/- as costs of petition.

14. Viewed thus, the claimants are held entitled to Rs.9,00,000/- + Rs.10,000/- + Rs. 5,000/- + Rs.2,000/- + Rs. 2,000/- = Rs. 9,19,000/-.

15. Having glance of the above discussions, the amount of compensation is reduced and the impugned award is modified, as indicated hereinabove.

16. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

17. The appeal is disposed of accordingly alongwith all pending applications.

18. Send down the record after placing copy of the judgment on the Tribunal's file.

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

The New India Assurance Co. Ltd. …Appellant.
Versus
Sh. Roshan Lal & others …Respondents.

FAO No. 273 of 2008
Decided on: 05.06.2015

Motor Vehicle Act, 1988- Section 149- Insurance Company pleaded that driver did not possess valid driving licence at the time of accident- unladen weight of the vehicle was 1670 kg. and laden weight of the vehicle was 2820 kg. – vehicle falls within the definition of light motor vehicle- driver possessed a driving licence to drive light motor vehicle- held, that Insurance Company was rightly held liable to pay compensation. (Para- 5 to 14)

Cases referred:

Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791
National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 SCC 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant: Mr. Ratish Sharma, Advocate.
For the respondents: Mr. Neeraj Gupta, Advocate, for respondent No. 1.
Nemo for respondent No. 2.
Mr. Ajay Chandel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is judgment and award, dated 25.02.2008, made by the Motor Accident Claims Tribunal, Kullu, H.P. (for short "the Tribunal") in Claim Petition No. 11 of 2007, titled as Roshan Lal versus Vishal Ranchan and others, whereby compensation to the tune of Rs. 89,000/- with interest @ 7% per annum from the date of the petition till its realization came to be awarded in favour of the claimant-injured (for short "the impugned award").

2. The claimant-injured, the owner-insured and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Mr. Ratish Sharma, learned counsel for the appellant, stated at the Bar that he has confined his attack to the impugned award only on the ground that the driver, namely Shri Uttam Singh, was driving offending vehicle, i.e. Tata Mobile No. HP-34 B-0436, which was a goods carriage and he was having a driving licence to drive a light motor vehicle and not goods carriage, thus, was not holding a valid and effective driving licence.

4. The argument of the learned counsel for the appellant is devoid of any force for the following reasons:

5. Admittedly, the offending vehicle was Tata 207DI Pick Up, the unladen weight of which is 1670 kg, and laden weight is 2820 kg, as per the registration certificate, Ext. RW-1/A, which falls within the definition of light motor vehicle.

6. I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle" as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the Motor Vehicles Act, 1988 (for short "the MV Act") herein:

> *"2. ....*
>
> *(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.*
>
> *xxx xxx xxx*
>
> (21) *"light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.*
>
> *xxx xxx xxx*
>
> *(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.*
>
> *xxx xxx xxx*
>
> *(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."*

7. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

8. The purpose of mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

> *"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi-trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.*
>
> *20. ....*
>
> *21. ....*
>
> *22. ....*
>
> *23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles*

which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', ' medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

9. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. to 13. ....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. ....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

10. Viewed thus, the driver of the offending vehicle was having a valid and effective driving licence.

11. The Apex Court in the case titled as **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** has laid down principles, how can insurer avoid its liability. It is apt to reproduce relevant portion of para 105 of the judgment herein:

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

12. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is*

on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

13. Having said so, I am of the considered view that the Tribunal has rightly saddled the insurer with liability.

14. Viewed thus, the appeal deserves to be dismissed and the impugned award is to be upheld. Accordingly, the appeal is dismissed and the impugned award is upheld.

15. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award after proper identification.

16. Send down the record after placing copy of the judgment on the Tribunal's file.

****

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

United India Insurance Company Limited …Appellant

VERSUS

Union of India and others …Respondents.

FAO No.482 of 2007.
Reserved on: 29.05.2015.
Pronounced on: 05.06.2015.

Motor Vehicle Act, 1988- Section 166- A bridge was constructed by Union of India across Jankar Nallah- bridge was meant for crossing by one vehicle at a time- caution boards were

put on both side of the bridge to this effect- respondent/driver took the vehicle to the bridge when another vehicle was present on it- bridge could not bear the weight of two vehicles and collapsed- Union of India filed a petition seeking compensation of Rs. 8,11,536/-- Insurer had admitted in the reply that accident had taken place due to the negligence of the driver who took the vehicle to the bridge when another vehicle was crossing- therefore, MACT had rightly held that Insurance Company was liable to pay compensation. (Para-13 to 22)

Cases referred:
United India Insurance Company vs. Thomas, I (1999) ACC 587 (DB),
Shivaji Dayanu Patil and another vs. Vatschala Uttam More (Smt), (1991) 3 SCC 530

For the Appellant: Mr.Ashwani K. Sharma, Advocate.
For the Respondents: Mr.Ashok Sharma, Assistant Solicitor General of India, for respondents No.1 to 3.
Nemo for respondents No.4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Subject matter of this appeal is the award, dated 31st August, 2007, passed by the Motor Accident Claims Tribunal, Kullu, (for short, the Tribunal), in Claim Petition No.73 of 2005, titled Union of India and others vs. Pawan Kumar and others, whereby compensation to the tune of Rs.8,11,536/-, with interest at the rate of 6%, from the date of filing of the Claim Petition till realization, was awarded in favour of the claimants-Union of India and the insurer (appellant herein) was saddled with the liability, (for short, the impugned award).

2. The insurer/appellant has questioned the impugned award on the ground that the driver of the offending truck had not driven the vehicle rashly and negligently and no damage was caused by the vehicle, which was insured with it. It was also submitted that the claimants have not been able to prove the amount spent for repairing the bridge/damaged property.

3. In order to determine these issues raised by the appellant-insurer, brief facts of the case are to be noticed.

4. The bridge across Jankar Nallah on Manali Sarchu road was constructed by the claimants-Union of India. The bridge was meant for crossing of only one vehicle at a particular time. Caution boards were also displayed on both sides of the bridge signifying the speed limit to be observed while crossing the bridge as also the fact that only one vehicle could go across the bridge at one point of time. It was averred that without paying any attention to the caution boards, truck bearing No.HP-38B-4647, being driven by Ramesh Chand (original respondent No.2), rashly and negligently, entered the bridge, despite the fact that there was another truck bearing registration No.HP-38B-6447, being driven by one Bhola Singh, was in the mid of crossing the bridge in question. Since the bridge was not in a position to bear the weight of both the vehicles crossing simultaneously, it gave way, and both the vehicles fell off the bridge, damaging the bridge in totality. FIR No.40 of 2004 was registered at Police Station, Keylong Lahaul and Spiti, on 3rd June, 2004.

5. Thus, the claimants-Union of India preferred the claim petition before the Tribunal claiming compensation to the tune of Rs.8,11,536/- on the ground that the driver

of the offending truck had driven the same rashly and negligently causing the accident in which the bridge was totally damaged.

6. The owner/insured, the driver and the insurer have contested the Claim Petition by filing separate replies.

7. On the pleadings of the parties, the following issues were settled by the Tribunal:

> *"1. Whether the bridge, belonging to the petitioners, has been damaged due to rash and negligent driving of truck No.HP-38B-4647 by respondent No.2? OPP*
>
> *2. If issue No.1 is proved in affirmative, to what amount of compensation/damages, the petitioners are entitled to and from whom? OPP*
>
> *3. Whether the truck in question was being driven in contravention of the terms and conditions of the insurance policy? OPR-3.*
>
> *4. Whether respondent No.2 was not holding a valid and effective driving licence at the time of accident? OPR-3*
>
> *5. Relief."*

8. Parties adduced their evidence in support of their respective claims.

9. The Claimants-Union of India examined four witnesses in all i.e. PW-1 Hari Singh, PW-2 Guruvanandam, PW-3 Vijay Kumar and PW-4 A.K. Singh. Respondents i.e. the owner and the driver have examined Bhola Singh (driver of truck No.HP-38B-6447) as RW-1 and Nawang Norbu (Record Keeper, in the office of Deputy Commission, Keylong) as RW-2, while the insurer has opted not to lead any evidence.

10. The witnesses have deposed that the driver of the offending vehicle, namely, Ramesh Chand, had driven the offending vehicle rashly and negligently and caused the accident because the bridge was not in a position to withstand the weight of two trucks crossing simultaneously. The witnesses have also deposed that the truck which was being driven by Bhola Singh had entered the bridge prior in time, was ahead of the offending vehicle and thereafter, the offending truck, without allowing the truck going ahead of it, to cross the bridge, tried to cross the bridge simultaneously, as a result of which the bridge collapsed and both the vehicles fell down. Thus, the accident was because of sheer carelessness, rashness and negligence on the part of the driver of the offending vehicle.

11. The driver of the offending vehicle examined Bhola Singh as RW-1, who has stated that Ramesh Chand had driven the vehicle carelessly, rashly and negligently. He has also stated that he was cautioned by the police officials present at the Check Post that only one vehicle was allowed to cross the Bridge at one point of time. He further stated that had Ramesh Chand not entered on the bridge just after him and waited till he crossed the bridge, the accident would not have occurred.

12. Thus, RW-2 Bhola Singh has, in fact, deposed against the driver of the offending vehicle. It is clear from the statement of this witness that the accident had occurred due to the negligence on the part of the driver of the offending vehicle i.e. Ramesh Chand.

13. Moreover, the insurer-appellant, in the reply filed by it to the Claim Petition, has categorically admitted in paragraph 13 that the accident was the outcome of rash and negligent driving of respondent No.2. It was also pleaded that had he not ignored the cautionary board, the accident would have been averted. It is apt to reproduce paragraph 13 of the reply hereunder:

> *"The accident and damage to the property is caused only due to the negligence on the part of the respondent No.2 who ignored the cautionary board as admitted by the petitioner and the respondent No.3 is not entitled to make any kind of compensation to the petitioners."*

14. Having said so, the Tribunal has rightly returned the findings on Issue No.1.

15. Before issue No.2 is dealt with, I deem it proper to deal with issues No.3 and 4. Onus to prove these issues was on the insurer. The insurer has not led any evidence. However, a perusal of the statement of RW-2 Nawang Norbu, Record Keeper, office of the Deputy Commissioner, Keylong, District Lahaul & Spiti, who was examined by the owner and the driver of the offending vehicle, shows that the driver of the offending vehicle was having a valid and effective driving licence at the time of accident. Accordingly, the findings of the Tribunal on issue No.4 are upheld.

16. As far as issue No.3 is concerned, it was for the insurer to plead and prove that the offending vehicle was being plied in contravention of the terms and conditions contained in the insurance policy, has failed to discharge the onus. The Tribunal has, therefore, rightly decided this issue against the insurer and in favour of the claimants and the owner/insured.

17. Now coming to issue No.2, the learned counsel for the appellant/insurer has argued that the State functionaries or the Union of India has not issued notifications, as required in terms of the provisions of the Motor Vehicles Act, 1988 (for short, the Act). Thus, it was contended that the accident had occurred due to the negligence of the State/Union of India and no negligence can be attributed to the driver of the offending vehicle. It was further submitted that keeping in view the strength of the bridge, the State ought to have posted an official in order to manage the traffic over it.

18. The argument, though attractive, is devoid of any force for the reason that RW-1 Bhola Singh has categorically stated that the accident was the outcome of rashness, negligence and carelessness of the driver Ramesh Chand. Even the insurer has admitted in paragraph 13 of the reply, reproduced above, that the accident had taken place due to the negligence of the driver of the offending vehicle.

19. The claimants have specifically pleaded in the Claim Petition as to what was the extent of damage to the bridge and the amount they have spent on its repairs. Assessment, qua cost of repairs, has been proved on record as Ext.PW-2/A and stands duly corroborated by PW-3 Vijay Kumar, Assistant Executive Engineer. No evidence, in rebuttal, was led by the insurer to demolish the said evidence.

20. The Tribunal has rightly made discussion in paragraphs 9 and 11 of the impugned award. The insurer has not led any evidence in rebuttal to prove that the assessment was not correctly made.

21. During the course of hearing, the learned counsel for the appellant has relied upon the decision of Kerala High Court in **United India Insurance Company vs. Thomas, I (1999) ACC 587 (DB),** which decision is based on the facts of that case and is not attracted to the facts of the present case, rather is against the appellant.

22. The Apex Court in **Shivaji Dayanu Patil and another vs. Vatschala Uttam More (Smt), (1991) 3 SCC 530,** has dilated on the scope of Section 110 of the Motor Vehicles Act, 1939 (old) corresponding to Section 166 of the Act, and the ratio laid down in this case is applicable to the case in hand.

23. It is apt to record herein that the owner and the driver have not questioned the impugned award on any count.

24. Thus, the only conclusion which can be drawn is that the insurer has to satisfy the award so far as it relates to third party since the factum of insurance is not in dispute.

25. Having a glance of the above discussion, I am of the opinion that the Tribunal has rightly awarded the compensation and no interference is required in the impugned award.

26. Accordingly, the impugned award is upheld and the appeal is dismissed.

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

Civil Revision No. 194 of 2003 and
Civil Revision No. 195 of 2003.
Judgment reserved on: 28.5.2015
Date of decision: June 15, 2015.

1. C.R. No. 194 of 2003

J.P.Chatrath … Petitioner
Vs.
Khem Chand Chauhan and others … Respondents

2. C.R. No. 195 of 2003

J.P. Chatrath …Petitioner
Vs.
Khem Chand Chauhan and others ….Respondents.

Code of Civil Procedure, 1908 - Order 1 Rule 10- Order VI Rule 17- Plaintiff filed a Civil Suit for declaration that he is owner in possession of the suit land and in adverse possession of the area adjacent to the suit land- suit was partly decreed- it was claimed that sale deeds were made in favour of respondents No. 2 and 3 through an attorney of a dead person, which are null and void- land belongs to respondents No. 4 to 9 who have to be impleaded and necessary amendment has to be made in the plaint- held, that plea of adverse possession is not available to the plaintiff as the suit cannot be filed on the basis of adverse possession - adverse possession can be used as a shield and not a sword - therefore, application dismissed with cost of Rs. 20,000/-. (Para-10 and 11)

Cases referred:

Steel Authority of India Limited vs. Gupta Brother Steel Tubes Limited, (2009) 10 SCC 63
Abdul Rehman and another vs. Mohd. Ruldu and others, (2012) 11 SCC 341
Amit Kumar Shaw and another vs. Farida Khatoon and another, (2005) 11 SCC 403
Thomson Press (India) Limited vs. Nanak Builders and Investors Private Limited and others, (2013) 5 SCC 397
Salem Advocate Bar Association, Tamil Nadu vs. Union of India, AIR 2005 SC 3353
State of Madhya Pradesh vs. Union of India and another, (2011) 12 SCC 268
J. Samuel and others vs. Gattu Mahesh and others, (2012) 2 SCC 300
S. Malla Reddy vs. Future Builders Cooperative Housing Society and Others, (2013) 9 SCC 349
Gurdwara Sahib versus Gram Panchayat Village Sirthala and another, (2014) 1 SCC 669

For the petitioner : Mr. Bhupender Gupta, Senior Advocate, with Mr. Suneet Goel, Advocate.

For the respondents : Mr. G.D.Verma, Senior Advocate, with Mr. B.C. Verma, Advocate, for respondents No. 1 to 3 and 9.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J.

Both these revision petitions arise out of common order dated 5.5.2003 whereby the learned Court below dismissed the application filed by the petitioner/plaintiff under Order 1 Rule 10 C.P.C. giving rise to Civil Revision No. 194 of 2003 and simultaneously dismissed another application preferred by the petitioner under Order 6 Rule 17 CPC giving rise to Civil Revision No. 195 of 2003.

2. The plaintiff filed a suit for declaration that he is owner in possession of the suit land comprised in Khasra Nos. 1698/399 and 1687/362 after having purchased the same from Smt. Parkashwati. He further claimed that he is in adverse possession of an area measuring 22 sq. metres which is adjoining the aforesaid land and comprised in Khasra No. 395/1.

3. The learned trial Court decreed the suit partly to the extent that the plaintiff was declared as owner in possession of the land purchased by him i.e. Khasra Nos. 1698/399 measuring 75 sq. metres and Khasra No. 1687/362 measuring 206 sq. metres. Insofar as the claim regarding adjoining land of 22 sq. metres as comprised in Khasra No. 395/1 is concerned, the same was dismissed.

4. In the application filed under Order 1 Rule 10 CPC, being Civil Misc. Application No. 25 of 2003, it was averred that the sales made in favour of respondents No. 2 and 3 were made through an attorney of a dead person and in Civil Suit No. 222/1 of 93 titled 'Avinash Chand vs. Khema Ram' decided on 26.9.1993, the sale deeds had been declared to be null and void. This fact came to the knowledge of the plaintiff during the pendency of the suit. Since the sale deeds in favour of respondents/ defendants No. 2 and 3 were declared null and void, they are not owners of the suit land and as the land now belongs to respondents No.4 to 9, they are required to be impleaded as respondents. The land referred to in this application is the one comprised in Khasra No. 395/1 i.e. land over which the plaintiff is claiming adverse possession.

5. Simultaneously, the plaintiff moved another application under Order 6 Rule 17 CPC for amendment of the plaint whereby he intended to add para 14-A, which reads thus:

> *"That Khasra No. 395 was transferred in the name defendants as claimed by them as Khasra No. 2386/395 measuring 150 square metres, 2387/395 measuring 22 square metres in the name of Smt. Madhu Thapa and 2388/395 measuring 154 sq.metres in the name of Khevan Ram per separate Tarteemas as carved out per old sale deeds declared as null and void as judgment dated 16.9.1993 in case No. 222/93 and which registered sale deeds are in possession of the defendants and said Tarteema will displayed further in mutation No. 1132 dated 29.12.1993 and the sale deeds dated 13.1.1994 wherein the plaintiff was not a party and in the said suit even the possession of the plaintiff qua the land in suit was not mentioned and no demarcation with respect to the said tarteema was ever got effective except the demarcation whereby 22 sq. metres was found in possession of plaintiff*

as Khasra No. 395/1 and which was never challenged and had become final and possession of which land since the date of purchase dated 4.12.1975 to 13.1.1994 etc. and till today is open, continuous and is as of site as owner and within the knowledge of owner Smt. Prakashwati as per successors Shri Vipin Chand, Avinash Chand and others being under fixed boundaries covered from all sides and the said possession as such having ripened into ownership, the defendants has no right, title and interest in the same. The possession at the spot of the said land was defined on 4.12.1975 at the time of registration of sale deed where the same was purchased from Smt. Prakashwati and whereby the construction was raised on the said land measuring 28 sq. meters and which presently had been found to be in excess by 22 sq. meters.

That the said possession been within the forwall and fencing and in actual physical possession of the plaintiff, the defendants are estopped to challenge the same and Smt. Parkashwati till her death in January, 1990 and from 4.12.1975 onwards had never challenged the same and had always treated plaintiff to be owner in possession of said land where the residential house was constructed by the plaintiff as per approved municipal plan and thus the defendants are estopped by their acts, conduct and deeds to challenge this position and have waved their right wavier comes into play on the part of the defendants. They are estopped and the plaintiff is entitled to be declared as owner on the said land. The defendants as such are liable to be restrained from interfering in the said land and from claiming and asserting any rights therein."

6. Now, a perusal of the proposed amendment would show that the same is again confined to Khasra No. 395/1 over which the plaintiff is claiming adverse possession.

7. As observed earlier, both these applications were dismissed by the learned Court below and the said order has been assailed by way of present revision petitions.

8. Learned counsel for the petitioner has relied upon the judgments of the Hon'ble Supreme Court in ***Steel Authority of India Limited*** vs***. Gupta Brother Steel Tubes Limited (2009) 10 SCC 63*** *and* ***Abdul Rehman and another*** vs***. Mohd. Ruldu and others (2012) 11 SCC 341*** to contend that the amendment can be allowed at any stage. He has further relied upon the judgments of the Hon'ble Supreme Court in ***Amit Kumar Shaw and another*** vs. ***Farida Khatoon and another (2005) 11 SCC 403*** and ***Thomson Press (India) Limited*** vs***. Nanak Builders and Investors Private Limited and others (2013) 5 SCC 397*** to contend that transferee pendente lite ought to be impleaded as a party.

9. While on the other hand, learned counsel for the respondents has placed reliance upon the judgments of the Hon'ble Supreme Court in ***Salem Advocate Bar Association, Tamil Nadu*** vs. ***Union of India, AIR 2005 SC 3353, State of Madhya Pradesh*** vs***. Union of India and another (2011) 12 SCC 268, J. Samuel and others*** vs***. Gattu Mahesh and others (2012) 2 SCC 300*** and ***S. Malla Reddy*** vs. ***Future Builders Cooperative Housing Society and Others (2013) 9 SCC 349*** to contend that even Order 6 Rule 17 now provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. He has further contended that the application filed under Order 1 Rule 10 CPC is not only gross abuse of the process of law but has been filed only with the intention to delay the matter.

10. I have given my thoughtful consideration to the rival submission of learned counsel for the parties and find that neither of the applications i.e. application under Order

6 Rule 17 CPC nor the application under Order 1 Rule 10 CPC are maintainable in view of the fact that the plea of adverse possession itself is not available to the plaintiff because a suit for declaration on the basis of adverse possession cannot be maintained as this claim can only be agitated by way of defence and can only be used as a '*shield'* and not a '*sword*' in terms of the judgment of the Hon'ble Supreme Court in ***Gurdwara Sahib*** *versus* ***Gram Panchayat Village Sirthala and another (2014) 1 SCC 669*** wherein it was held as under:

> *"8. There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."*

11. Once the suit itself is not maintainable then these applications seeking impleadment and amendment automatically become redundant. Consequently, both revision petitions are dismissed with costs assessed at Rs.20,000/- each.

12. The plaintiff/petitioner has been successful in dragging on this litigation for nearly two and half decades and, therefore, it is high time that the matter is concluded at the earliest. Accordingly, the learned Court below is requested to decide the case at the earliest and in no event later than **30th September, 2015.**

13. The parties through their counsel are directed to appear before the Court below on **25.6.2015.** The Registry is directed to transmit the records of the case forthwith to the Court below so as to reach well before the date fixed. Both these revisions are disposed of in the aforesaid terms, so also the pending application(s), if any.

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

CWP No. 8953/2013 alongwith
CWP No.3106/2014 and 2815 of 2015
Reserved on : 4.6.2015
Decided on: 15.6.2015

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1. CWP No. 8953/2013

Joga Singh and others. …Petitioners.

Versus

State of Himachal Pradesh and others. …Respondents.

2. CWP No. 3106/2014

Vinod Kumar and others. …Petitioners.

Versus

State of Himachal Pradesh and others. …Respondents.

3. CWP No.2815/2015

Santosh Kumari. …Petitioner

Versus

State of Himachal Pradesh and others. …Respondents.

Constitution of India, 1950- Article 226- Government had framed Himachal Pradesh Vidya Upasak Yojna, 1998 to provide teaching man power in Government Primary Schools located in remote/backward/difficult/tribal areas as regular teachers were not willing to serve in

those areas- Vidya Upasaks were to be initially recruited for a period of one year and their services could be extended after evaluating their performances- services of those teachers who had passed a written test and had successfully completed one year's condensed teacher training course specifically prepared for them were to be regularized after a period of five years subject to the condition that they passed 10+2 examination and had qualified written test and interview conducted by H.P. Subordinate Service Selection Board- appointment letters were issued on the basis of combined merit list- services of the candidates were counted from the date of the regular appointment and not from the date of initial appointment- further, they were also not held entitled for pension- petitioners were appointed in the year 2000 and their appointment continued till 2007- their services were to be counted from the date of the initial appointment- pension rules were amended in the year 2003 and their appointment was prior to the amendment- hence, they were wrongly deprived of the pension- petition allowed and their services were ordered to be counted from 2000 for the purpose of pension and annual increments etc. (Para-7 to 14)

For the Petitioners: Mr. Adarsh. K. Vashista, Advocate.
For the Respondents: Mr. P.M. Negi, Dy. A.G.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge:

Since common questions of law and facts are involved in all these petitions, the same were taken up together for hearing and are being disposed of by a common judgment.

2. State has framed the Himachal Pradesh Vidya Upasak Yojna, 1998 (hereinafter referred to as the "***Vidya Upasak Yojna***" in short). The rationale for formulation of the ***Vidya Upasak Yojna*** was to provide teaching man power in Government Primary Schools, which were located in remote/backward/difficult/tribal areas. The trained teachers available in the urban and other developed areas were not willing to serve in the remote places as a result of which most of the schools in such areas were without teachers. In the remote and inaccessible areas of the State, the Department of Primary Education faced many problems like teacher absenteeism, poor scholastic standards leading to irregular functioning of primary schools and increased drop-out rate. In order to effectively counter the problem, the solution was sought in an innovative way, i.e. by recruiting voluntary teachers through the Volunteer Teacher Scheme launched by the Government of Himachal Pradesh in 1985, which was subsequently modified in 1991. However, due to relatively poor qualification of the VT's, the general standard of teaching came down resulting in undermining the basic objective of providing qualitative education in the State. In order to find a permanent and realistic solution to the problems being encountered in the realization of the objectives and to meet the growing demand for qualified teachers in the State, the ***"Vidya Upasak Yojna***" was proposed for implementation in the primary schools in the State. According to "***Vidya Upasak Yojna***", all the vacant post of teachers in Government Primary Schools, which were located in remote/backward/difficult/tribal areas were to be filled by appointing ***Vidya Upasaks*** in accordance with the laid down procedure. The ***Vidya Upasaks*** were to be initially recruited for a period of one year after following the procedure. The period of appointment could be extended after evaluating the performance of the appointees and approval by the Director Primary Education. The services of Vidya Upasaks, who had passed the written test, were to be utilized in the Government Primary Schools and the services of those candidates were to be regularized after completion of five

years of continuous service required under Chapter-VIII of Education Code amended from time to time, that too, after successful completion of one year condensed teacher training course specifically prepared for them. The regularization of Vidya Upasaks was also subject to the condition that those who were matriculates, were required to improve their educational qualification essentially upto the level of 10+2 as per NCTE norms within a period of five years. The selection was to be made through H.P. Subordinate Service Selection Board, Hamirpur on the basis of written test and interview. The minimum educational qualifications prescribed for Vidya Upasaks was matriculation examination with a minimum of 45% marks in the aggregate for general category and 40% for candidates of reserved categories. The objectives of the Vidya Upasak Yojna was also to achieve the goals set out in the H.P. Compulsory Primary Education Act, 1997, which was enforced with effect from 1.4.1998 to enforce the Universalisation of Primary Education in remote and socio-economically backward villages. The ***Vidya Upasaks*** were entitled to honorarium of Rs. 2,500/- per month. The number of vacancies was notified as per clause 10 of the ***Vidya Upasak Yojna***. The candidates were required to appear in the written test consisting of 85 marks. The written test was of objective type. Thereafter, the candidates were to be called for interview restricted to three times the number of vacancies in the Sub-Division. 15 marks were to be awarded in interview. After interview, a combined merit list was to be prepared Sub Division-wise after adding the marks obtained by the candidates in the written test and interview. The combined merit list (Sub-Division-wise) of every district was to be supplied by the Secretary, H.P. Subordinate Services Selection Board, Hamirpur to the District Primary Education Officers of the respective districts for making appointments in each of the Sub-Division in the district. The reservation was also to be provided as per the norms laid down by the State Government. The candidates were also required to attend the one year condensed teacher training course. The norms for absorption as regular primary teacher were provided under clause 16 of the ***Vidya Upasak Yojna***.

3. In sequel to ***Vidya Upasak Yojna***, H.P. Subordinate Services Selection Board Hamirpur issued an advertisement whereby the applications were invited on or before 28.4.2009. Petitioners and similarly situate persons participated in the selection process. They sat in the written test and they also appeared in the interview. Petitioners, on the basis of the combined merit list, were issued appointment letters vide office order dated 19.9.2000. Petitioners have also obtained one year condensed teacher training course, as required under the ***Vidya Upasak Yojna*** and the conditions enumerated in the appointment letters. Petitioners were regularized/absorbed vide office order 31.10.2007 and 22.11.2007 and were placed in the pay scale of Rs. 4550-7200.

4. Mr. Adarsh K. Vashishta, learned counsel for the petitioner, has vehemently argued that the respondents have not counted the services rendered by the petitioners from their initial date of appointment towards pension and increments.

5. Mr. P.M. Negi, learned Deputy Advocate General, has strenuously argued that since the petitioners have been regularized after 15.5.2003, they would be covered under the Contributory Pension Scheme notified on 17.8.2006, which would be deemed to have come into force with effect from 15.5.2003.

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

7. The State Government has framed a ***Vidya Upasak Yojna*** in order to achieve total eradication of illiteracy as per the goals laid down in the National Policy on Education, 1986 and to achieve the goals set out in the H.P. Compulsory Primary Education Act, 1997 and also to achieve 100% enrolment of children in the age group of 6-11 years in

Government Primary Schools in Himachal Pradesh. The minimum essential qualification was prescribed under clause 7 of the Vidya Upasak Yojna. The selection was to be made through H.P. Subordinate Services Selection Board, Hamirpur on the basis of written test consisting of 85 marks and interview of 15 marks. The H.P. Subordinate Services Selection Board, Hamirpur commenced the selection process, which led to the appointment of the petitioners in the year 2000. Petitioners have also undertaken initially training of 21 days and thereafter completed one year condensed teacher training course. They were regularized/absorbed, as noticed hereinabove, on 22.11.2007.

8. The State Government has amended the Central Civil Services (Pension) (Himachal Pradesh First Amendment) Rules, 2003 whereby after clause (h) of rule 2 of the Central Civil Services (Pension) Rules, 1972, the following new clause (i) has been inserted:

> **"(i) All appointments made in the State Government of Himachal Pradesh on or after the date of the publication of the notification in Rajpatra, Himachal Pradesh."**

9. According to the plain language of newly added clause (i) of rule 2, the persons appointed in the State of Himachal Pradesh on or after 15.5.2003 shall not be entitled to pension as per Central Civil Services (Pension) Rules, 1972. According to Mr. P.M. Negi, learned Deputy Advocate General, they would be covered under Contributory Pension Scheme as per notification dated 17.8.2006.

10. Petitioners have been appointed after undergoing the rigours of selection process in the year 2000. They were qualified as per the norms laid down in the ***Vidya Upasak Yojna***. They successfully completed one year condensed teacher training course, which led to their regularization/absorption vide letters dated 31.10.2007 and 22.11.2007. There is no break in their service from the year 2000 till the date of their regularization/absorption. It is specifically provided in the ***Vidya Upasak Yojna*** and as per the terms and conditions enumerated in the appointment letters that they would be considered for regularization/absorption after five years of continuous service, including one year condensed teacher training course starting from the date of joining and successful completion of training and passing of subsequent examination after the training. However, there was a rider that the candidates, who were only matriculate, were required to pass 10+2 examinations within five years after the appointment as Vidya Upasak. Petitioners were to be regularized/absorbed as regular primary teacher irrespective of vacant post in the regular scale. However, fact of the matter is that petitioners were appointed against regular post initially in the year 2000 and at the time of their absorption/regularization also, posts were lying vacant.

11. According to rule 13 of the Central Civil Services (Pension) Rules, 1972, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity provided that officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post. In the instant case, petitioners have been appointed by the State Government as per the norms laid down though initially for a period of one year, but their appointments were continued from the year 2000 followed by their appointments on substantive post on 31.10.2007 and 22.11.2007. The service on contract can also be counted under rule 17, which is subsequently followed by substantive appointment in a pensionable establishment. The status of the petitioners was better of than the persons appointed merely on contract basis since they have continuously worked for a period of 7 years without any obstruction and obtained essential qualification of one year condensed teacher training course.

12. We are of the considered view that the petitioners have been appointed before 15.5.2003 and are entitled to pension under the Central Civil Services (Pension) Rules, 1972. There is no merit in the contention of Mr. P.M. Negi, learned Deputy Advocate General that the appointments of the petitioners would be reckoned from the date of their regularization/absorption on 31.10.2007 and 22.11.2007. There is not even a single day break in the service of the petitioners and they have fulfilled all the conditions stipulated in the ***Vidya Upasak Yojna*** as well as in their appointments letters. Respondent-State is a welfare State. The services rendered by the petitioners from the years 2000 to 2007 cannot be obliterated or rendered otiose.

13. Mr. Adarsh K. Vashista has vehemently argued that though the petitioners were appointed on honorarium, but they have been discharging the same and similar duties, which were discharged by the regularly appointed teachers. Rather the petitioners were posted in remote/backward/difficult/tribal areas where the regularly appointed Junior Basic Trained Teachers were reluctant to serve and there was large scale absenteeism which has deteriorated the educational standard. Petitioners werert6 not entitled to the regular pay scale at par with regularly appointees but they are entitled at least to count this period from the years 2000 to 2007 towards annual increments as well as qualifying service for pension. Action of the respondents of not counting the period from 2000 to 2007 for the purpose of pensionary benefits and annual increments is violative of Articles 14 and 16 of the Constitution of India. It is made clear that the petitioners are entitled to count this period towards pensionary benefits as well as annual increments.

14. Accordingly, in view of the analysis and discussion made hereinabove, all the petitions are allowed. The period from 2000 to 31.10.2007 and 22.11.2007, respectively shall be counted as qualifying service for the purpose of pension under the Central Civil Service (Pension) Rules, 1972. This period shall also be counted for the purpose of annual increments. Pending application(s), if any, also stands disposed of. No costs.

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

Mast Ram ……Appellant.
Vs.
State of Himachal Pradesh …..Respondent.

Cr. Appeal No. 107 of 2013
Reserved on: 03.06.2015
Date of decision: 15.6. 2015

Indian Penal Code, 1860- Sections 376 and 506- Prosecutrix was found to be pregnant- she disclosed that her pregnancy was due to forcible sexual intercourse by accused within a period of 1 years- a panchayat was convened in which compromise was effected - however, mother of the prosecutrix filed a complaint against the accused before Panchayat which was forwarded to the police where FIR was registered- prosecutrix made improvement in her statement while appearing in the Court- there are variations in her statement recorded on 11.7.2012 and 12.7.2012 under Section 161 of Cr.P.C and the statement made in the Court- it was admitted that prosecutrix and her family members went to the Clinic in the vehicle of the accused after the incident was disclosed by the prosecutrix – family members would have never boarded the vehicle if the incident was narrated by the prosecutrix- witness of the compromise turned hostile- prosecutrix stated that she was raped in the house- it was

not believable that accused would have raped the prosecutrix in the house in the presence of all the members of the family- version of the prosecutrix did not inspire confidence- accused acquitted. (Para-25 to 29)

For the appellant : Mr. Vikas Rathore, Advocate.
For the respondent: Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, J.

This appeal is instituted against the judgment and order, dated 15.03.2013/19.03.2013, rendered by the learned Additional Sessions Judge, Fast Track Court, Hamirpur, H.P., whereby the appellant-accused, who was charged with and tried for the offence punishable under Sections 376 & 506 of the Indian Penal Code, was convicted and sentenced to undergo rigorous imprisonment for a term of ten years and to pay a fine of Rs.50,000/- for the offence punishable under Section 376 of the Indian Penal Code and in default of payment of fine, he was further ordered to undergo simple imprisonment for a term of one year. He was also sentenced to undergo simple imprisonment for a term of one year and to pay a fine of Rs.1,000/- for the offence punishable under Section 506 of the Indian Penal Code and in default of payment of fine to further undergo simple imprisonment for a term of one month.

2. Case of the prosecution, in a nut-shell, is that the prosecutrix was a student of 10+1 at Government Senior Secondary School Chabutra, District Hamirpur, H.P. On 02.07.2012, she was brought for medical check up at Thakur Surgical and Maternity Nursing Home, Hamirpur, H.P. by her relatives. She was found three months pregnant. She disclosed that her conception was due to forcible sexual intercourse by the accused for over a period of 1 ½ years. She was admitted at Thakur Surgical and Maternity Nursing Home, Hamirpur on 03.07.2012 and her MTP (abortion) was conducted on 05.07.2012. Father of the prosecutrix Ajit Singh, convened a Panchayat meeting at his house on 05.07.2012 in the presence of accused and his wife and the compromise was effected. On 07.07.2012, Shakuntla Devi, mother of the prosecutrix filed a complaint against the accused before the Gram Panchayat, Chabutra for initiating legal action again him. The complaint was forwarded by the Gram Panchayat to the police on 11.07.2012. Thereafter, FIR No. 66/12, dated 11.07.2012 was registered against the accused. Police also preserved the clothes of the prosecutrix which she was wearing at the time of abortion. The date of birth certificate of the prosecutrix was procured from the office of Panchayat Secretary, Gram Panchayat Chabutra. The vaginal slides, swabs and pubic hair preserved during the medical examination were sent for forensic examination to FSL, Junga. The matter was investigated and the challan was put up in the Court after completion of all the codal formalities.

3. The prosecution has examined number of witnesses to support its case. The accused was also examined under Section 313 of the Cr. P.C. Accused denied the case of the prosecution. The accused was convicted and sentenced, as noticed hereinabove. Hence, this appeal.

4. Mr. Vikas Rathore, learned counsel for the appellant has vehemently argued that the prosecution has failed to prove the case against the appellant.

5. Mr. Ramesh Thakur, Assistant Advocate General has supported the judgment and order, dated 15.03.2013/19.03.2013.

6. We have heard the learned counsel for the parties and gone through the judgment and records, carefully.

7. PW-1, Dr. Tanu Priya, has issued MLC Ex. PW1/A. According to her opinion, as per physical examination, sexual intercourse had taken place and the possibility of recent abortion could not be ruled out.

8. PW-2 is the prosecutrix. She was studying in 10+1 at GSSS Chabutra. Accused was related to her as paternal uncle. The grand daughter of the accused was also the student of 10+1 at GSSS Chabutra and was her classmate. Her name was Manisha. About 1 ½ years back, she had gone to her house to meet her. She was not at home at that time. Accused was at home. He took her in a room, shut the same and said that he wanted to establish physical relations with her. Despite her resistance, he committed sexual intercourse against her wishes and without her consent. Accused used to give her Rs.100/- and sweets (*meethai*). Accused also threatened her to defame in the society in case she disclosed his acts to anyone. In the month of June-July, 2012, she had sensation of vomiting and giddiness. She disclosed the problem to her mother. Her mother sent her along with Seema, Anu Bala and Saroti to a private hospital, i.e., Thakur Clinic at Hamirpur. On 03.07.2012, they came to the hospital for medical check up. She was found pregnant. The doctor also disclosed that due to the pregnancy, there was threat to her life. On returning back to her home, she told the aforesaid fact to her mother. On the next day, she was sent alongwith her relatives to the hospital, where her abortion was conducted. She remained hospitalized for two days. Thereafter, her mother filed an application before the local Gram Panchayat. She deposed in her cross-examination that she did not know the name of the village where accused resides. It took 15 minutes on foot from her house to reach the house of the accused. It took half an hour to reach GSSS Chabutra from her house on foot. Police recorded her statement 2-3 times. While making statement to the police, she had also disclosed that the accused used to give her Rs.100/-(the witness was confronted with her statements, dated 11.07.2012 and 12.07.2012 under Section 161 Cr. P.C., wherein it was not so recorded). While making statement to the police, she had also disclosed that she had gone to the house of the accused to meet his grand daughter Manisha (the witness was confronted with her statements, dated 11.07.2012 and 12.07.2012 made under Section 161 Cr. P.C., wherein it was not so recorded). She also admitted that the accused was married and his son was also married and they live together in the same house. She also admitted that the accused had two grand daughters, who also live with him in the same house. On 03.07.2012, when she came for her medical check up at Thakur Clinic, the fact of pregnancy was detected and disclosed to her and other persons accompanying her. On returning home, she had told the aforesaid fact to her mother. She also told her mother that she had become pregnant due to sexual relations with the accused. She also admitted that on being discharged from Thakur Clinic, they returned back to home in the vehicle of the accused. She also admitted that the accused drives a taxi. She also admitted that on 03.07.2012, her mother did not come to the Clinic at Hamirpur. Her mother came to the clinic on 04.07.2012. Her father also came to the Clinic, but she did not remember the date.

9. PW-3, Smt. Shakuntla Kumari, is the mother of prosecutrix. According to her, the age of the prosecutrix was 15 years. She sent her daughter alongwith Seema, Anu Bala and Saroti Devi for medical check up to Thakur Clinic at Hamirpur. On 03.07.2012, after medical check up, her daughter returned home and told that she was pregnant. She was advised abortion because there was threat to her life. She conceived because of forcible sexual relations with the accused for the last 1 ½ -2 years. On 05.07.2012, she was sent for termination of the pregnancy to Thakur Clinic, Hamirpur. Her daughter returned after the abortion on the same day in the evening. Thereafter, she reported the matter to Pradhan,

Gram Panchayat Chabutra by filing a complaint Ex.PW3/A. The complaint was forwarded by the Panchayat to Police Station, Sujanpur. Her daughter got identified the places where she had been raped by the accused. Thereafter, they came to Government Hospital at Sujanpur. The medical check up of her daughter was conducted at Sujanpur Hospital. According to her, no compromise took place before the Panchayat with the accused. She was cross-examined by the learned Public Prosecutrix. She also admitted that her husband entered into a compromise with the accused before Gram Panchayat, Chabutra. She did not remember the date on which the compromise took place with the accused. She did not know the person who scribed the compromise. She has admitted that the day her daughter went for her medical check up at Thakur Clinic Hamirpur, she travelled to and fro in the Taxi of the accused. She never went to Thakur Nursing Home. Her husband also never went to Thakur Clinic when abortion of her daughter took place. Her husband came to the village 3-4 days after the abortion of her daughter.

10. PW-4, Mis. Poonam, is the sister of prosecutrix. According to her, the age of the prosecutrix was 16 years and she was student of 10+1 at GSSS Chabutra. She was brought to Thakur Clinic at Hamirpur on 02.07.2012. She was pregnant. On 03.07.2012, she was again taken to Thakur Clinic, where the abortion was conducted. She returned back from the Clinic on 05.07.2012.

11. PW-5, Smt. Saroti Devi, deposed that on 02.07.2012, they brought the prosecutrix to Thakur Hospital, Hamirpur. She was also accompanied by Seema Devi and Anu Bala. After medical check up of prosecutrix, she was found to be pregnant. They were also told that there was a threat to the life of the prosecutrix and in order to save her, termination of pregnancy was necessary. Thereafter, they inquired from the prosecutrix about the person who was responsible for the pregnancy. The prosecutrix disclosed the name of the accused. On the next day morning, they again came to Thakur Hospital at Hamirpur. The prosecutrix was admitted in the hospital. On 05.07.2012, before the prosecutrix was discharged from the hospital, they called the accused alongwith the vehicle to verify the facts disclosed by the prosecutrix. The accused admitted his fault and gave Rs.6000/- to meet the expenses of the abortion. They returned home from the Clinic in the vehicle of the accused on 05.07.2012. In her cross-examination, she stated that she had told the police that the accused had paid a sum of Rs.6000/- as the medical expenses incurred for abortion (the witness was confronted with her statement Mark-C, wherein this fact was not so recorded). In her statement, she had not disclosed that the accused was asked by her regarding his involvement on 05.07.2012 at Thakur Clinic Hamirpur. The prosecutrix was discharged from the Clinic on 05.07.2012 at 7:00 p.m. Mother of the prosecutrix was also present and they returned together to the village in the same vehicle.

12. PW-6, Puran Chand, deposed that he went to the house of Ajit Singh alongwith Vidhya Devi, Ward Member. The other two ward members, i.e., Joginder and Raman also reached the house of Ajit Singh. The wife of the accused Champa Devi and Ajit Singh were also present. The parties had written a compromise which was presented for attestation. The wife of the accused had agreed to bear the expenses of the medical treatment etc. He proved compromise Ex. PW6/A. The accused at first instance had admitted, but thereafter he refused regarding his involvement. He was declared hostile and was cross-examined by the learned Public Prosecutor. He denied the suggestion that when he reached the house of Ajit Singh on 05.07.2012, accused Mast Ram was also present there. He also denied that after Ajit Singh narrated him the matter, he enquired from the accused about his involvement, on which he admitted his fault, voluntarily stated that the accused had left the house before he reached there. He also denied that the compromise Ex. PW6/A was arrived at in his presence and thereafter, it was prepared and the signatures of

the persons present there and the accused were obtained on the same. He also denied the suggestion that Ajit Singh had told him that the accused had been raping his daughter for last 1 ½ years. In his cross-examination by the learned defence counsel, he admitted that when he went to the house of Ajit Singh on 05.07.2012, he did not meet either the prosecutrix or her mother. He did not know who had scribed the compromise Ex. PW6/A.

13. PW-7, Joginder Singh, deposed that Ajit Singh produced a written compromise Ex.PW6/A, which he signed as a Ward Member. He did not enquire before signing the compromise Ex. PW6/A either from Ajit Singh or other persons present there. He signed the compromise since it had been prepared and already signed by other persons. In his cross-examination by the learned Public Prosecutor, he admitted that on 05.07.2012, when they reached the house of Ajit Singh, he disclosed that the accused had been doing wrong act with his daughter, the prosecutrix for the last 1 ½ years. He also admitted that Up Pradhan Puran Chand inquired about the incident from the accused, to which he admitted his fault. In his cross-examination by the learned defence counsel, he stated that he had no conversation with the accused.

14. PW-8, Dr. Shobna Thakur, deposed that on 02.07.2012, the prosecutrix was brought to her. She found her three months pregnant. On the next day, i.e., 03.07.2012, the prosecutrix was again brought to her in a critical condition by her *Bua.* She was admitted in the hospital on 03.07.2012 and abortion was conducted on 05.07.2012.

15. PW-9, Santosh Kumar deposed that he went to the house of Ajit Singh and found that some persons of the village had gathered there. Accused Mast Ram was also present there. The wife of the accused was also present. He alongwith others inquired from the accused regarding the allegations made by Ajit Singh, on which, he admitted his involvement.

16. PW-10, Mohinder Singh, Panchayat Secretary, deposed that on 11.07.2012, a complaint Ex. PW3/A alongwith a compromise Ex. PW6/A was received. He issued the date of birth certificate as per Ex. PW10/C. He also produced the original birth register for the year 1996. The date of birth of the prosecutrix was recorded as 07.08.1996. The entry was made on the basis of information given by Ashok Kumar, Up Pradhan. In his cross-examination, he has admitted that there were no signatures of Ashok Kumar, Up Pradhan on the register, volunteered that there were signatures of Rattan Chand, who was relative of the prosecutrix. There was no copy of the compromise Ex. PW6/A in the Panchayat record, since the same was not retained.

17. PW-11, Ajit Singh, is the father of the prosecutrix. He deposed that on 04.07.2012, he was at his work place, where he received a telephone call from his wife that his daughter was unwell and was admitted at Thakur Nursing Home at Hamirpur. He went to Thakur Nursing Home at Hamirpur. After meeting his daughter, he also met the doctor, who told him that in order to save the life of the prosecutrix, her abortion is required. His daughter disclosed to him that accused had been raping her for the last 1-1½ years at his home and Jhangri jungle. He had been paying her Rs.100/-. On 05.07.2012, he convened the Panchayat. In his cross-examination, he has stated that while making statement to the police, he had not disclosed that his daughter told him of being raped by the accused for the last 1-1 ½ years. In his statement to the police, he had disclosed that during the meeting in the presence of the Panchayat Members and other persons, the accused has admitted his guilt and fault (he was confronted with his statement Mark-F, wherein it was not so recorded). In his statement to the police, he had told that the accused had borne the expenses of the abortion (he was confronted with his statement mark-F, wherein it was not so recorded).

18. PW-12, Sh. Raman Kumar, was the witness to compromise Ex. PW6/A. He was also declared hostile. He denied the suggestion during cross-examination by the learned Public Prosecutor that the accused was present during the meeting and had signed Ex. PW6/A in his presence. He also denied that the accused had admitted his fault and guilt for raping the daughter of Ajit Singh. However, he admitted that on 11.07.2012, Shakuntla Devi, mother of the prosecutrix filed a complaint alongwith compromise to the Panchayat, which was forwarded to Police Station Sujanpur. He accompanied the police alongwith Joginder Singh and prosecutrix to the house of accused, where the prosecutrix identified the room, in which she had been raped. He also admitted that on 14.07.2012, he remained associated with the police. The prosecutrix produced her clothes, i.e., Salwar and Kameej, which were taken into possession by the police vide seizure memo Ex. PW2/A. He further admitted that the clothes were sealed in a cloth parcel by affixing six seals of impression H. He also admitted that on 14.07.2012, the accused led the police party to Jhangri *jungle* and identified the spot.

19. PW-13, Dr. Raj Kumar, has examined the accused and issued MLC Ex. PW13/B. PW-14, Constable Pawan Kumar is a formal witness. PW-15, Dr. Rakesh Sharma, Radiologist, has undertaken the ultrasound examination of the prosecutrix. PW-16, HHC Amarjit, PW-17, LC Reena Kumari and PW-18, Constable Lekh Raj are formal witnesses.

20. PW-19, HC Ranjit Singh, deposed that he was posted as MHC, Police Station Sujanpur since 2011 onwards. On 11.07.2012, HHC Amarjit Singh deposited the case property with him and he made the entries regarding the deposit of case property at Sr. No. 52/12 in the *malkhana* register vide Ex. PW19/A. On 12.07.2012, LC Reema deposited the case property with him and he made the entries regarding the same at Sr. No. 53/12 vide Ex. PW19/B. On 14.07.2012, ASI Hakam Singh deposited the case property with him and it was deposited in the *Malkhana* register at Sr. No. 54/12 vide Ex. PW-19/C. On 25.07.2012, the abovementioned sealed parcels were handed over to Constable Lekh Raj for depositing the same at State Forensic Science Laboratory, Junga vide RC No. 82/12.

21. PW-20, Dr. Sunita Galoda, issued MLC Ex. PW20/C. According to her opinion, sexual intercourse had taken place and there were signs of recent abortion. According to PW-21, Kuldeep Chand, accused Mast Ram and his wife were present when they visited the house of Ajit Singh. Ajit Singh and Mast Ram agreed and entered into a compromise, wherein it was settled that the accused will bear the expenses of her marriage.

22. PW-22, ASI Hakam Singh, deposed that on the basis of the complaint, he registered FIR No. 66 of 2012, dated 11.07.2012, Ex. PW22/A. Thereafter, he immediately went to the house of the prosecutrix. He recorded the statements of Nikki Devi, Poonam, Kusum & Tripta Devi under Section 161, Cr. P.C. On 14.07.2012, he went to Village Chabutra to the house of the prosecutrix, where she produced her clothes, which were taken into possession vide seizure memo Ex. PW-2/A. On 11.07.2012, the prosecutrix was sent for medical examination to CHC Sujanpur. Accused was also sent for medical examination to CHC, Sujanpur.

23. PW-23, SI Parkash Chand, deposed that on 12.07.2012, at about 8:30 a.m., he left Police Station and went to village Dhardu. On reaching, he associated Shakuntla Devi, Tripta Devi, Puran Chand, Joginder Kumar and Raman Kumar. They went to Jhangri *jungle*. The prosecutrix identified the place where she was raped by the accused. Spot map Ex. PW23/A was prepared. Thereafter, the prosecutrix took the police party to the house of the accused at village Chabutra and got identified the room where she had been raped by the accused and spot map Ex. PW23/B was prepared. Statements of the witnesses were recorded. Statement of the prosecutrix was recorded under Section 164, Cr. P.C. on

16.07.2012. On 20.07.2012, he took into possession the medical record regarding abortion of the prosecutrix. He also obtained the date of birth certificate of the prosecutrix from the Panchayat Secretary.

24. The accused has produced DW-1, Ms. Manisha Kumari as defence witness. According to her, she was student of 10+1 at Govt. Sr. Sec. School, Chabutra. She took admission in this School on 10.04.2012. Prior to this, she was studying in Govt. Sr. Sec. School, Rail, Tehsil Nadaun, District Hamirpur, H.P. She deposed that family of the accused comprised of his mother, wife, son, daughter-in-law and two grand daughters. Prosecutrix was also studying in her class. She knew her since she joined the School on 10.04.2012. In her cross-examination, she denied the suggestion that she was knowing the prosecutrix since 2006 onwards and they were good friends. Accused also examined DW-2, Sh. K.C. Katoch and DW-3, Sh. Beer Singh. They deposed about the admission of Manisha Kumari.

25. According to the prosecutrix (PW-2), she had gone to the house of accused to see her classmate. She was not at home. The accused was at home. He took her in his room, shut the same and said that he wanted to establish physical relations with her. Accused forced her to lie on the bed and despite her resistance, he committed sexual intercourse against her wishes and without her consent. He also threatened her to do away with her life in case she disclosed the incident anywhere. Thereafter also, whenever accused got time and opportunity, he continued to have sexual intercourse with her. He used to give her Rs.100/-. She went to Thakur Clinic on 02.07.2012 for medical check up. She was found pregnant. She came back and narrated the incident to her mother. She was again sent to hospital, where her abortion was conducted. She did not know the name of the village where the accused resides. Police recorded her statement 2-3 times. She disclosed that the accused used to give her Rs.100/- (she was confronted with her statements dated 11.07.2012 and 12.07.2012 made under Section 161, Cr. P.C. wherein it was not so recorded). She also disclosed that she had gone to the house of the accused to meet his grand daughter Manisha (she was confronted with her statements dated 11.07.2012 and 12.07.2012 under Section 161 Cr. P.C. wherein it was not so recorded). She also admitted that accused Mast Ram was married and his son was also married and they live together in the same house. She also admitted in her cross-examination that when she was discharged from Thakur Clinic, they returned back home in the vehicle of the accused. She has made improvements in her statement while appearing in the Court and there is variance in her statements recorded under Section 161 Cr. P.C. on 11.07.2012 and 12.07.2012 and the statement made in the Court. Case of the prosecution is that the prosecutrix had gone to the house of the accused to meet his grand daughter, but it was not so stated in her statement made on 11.07.2012 and 12.07.2012. It was also her case that she was given Rs.100/- every time by the accused, but it was not stated in her statement recorded under Section 161 Cr. P.C. recorded on 11.07.2012 and 12.07.2012. She went to the hospital on 02.07.2012 and when she came back, she narrated the incident to her mother. Thereafter, she again went to the hospital on 03.07.2012 and was admitted in Thakur Clinic, Hamirpur. When she was discharged, she came back in the vehicle of the accused. It is not believable that when the entire family knew that the accused had committed rape on the prosecutrix, why would she come back in the vehicle owned and driven by the accused. Similarly, PW-3, Smt. Shakuntla Kumari, mother of the prosecutrix in her cross-examination has admitted that the day her daughter went for her medical check up at Thakur Clinic Hamirpur, she travelled to and fro in the Taxi of the accused Mast Ram. PW-5, Smt. Saroti Devi, who accompanied the prosecutrix to Thakur Clinic, Hamirpur, has also admitted that they returned home from Clinic in the vehicle of the accused on 05.07.2012. She further admitted in her cross-examination that the prosecutrix was discharged from the Clinic on 05.07.2012 at 7:00 a.m. Mother of the prosecutrix was also present and they returned home in the vehicle owned by

the accused. The family after knowing the fact that the accused had committed rape on prosecutrix would not have gone to the Clinic and come back in the vehicle of the accused. They would have never boarded the vehicle owned and driven by the accused after the incident has been narrated by the prosecutrix to her mother, as noticed by us hereinabove.

26. Case of the prosecution is also that a compromise was also arrived at vide Ex. PW6/A, whereby the accused has admitted his guilt. According to PW-3, Shakuntla Kumari, no compromise had taken place before the Panchayat with the accused. She was declared hostile. She did not know the person who scribed the compromise. She also admitted that the compromise did not take place in her presence. PW-5, Smt. Saroti Devi, deposed that on 05.07.2012 before the prosecutrix was discharged, they called the accused alongwith the vehicle and enquired about the facts disclosed by the prosecutrix. According to her, the accused admitted his fault and gave Rs.6000/- to meet the expenses of the abortion. However, in her cross-examination, she was confronted with her statement Mark-C, wherein it was not so stated.

27. The other witness qua the compromise Ex. PW6/A, Sh. Puran Chand was also declared hostile. In his cross-examination by the learned Public Prosecutor, he denied the suggestion that after Ajit Singh narrated him the matter, he enquired from the accused present there about his involvement on which he admitted his fault. He did not know, who has written the compromise Ex. PW6/A. Similarly, PW-7, Sh. Joginder Singh was also declared hostile. There is variance in the statements of PW-6, Sh. Puran Chand, Up Pradhan, Gram Panchayat Chabutra and PW-7, Sh. Joginder Singh, Ward Member, Gram Panchayat Chabutra. PW-11, Sh. Ajit Singh, father of the prosecutrix, in his cross-examination has admitted that while making statement to the police, he had not disclosed that his daughter told him of being raped by the accused for the last 1-1 ½ years. In his statement to the police, he had disclosed that the accused during the meeting in the presence of the Panchayat Members and other persons, admitted his guilt and fault (he was confronted with his statement Mark-F wherein it was not so recorded). In his statement to the police, he had told that the accused had borne the expenses of the abortion (he was confronted with his statement Mark-F, wherein it was not so recorded).

28. The case of the prosecution is that the prosecutrix was raped in the house of accused and in forest. <u>The accused was married. His son was also married. He was living with his family, i.e., wife, son and daughter-in-law and two grown up grand daughters. It is</u> not believable that the accused could rape the prosecutrix in the presence of all the members of his family, as alleged by the prosecutrix.

29. The alleged compromise, Ex. PW6/A is doubtful. We reiterate that if the accused was involved, the family of the prosecutrix would have never gone in his vehicle for medical check up on 3rd July, 2012 and 5th July, 2012. The relations would have become immediately bitter when the prosecutrix had told her mother about the alleged involvement of the accused. The version of the prosecutrix does not inspire confidence. There is variance in the statements of the witnesses recorded in the Court and previous statements recorded under Section 161 Cr. P.C. The contradictions made are major in nature. Consequently, the prosecution has failed to prove the case against the accused beyond reasonable doubt. The defence of the accused is also probablised that the family of the prosecutrix has to pay a sum of Rs.6,000/- and they refused to pay and the accused was implicated in this case. The prosecution has to prove the case beyond reasonable doubt and the accused has to prove his defence by probability.

30. Accordingly, in view of the observations and discussions made hereinabove, the appeal is allowed. The judgment and order, dated 15.03.2013/19.03.2013, are set aside.

The accused is acquitted of the charges framed against him. Fine amount, if already depositied, be refunded to the accused. He be released forthwith, if not required in any other case. The Registry is directed to prepare the release warrants and send the same to the concerned Superintendent of Jail.

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

Parveena Devi ….. Petitioner.
Versus
State of H.P. and others. ….Respondents

CWP No. 1842 of 2015.
Date of decision: 15th June, 2015.

Constitution of India, 1950- Article 227- It was reported that closure report had been filed before the Magistrate- held, that petitioner should approach the Court of competent jurisdiction for the redressal of his grievances. (Para-2 and 3)

For the petitioner: Mr. Naresh Verma, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals, & Mr.J.K. Verma, and Mr. Vikram Thakur Deputy Advocate Generals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Mr. Romesh Verma, learned Additional Advocate General stated at the Bar that the Investigating officer has filed the closure report before the Court of learned Judicial Magistrate 1st Class, Joginder Nagar on 14.5.2015.

2. This Court has already discussed the issue involved in case titled ***Raj Pal Singh* versus *Central Bureau of Investigation and others,*** CWP No. 2526 of 2015 decided on 30.5.2015. It is apt to reproduce para 27 of the said judgment herein:

> *"27.Applying the test to the instant case, it can be safely said that it is the domain of the Magistrate/Court of competent jurisdiction to pass appropriate orders, while examining the report filed by the Investigating Agency."*

3. Applying the test, the petitioner is at liberty to approach the Court of competent jurisdiction for the redressal of her grievances.

4. Accordingly, the petition is disposed of, as indicated hereinabove, alongwith pending applications, if any.

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

Roshan Lal ...... Appellant

Versus

State of Himachal Pradesh ....Respondent

Cr. Appeal No. 4132/2013
Reserved on: 5.6.2015
Decided on: 15.6.2015

N.D.P.S. Act, 1985- Section 20- The person who produced the case property in the Court was not examined- no evidence was led to prove as to when the case property was taken out from the Malkhana for production before the court- Malkhana register was not produced to verify this fact- entry was required to be made when the case property was taken out from the Malkhana for its production in the court and when it was returned to be deposited in the Malkhana after its production in the court- failure to do so would make it doubtful that the case property, which was seized from the accused was sent to FSL, Junga and was produced before the court, or it was the case property of some other case- link evidence has not been established from the seizure of the case property till its production in the Court- accused acquitted. (Para-19)

For the appellant	:	Mr. Anoop Chitkara, Advocate.
For the respondent	:	Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This appeal is instituted against Judgment dated 5.8.2013 rendered by learned Special Judge (III) Mandi, District Mandi, Himachal Pradesh in Session Trial No. 56/2010, whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985, was convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1.00 Lakh, and in default of payment of fine, to further undergo simple imprisonment for one year.

2. Case of the prosecution, in a nutshell, is that on 22.3.2010, SI Dharam Singh (PW-13) alongwith Constable Bansi Lal (PW-5), HHC Hukam Chand (PW-11), HHG Trilok Chand and HHG Praveen Kumar proceeded from Police Station Jogindernagar for Nakkabandi. At about 8.00 am, they were checking the vehicles at place near Galu. Dharam Dass also called ASI Bansi Lal (PW-7) from police station. At about 8.30 am, a private bus bearing registration No. HP-32-5117 came from Mandi, which was going towards Palampur. HHC Hukam Chand signalled the bus to stop. SI Dharam Dass entered the bus from front door and ASI Bansi Lal from back door. They asked the passengers to get their luggage checked. Accused was found standing near front door of the bus and carrying one rucksack (Pithu bag) of blue and red colour. Accused was asked to get the bag checked. The accused opened the zip of the bag and inside the bag, one more pink coloured bag was found, on which words 'Dharwal Garments' were printed, which contained substance in the shape of sticks. Accused was asked to alight from the bus. Driver of the bus Hoshiar Singh and conductor Kashmir Singh as well as ASI Bansi Lal were associated as witnesses. Constable

Bansi Lal was sent for balance and weights. Contraband was weighed and found to be 2.7 kg. Charas was put back in the pink coloured bag and then put into said rucksack and parcelled in a cloth by putting 10 seals of seal 'D'. NCB form in triplicate, Ext. PW-13/A was prepared. Seal impression of seal 'D' was embossed on NCB form. Case property was taken into possession vide recovery memo Ext. PW-7/B. Rukka Ext. PW-13/B was prepared. Rukka was sent to the police Station through Constable Hukam Chand. Thereafter FIR Ext. PW-12/A was registered. Contraband was produced before the Inspector/SHO Smt. Shakuntla (PW-12) alongwith sample seal. She resealed the same with seal 'K' at four places. She filled in the relevant columns of NCB form and prepared reseal memo Ext. PW-12/D. Case property alongwith sample seals 'D' and 'K', NCB form in triplicate was deposited by PW-12 with HC Mangat Ram, who made entry in the Malkhana Register. Extract of Malkhana Register is Ext. PW-1/A. Case property alongwith sample seals and NCB form was sent to the Forensic Science Laboratory Junga through HHG Jagdish Chand. He deposited the case property and obtained receipt and handed it over to PW-1. Report of the FSL Junga is Ext. PX. Matter was investigated. Challan was put up in the Court after completing all the codal formalities. Accused was convicted and sentenced as noticed by us herein above.

3. Prosecution has examined as many as 13 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. Trial Court convicted and sentenced the accused as noticed above. Hence, this appeal.

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

5. Mr. Ramesh Thakur, Assistant Advocate General, has supported the judgment of conviction dated 5.8.2013.

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

7. PW-1 Mangat Ram deposed that on 22.3.2010 Inspector Shakuntla deposited with him one parcel sealed with seal impression 'D' at 10 places and seal 'K' at four places. The parcel was stated to be containing Charas. He made entry in the Malkhara Register. Extract of Malkhana Register is Ext. PW-1/A. On 23.3.2010, he forwarded the case property to FSL Junga through Jagdish Chand vide receipt No. 52/2010. Samples seals were also sent alongwith case property. Copy of RC is Ext. PW-1/B. Jagdish Chand after depositing the case property returned RC alongwith receipt to him.

8. PW-2 Hoshiar Singh deposed that at about 8.15 am, a bus was stopped by the police. Police checked the bus. He did not know what was recovered because he was on the driver seat. He did not identify the accused. He could not narrate whether the accused was travelling in the bus or not. He was declared hostile and cross-examined by the learned Public Prosecutor. He admitted that two police officers entered the bus, one from front door and other from the back door. He denied that accused was sitting on the seat ahead of first gate of the bus and carrying a pithu on his back, red and blue in colour. He denied the suggestion that search of the bag of the accused, another pink coloured bag was found. He denied the suggestion that it contained any charas. He identified signatures mark 'X'. He also denied that suggestion about resealing of contraband. He also denied that parcel alongwith sample seals alongwith NCB form was taken into possession in his presence and in the presence of Kashmir Singh. However, in his cross-examination, he has admitted that police told him that they wanted to search the bus and luggage of passengers.

9. PW-3 Jagdish Chand deposed that on 23.3.2010, a sealed parcel with 10 seals of 'D' as well as 4 seals 'K' was handed over to him by Mangat Ram for depositing that

parcel alongwith sample seals alongwith NCB form with FSL Junga vide RC No. 52/2010. The case property was carried by him and deposited with FSL Junga on 25.3.2010. Receipt was also obtained.

10. PW-4 Suresh Kumar is a formal witness.

11 PW-5 Bansi Lal also deposed the manner in which accused was nabbed, search, seizure and sealing process was completed at the spot on 22.3.2010.

12. PW-6 Parmod Kumar is a formal witness.

13. PW-7 ASI Bansi Lal also deposed the manner in which accused was apprehended, search, seizure and sealing process was completed on 22.3.2010.

14. PW-8, Tej Singh, PW-9 Lachhman Dass and PW-10 Roshan Lal, are formal witnesses.

15. PW-11 Hukam Chand also testified the manner in which accused was nabbed, contraband was recovered, seized and sealed. Case property was deposited vide memo Ext. PW-7/B. Rukka was prepared. He carried the same to the police station. In his cross-examination, he has admitted that they have associated the driver and conductor of the bus as independent witnesses and no other independent witness was called on the spot.

16. PW-12 Smt. Shakuntla deposed that on 23.3.2010, HHC Hukam Chand deposited a parcel sent by SI Dharam Chand at 10.15am. FIR Ext. PW-12/A was registered. On the same day, i.e. 3.25 pm, SI Dharam Singh handed over a parcel containing 2.7 kg charas. Parcel was sealed with 10 seals of 'D' alongwith sample seals and NCB form. She resealed the parcel with seal 'K' at four places. She filled the relevant columns of NCB form and prepared reseal memo vide Ext. PW-12/D.

17. PW-13 Dharam Singh has deposed the manner in which accused was apprehended at 8.00 am on 22.3.2010 and contraband was recovered, search and seizure process was completed at the spot. He handed over the case property to PW-12. Case property was produced while recording his statement. It was produced before the Court by HHG Mohan Singh of Police Station Jogindernagar.

18. PW-2 Hoshiar Singh has not at all supported the case of the prosecution. According to him, no contraband was recovered in his presence. He has also denied seizure and sealing process completed at the spot. Though he has identified his signatures at mark 'X'.

19. Case property was deposited by PW-12 Shakuntla with PW-1 HC Mangat Ram. On 22.3.2010, he made entry in the Malkhana Register. He proved Malkhana Register Ext. PW-1/A. Case property was sent to FSL Junga through HC Jagdish Chand vide RC No. 52/2010. He has deposited it on 25.3.2010. Case property was produced in the Court while recording statement of PW-13 Dharam Singh. Mohan Singh, who has produced the case property, has not been examined. Prosecution has not led any evidence when the case property was taken out from the Malkhana to be produced before the Court. Malkhana Register has not been produced to verify this fact. Entry was required to be made when the case property was taken out from Malkhana, for its production in the Court. Similarly, entry was also required to be made when the case property was returned to be deposited in the Malkhana after its production in the Court. There is no DDR also when the case property was taken out from the Malkhana. Every time, the case property is deposited and taken out, entries are required to be made in the Malkhana Register which is prescribed in form (Form-19) of Punjab Police Rules. It is, thus, doubtful that the case property, which was seized and

sent to FSL Junga and produced before the Court was the same, which was recovered from the accused, or it was the case property of some other case. Prosecution has not proved the entire link from the time of seizure of contraband till its production in the Court.

20. Accordingly, the present appeal is allowed. Judgment dated 5.8.2013 rendered by learned Special Judge (III) Mandi, District Mandi, Himachal Pradesh in Session Trial No. 56/2010, is set aside. Accused is acquitted of the offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985. The accused is ordered to be released forthwith, if not wanted by the police in any other case. Fine amount, if any deposited by the accused, be also refunded to him. Registry is directed to prepare the release warrant of the accused and send the same to the concerned Superintendent of Jail immediately.

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

Cr. Appeal No. 4199 of 2013 a/w
Criminal Appeal No. 37 of 2014
Reserved on: 04.06.2015
Date of decision: 15.6. 2015

Cr. Appeal No. 4199 of 2013

Ruchi Kant and others ……Appellants.
Vs.
State of Himachal Pradesh …..Respondent.

Criminal Appeal No. 37 of 2014

Smt. Sukhdei ……Appellant.
Vs.
Smt. Raj Kumari and others …..Respondents.

Indian Penal Code, 1860- Sections 364, 302, 201 read with Section 34- Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989- PW-1 informed the police that accused had kidnapped her husband after beating him- search was made to locate her husband but he could not be found- the slippers of her husband were found on the next day near the house of the accused- accused had enmity with the deceased as deceased had purchased the land which accused intended to purchase – accused had beaten the complainant and her son- accused 'A' was arrested and he made a disclosure statement on which body parts of the deceased and darat were recovered- PW-1, PW-2 and PW-3 had not made any efforts to search the deceased, even though they were accompanied by many persons- PW-33 admitted the overwriting on the disclosure statement- motive for the commission of crime was not established and no material was brought by the prosecution on record to show that deceased was killed simply because he happened to be member of scheduled caste category- Medical Officer stated that cause of death could not ascertained due to advance decomposition of the body- witnesses were closely related to each other and their statements did not inspire confidence- held, that in these circumstances, prosecution version was not proved- accused acquitted. (Para-34 to 55)

Cases referred:

Masumsha Hasanasha Musalman Vs. State of Maharashtra (2000) 3 SCC 557
Dinesh alias Buddha Vs. State of Rajasthan (2006)3 Supreme Court Cases 771
Ramdas and others Vs. State of Maharashtra (2007) 2 Supreme Court Cases 170

For the appellants : Mr. Satyen Vaidya, Advocate, for the appellants in Cr. Appeal No. 4199 of 2013.
Mr. Ajay Thakur, Advocate, vice Mr. Lakshay Thakur, Advocate, for the appellant in Cr. Appeal No. 37 of 2014.

For the respondent(s): Mr. Ramesh Thakur, Assistant Advocate General, for the respondent-State in both the appeals.
None for respondents No. 1 and 2 in Criminal Appeal No. 37 of 2014.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

Since both the appeals have arisen out of the common judgment, dated 24.08.2013/26.08.2013, the same were taken up together for hearing and are being disposed of by this common judgment.

2. These appeals are instituted against the judgment dated 24.08.2013/ 26.08.2013, rendered by the learned Special Judge, Hamirpur, H.P. in Sessions Trial No. 24 of 2012, whereby the appellants in Cr. Appeal No. 4199 of 2013 alongwith Raj Kumari and Asha Devi were charged with and tried for the offence punishable under Sections 364, 302, 201 read with Section 34 of the Indian Penal Code and Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Accused Raj Kumari and Asha Devi were acquitted, however, accused Ruchi Kant, Subhash Chand and Anil Kumar were convicted and sentenced to imprisonment for life and a fine of Rs.20,000/- each was also imposed for the offence punishable under Section 302 of the Indian Penal Code and in default of payment of fine, they were further ordered to undergo simple imprisonment for one year. They were also sentenced to undergo rigorous imprisonment for 7 years and a fine of Rs.10,000/- each was also imposed for the offence punishable under Section 364 of the Indian Penal Code and in default of payment of fine, they were further ordered to undergo simple imprisonment for six months. They were also sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs.5,000/- each for the offence punishable under Section 201 of the Indian Penal Code and in default of payment of fine, they were further ordered to undergo simple imprisonment for three months. They were also sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/- each for the offence punishable under Section 3(2)(v) of the SC & ST Act and in default of payment of fine, they were further ordered to undergo simple imprisonment for six months.

3. Case of the prosecution, in a nut-shell, is that on 11.08.2011, complainant Smt. Sukhdei (PW-1), wife of Shri Ramesh Chand, resident of Village and Post Office, Badoh, Tehsil and Police Station, Bhoranj, telephonically informed the police at Police Station, Bhoranj that accused Ruchi Kant, Anil Kumar, Subhash Chand, Raj Kumari and Asha Devi have kidnapped her husband after giving beatings to him. On this information, *rapat* Ex. PW38/A was entered in the Police Station and SI Desh Raj (PW 38) went to the spot where complainant Smt. Sukhdei (PW-1) got recorded her statement under Section 154 Cr. P.C. Ex. PW1/A. FIR Ex. PW37/A was registered. During investigation, every effort was made to locate Ramesh Chand, but he could not be located either alive or dead due to rainy season and growing of crop. Thereafter, Dy. SP Headquarters searched at the spot and on his supervision separate teams were constituted to trace Ramesh Chand. On the next day in the morning, slippers of the husband of complainant were located at a distance of 40-50 feet away from the house of accused and the complainant (PW-1) identified those slippers. The investigating officer (PW-38) took into possession those slippers Ex. P1. He also clicked the

photograph Mark-C and lifted the samples of blood from the spot with the help of cotton in a match-box and sealed it in a cloth parcel and took the same into possession vide memo Ex. PW8/A. On April, 2011, deceased Ramesh Chand purchased 15 Marlas land from one Roshan Lal, which was situated adjacent to the house of deceased Ramesh Chand and the boundary of land of accused was also adjoining to this land. Accused wanted to purchase the said land and due to that reason accused developed some enmity with the complainant party. The accused persons had quarreled and beaten the complainant (PW-1) and her son Purshotam (PW-18) and FIR No. 66, dated 16.04.2011 Ex. PW41/A under Sections 341, 323, 325 &506 read with Section 34 of the Indian Penal Code regarding this incident was registered at Police Station Bhoranj. On 11.08.2011, deceased Ramesh Chand had gone to his routine work to Jahu in the morning and come back for taking his lunch and thereafter, he again left for his shop at about 2:30/3:00 p.m. When at about 7:30 p.m., deceased Ramesh Chand did not return from the shop as usual, complainant came out to her courtyard and waited for him. In the meantime, she heard the cries of her husband from the side of house of accused Subhash Chand. At about 7:45 p.m., when Miss Baby (PW-5) was cooking meal in her kitchen, she heard the sound of gate of house of accused Subhash Chand and then she peeped through window of her house and saw that the accused persons were beating Ramesh Chand with kicks and blows. When Baby (PW-5) was peeping through the window, accused Subhash Chand and Anil Kumar had seen her and thereafter they started taking Ramesh Chand towards verandah. Thereafter, Baby (PW-5) went to her cousin sister Pushpa Devi (PW-3) and narrated about the incident, on which she also came out and saw giving beating to Ramesh Chand by the accused persons. Pushpa Devi (PW-3) tried to make a call to Dina Nath, but the call could not be matured and then she made a call on landline phone to Rekha Devi (PW-2) at about 8:00 p.m. and informed her that the accused persons were beating Ramesh Chand and on this, PW-2 went to the house of complainant and told about this incident to her. Thereafter, Baby (PW-5) and Pushpa Devi (PW-3) came to the courtyard of PW-5 and saw that Ramesh Chand was being taken by accused Subhash Chand, Ruchi Kant and Anil Kumar towards Khad, while accused Raj Kumari and Asha Devi were following them at some distance. On seeing this, Pushpa Devi (PW-3) asked the accused persons as to why they had beaten up Ramesh Chand. When complainant (PW-1) was still in the courtyard, at the same moment Rekha Devi (PW-2) came to her house and disclosed that accused persons were giving beating to Ramesh Chand. Complainant Sukhdei started weeping loudly and called Dina Nath and thereafter Dina Nath, Braham Dass, Gian Chand, Santosh Kumari, Pushpa Devi & Rekha Devi came to her house and then went towards the house of accused. When they reached in the house of accused, neither Ramesh Chand nor accused were present there and some blood stains were present on the gate, wall and courtyard of the house of accused Subhash Chand as well as on the path leading towards the Khad (rivulet). Accused were arrested. Accused Anil Kumar made disclosure statement Ex. PW9/A. Thereafter body parts of deceased Ramesh Chand were recovered. The recovery of drat was also effected. The investigation was completed and the challan was put up in the Court after completing all the codal formalities.

4. The prosecution has examined number of witnesses to support its case. The accused were also examined under Section 313 of the Cr. P.C. They pleaded innocence. The appellants/accused in Cr. Appeal No. 4199 of 2013 were convicted and sentenced, as stated hereinabove. Hence, these appeals.

5. Smt. Sukhdei, complainant has also filed an appeal bearing Cr. Appeal No. 37 of 2014 against the acquittal of Raj Kumari and Asha Devi.

6. Mr. Satyen Vaidya, learned counsel for the appellants in Cr. Appeal No. 4199 of 2013 has vehemently argued that the prosecution has failed to prove the case against the accused persons.

7. Mr. Ramesh Thakur, learned Assistant Advocate General, has supported the judgment, dated 24.08.2013/26.08.2013.

8. We have heard the learned counsel for the parties and gone through the judgment and records, carefully.

9. PW-1, Smt. Sukhdei, deposed that her husband was working as a Carpenter at Jahu. On 11.08.2011, he had gone for his routine work to Jahu in the morning and came back to house for taking lunch and thereafter, he again left for the shop at about 2:30/3:00 p.m. When at about 7:30 p.m., he did not return from the shop, she came out to her courtyard and waited for his arrival. In the meantime, she heard cries of her husband coming from the side of house of accused Subhash. She was in the courtyard, in the meantime, Rekha Devi, wife of Prem Chand came to her house and she told her that the family of Subhash Chand was beating her husband Ramesh Chand. She started weeping loudly and called Dina Nath. Thereafter, Dina Nath, Braham Dass, Gian Chand, Santosh Kumari, Pushpa Devi, Rekha Devi all came to her house and then they went towards the house of Subhash Chand. Some blood stains were found on the gate and wall of the house as well as in the courtyard of the accused. There were blood stains on the passage leading towards the Khad/Jahu. Pushpa Devi and Baby, who were already present there, disclosed them that accused Ruchikant, Anil Kumar, Subhash Chand, Raj Kumari and Asha Devi had beaten up Ramesh Chand and taken him towards Khad. She telephonically informed the police. Police arrived on the spot after some time. Police inquired from her and recorded her statement Ex. PW1/A. Police clicked the photographs of the blood lying on the spot and also took the blood into possession. The police as well as villagers searched for her husband, but he could not be traced. On the next day in the morning, the sleepers of her husband were located at a distance of 40-50 feet away from the house of accused. She identified the sleepers of her husband. Police took into possession that sleepers after taking photographs of the same vide memo Ex. PW1/8. They had purchased 15 Marlas of land from one Roshan Lal in the month of April, 2011, which was quite adjacent to their house and the boundary of the land of the accused persons adjoins to that land and accused persons wanted to purchase that land and due to that reason, they had developed some enmity with them. According to her, the accused persons had quarreled and beaten up her and her son due to enmity after the purchase of land and the case regarding this beating was registered against the accused. In her cross-examination, she deposed that distance of her house from the house of Subhash was about 250-300 metres by road, but through fields it was lesser. The house of Rekha was situated after 2-3 houses of her house. The house of Baby was not on back side of the house of Subhash. However, between both these two houses, there was a passage. She has admitted that Rekha was the daughter of maternal uncle of Baby. She also admitted that Pushpa and Baby were first cousins. Purshotam was her son. She could not say after how much time of reaching Rekha to her house, she went to the house of Subhash. She could not tell that she visited there after half an hour or one hour. Baby and Pushpa were in their courtyard and when they reached the house of Subhash, Baby, Pushpa and their family members had also reached there. She did not remember whether she had told the police that Santosh Kumari and Pushpa Devi had also come to her house alongwith Dina Nath etc. (she was confronted with her statement Ex.PW1/A, where names of these ladies were not stated). She had told the police that when they reached the house of accused Subhash, he and his family members were not present (she was confronted with her statement Ex. PW1/A, in which it was not stated). She had also told the police that Pushpa

Devi and Baby were already present there who had told her that the accused had beaten her husband and taken him towards Khad (she was confronted with her statement Ex. PW1/A in which, no such fact was recorded). However, according to her, this fact was stated by her in her supplementary statement. She had not told the police that Subhash Chand wanted to purchase 15 Marlas of land. She had told the police that accused Ruchikant and Anil Kumar had threatened to kill her entire family whenever they got an opportunity (she was confronted with her statement Ex. PW1/A where this fact is not so recorded).

10. PW-2, Smt. Rekha Devi deposed that on 11.08.2011, she went to her kitchen. In the meantime, she received a telephone call on her landline from Pushpa Devi and she disclosed her that accused persons, namely, Subhash Chand, Ruchikant, Anil Kumar, Raj Kumari and Asha Devi were beating Ramesh Chand. She went to the house of Ramesh Chand, where wife of Ramesh Chand was present in the courtyard. She told her that she got a telephone call from Pushpa Devi, who disclosed that the accused persons were beating Ramesh Chand. On this, PW-1, Smt. Sukhdei started weeping loudly and on hearing her cries, one Dina Nath, Braham Dass, Gian Chand and two three other ladies of the locality gathered there. Thereafter, they all went to the house of accused Subhash Chand, where they saw blood stains on the wall of the house of accused, gate and in the courtyard. Thereafter, they went to the house of Pushpa and Baby, who informed them that the accused persons after giving beatings to Ramesh Chand, took him towards downward Khad. There was none in the house of the accused except one person having beard sitting in the verandah. PW-1 informed the police telephonically and they all searched for Ramesh Chand in the fields but could not trace him. Thereafter, police came to the spot and recorded the statement of PW-1. Police took into possession the sample of blood from the spot. The accused persons had beaten Ramesh Chand due to some previous enmity regarding purchase of land and earlier also the accused persons had beaten up the family members of deceased Ramesh Chand. During search, police recovered sleepers Ex. P1 from the spot at a distance of 40-50 feet away from the house of accused. In her cross-examination, she admitted that Baby was her cousin being the daughter of sister of her father. She also admitted that their house was situated at higher level, whereas house of accused was at lower level. She did not know at what time, she reached the house of Sukhdei. She stated that it might have taken 20-25 minutes to reach them to the house of accused from the house of Sukhdei. She also admitted that as long as she remained in the house of Subhash, Pushpa and Baby did not come there. She also admitted that sometimes, Subhash Chand and his family members throw wastes of their house in their land despite their protest a number of times and because of this, there had been altercations between them. She had told the police that Pushpa Devi disclosed her on phone that accused Subhash Chand, Ruchikant, Anil Kumar, Raj Kumari and Asha Devi were beating Ramesh Chand (she was confronted with her statement Mark-DA, where the names of family members of accused Subhash Chand were not recorded). She had also told the police that they all went to the house of accused Pushpa and Baby, who informed them that accused persons after beating Ramesh Chand, took him towards Khad (she was confronted with statement Mark-DA, where it is not so recorded). They had gone towards the Khad to search for Ramesh Chand. Other persons were also with them. By that time, police had not reached the spot. At that time, Sukhdei was also with them, when they had gone towards Khad to search Ramesh Chand. They had not searched the deceased Ramesh Chand on the next day of the occurrence.

11. PW-3, Smt. Pushpa Devi deposed that on 11.08.2011 at about 7:45 p.m., she was cooking food in her kitchen. In the meantime, her cousin sister Baby came to her and told that Subhash Chand and his family members were beating Ramesh Chand. On this, she came out of her kitchen and saw that Ramesh Chand was crying and requesting for his

rescue in the gate of the house of accused Subhash Chand. All the accused persons namely Subhash Chand, Ruchikant, Anil Kumar, Raj Kumari and Asha Devi were giving beatings to Ramesh Chand. She tried to make a telephone call at the house of Ramesh Chand, but the call did not mature. On this, she told about the incident to Smt. Rekha Devi on her landline telephone. Thereafter, she and Baby went to the house of accused persons, where Ramesh Chand was lifted by the accused Subhash Cnand, Ruchikant and Anil and went towards Khad side. Accused Raj Kumari and Asha Devi also followed them. She asked accused Raj Kumari as to why she had beaten up Ramesh Chand. After 10-15 minutes, wife of Ramesh Chand alongwith other persons reached on the spot. They all searched for Ramesh Chand, but he could not be traced. In her cross-examination, she deposed that Rekha Devi is not related to her. House of Baby was at a lower level from the house of Subhash and in between the house of Subhash and Baby, there was a mango tree. She did not go to the house of Rekha Devi. She also did not go to the house of Subhash Chand, but she had made a call to Rekha Devi. She also deposed that earlier, she tried to inform Sukhdei, but call to her could not mature. The fact that she and Baby went to the house of accused persons and saw that Ramesh Chand was lifted by the accused Subhash Chand, Ruchikant and Anil, who took him towards Khad, was told by her to the police (she was confronted with statement Mark-DB, where it is not so recorded). She had told the police that her cousin Baby came to her and told that Subhash Chand and his family members were beating Ramesh Chand (she was confronted with her statement Mark-DB, in which names of only three accused Subhash Chand, Anil and Ruchikant are mentioned). She talked to Rekha on telephone about 15 minutes and thereafter, she came to the house of Baby. She did not remember for how long she remained in the house of Baby, but she remained there for quite long. Thereafter, she came back to her house and stayed at her house during the night. She had not gone to the Khad to search Ramesh Chand alongwith other persons. She could not remember the colour of the clothes worn by Ramesh Chand.

12. PW-4, Nazeer Deen, has deposed that on 10.08.2011, he had gone to the house of accused Subhash Chand. He took dinner and went to sleep in the night. On the next day, Subhash Chand and his family members had to go to appear before the Panchayat. They proposed him to accompany them. At 7:00 p.m., they came to the house of Subhash Chand. They sat in the upper storey verandah of the house of Subhash Chand. In the meantime, he heard some cries from the passage which was leading along the house of accused. He could not identify the persons who were crying. After some time, police arrived there. Some villagers had also reached on the spot. He heard some noise when he was in the bath room. Thereafter, nothing has happened. He was declared hostile and was cross-examined by the learned Public Prosecutor. He admitted that when the person was going along the passage leading in front of the house of accused, Subhash Chand said to him why he usually abused him while passing through the passage. He denied the suggestion that thereafter accused Ruchikant and Anil Kumar chased him. He also denied that when the said person tried to stand, accused Anil Kumar kicked him and gave blows to him. He also denied that thereafter Ruchikant and Anil Kumar lifted that person and took him to passage leading downward. He admitted that his statement was recorded before the Judicial Magistrate 1st Class, Court No. II, Hamirpur. He admitted his signatures on Ex. PW4/B. He admitted that whatever he deposed that was recorded by the Magistrate in his statement Ex.PW4/C, volunteered that when he was brought to the Court, police had asked him to make the statement in the manner which was recorded by the police, otherwise he may be in trouble. He admitted that after writing his statement Ex. PW4/C, the same was read over to him by the Magistrate and he signed each page as correct. In his cross-examination, by the learned defence counsel, he admitted that till the arrival of police, entire family of the accused was inside the house. He also admitted that from 13.08.2011 onwards, police kept on asking him to make the statement according to their wish.

13. PW-5, Ms. Baby deposed that on 11.08.2011 at about 7:45 p.m, she was cooking meals in her kitchen. In the meantime, she heard the sound of gate of Subhash Chand. She peeped through window of her house and saw that Ramesh Chand was being beaten up by accused persons, namely, Subhash Chand, Ruchikant and Anil Kumar. Accused Raj Kumari and her daughter in law Asha Devi were also standing there. They were beating Ramesh Chand by giving kick and fist blows. When she was peeping through the window, Subhash Chand and Anil Kumar saw her looking towards them. Thereafter, they started taking Ramesh Chand towards verandah. She went to her cousin sister Pushpa Devi and narrated about the beating being given to Ramesh Chand by the accused persons, on which she also came out and saw the beatings being given by accused persons. Pushpa Devi tried to make phone call to Dina Nath, resident of Badoh, but the call could not mature. Then, Pushpa Devi made a telephone call on the landline phone of Rekha Devi and informed her regarding the beatings. Thereafter, she and Pushpa Devi came to her courtyard and saw that Ramesh Chand was being taken away by accused Subhash Chand, Ruchikant and Anil Kumar towards Khad while accused Asha Devi and Raj Kumari were following them at some distance. After 15-20 minutes, Sukhdei alongwith other villagers came there. Sukhdei was crying. All the villagers searched for Ramesh Chand, but he could not be traced. In her cross-examination, she told the police that when the accused were beating Ramesh Chand, accused Asha Devi was also there (she was confronted with statement Mark-DC, in which name of accused Asha Devi was not stated). She also deposed that she had not told the police that Pusshpa Devi tried to call Dina Nath. She has admitted that their house was at a lower level as compared to the house of accused Subhash Chand. She has narrated the incident to her father, volunteered that after hearing the incident, his BP arose and after taking medicine, he went to sleep.

14. PW-6, Sh. Surjit Kumar is not a material witness. PW-7, Sh. Ishwar Dass, deposed that on 12.08.2011, during investigation, police recovered black colour Chappal (sleepers). The wife of Ramesh Chand identified the sleepers to be that of her husband. These were taken into possession vide memo Ex. PW1/B.

15. PW-8, Sh. Nanak Chand, deposed that on 11.08.2011 at about 9:00 p.m., he received a telephone call from her sister, who informed him that Ramesh Chand was beaten up by Subhash Chand and his family members had kidnapped him. He hired a vehicle and reached at the spot at about 9:15 p.m. Police and other villagers were on the spot. There were blood stains on the gate and on the passage leading towards Khad. Police clicked the photographs and lifted samples of blood with the help of cotton from the spot in the match box and sealed in a cloth parcel and taken into possession vide memo Ex. PW8/A.

16. PW-9, Sh. Onkar Singh, deposed that accused Anil Kumar made a disclosure statement vide Ex.PW9/A, vide which he disclosed that he could get recover the parts of body of deceased Ramesh Chand from Jauh/Chanth Khad. Thereafter, accused led the police party to Jauh/Chanth Khad and reached there at 5:30 p.m. Accused pointed out the spot and got recovered the trunk (*Dhad*) of the dead body underneath the boulders. Police took into possession the trunk vide memo Ex. PW9/B. On 16.08.2011, he and Rakesh Kumar were present at Jauh Khad in the evening. Police brought Anil Kumar accused in custody there, where accused Anil Kumar disclosed during interrogation that he could get recover the parts of the body from the place where he had hidden them. Police recorded the statement of accused vide Ex. PW9/C. Thereafter, the accused led the police to the spot and got recovered both feet and one half arm of the dead body of Ramesh Chand, which were taken into possession by the police vide memo Ex. PW9/D. On 20.08.2011, police recovered fingers of the deceased Ramesh Chand from the bushes in putrid condition. On 21.08.2011,

accused Anil Kumar got recovered one drat, which was taken into possession vide memo Ex. PW9/G.

17. PW-10, Sh. Majid Mohammad, deposed that Nazeer Mohammad was his brother-in-law. He visited his house on 12.08.2011 alongwith one person whose name he came to know as Subhash Chand later on. They stayed in his house and left his house on 13.08.2011. Subhash Chand had left a bag there containing his clothes in his house. During investigation on 18.08.2011, police visited his house and he handed over the bag containing clothes of Subhash Chand to the police. Police sealed the clothes of Subhash Chand in a cloth parcel and taken into possession vide memo Ex. PW4/A.

18. PW-11, Smt. Parkasho Devi, deposed that she and her daughter-in-law were cutting maize crop in her field. They felt some foul smell from the side of *maind*. She saw the object and observed some round type bones, on which, she called one Jiwan Kumar. She suspected that this object could be the bones of dead body of a human being as recently one Ramesh Chand was missing.

19. PW-12, Smt. Neelam Kumari deposed that police has taken into possession the bones of neck and head of human being vide Ex. PW12/A. PW-13, Sh. Dalip Kumar, deposed that during investigation, accused Anil Kumar made disclosure statement that he could get the *drat* recovered from the spot. His statement was recorded vide Ex. PW 13/A. Thereafter, accused Anil Kumar led the police party to Chanth Khad and got recovered the *drat* Ex. P5

20. PW-14, Sh. Harbans Lal, deposed that during August, 2011, he was posted at Police Station Bhoranj. He alongwith other police officials and HHGs. were deputed for the security of the house of deceased Ramesh Chand at village Badoh. He remained there for about 15-20 days. When he was on duty, he found a sim lying in the passage downward to the house of deceased Ramesh Chand. He was not aware of the owner of sim, so he used the said sim in his mobile. There was forty eight rupees balance. The number of the sim was 98174-74972. Later on, he came to know through Police Station Bhoranj that the sim belonged to deceased Ramesh Chand. In his cross-examination, he deposed that the sim was found at a distance of 10-20 yards from the house of Ramesh Chand. He did not tell to his senior police officials and Home Guards about the sim. He admitted that if something is found on the way, then it becomes his duty to deposit the same with the Police Station.

21. PW-15, Sh. Kuldip Kumar, is a formal witness. PW-16, Sh. Roshan Lal, deposed that he sold the land to Ramesh Chand through registered sale deed during the month of February, 2011 and mutation was sanctioned in the month of April, 2011. When he sold this land to Ramesh Chand, accused Subhash Chand and his family members, whose land was also situated near the aforesaid land, asked him that he also wanted to purchase that land and why did he sell land to Ramesh Chand. He told him that this land was situated near the house of Ramesh Chand, therefore, he sold it to him. In his cross-examination, he deposed that he came to know about the missing of Ramesh Chand on 11.08.2011. He did not go to the house of Ramesh Chand, because he was advised rest because of his surgical operation. He was called by the police to Police Station Bhoranj after 2-3 months of missing of Ramesh Chand. Subhash Chand had never offered for the purchase of said land before he sold the same to Ramesh Chand.

22. PW-17, Sh. Gurdev Singh, deposed that on 12.08.2011, at about 5:30 p.m., he reached Barthin and accused Subhash met him on the Chowk and he handed over the bag alongwith suite. PW-18, Shri Purshotam Dhiman is the son of deceased Ramesh Chand. According to him, in April, 2011, they had purchased 15 marlas land from one Roshan Lal

of their village, which was situated near their house. The boundary of the land of Subhash Chand adjoins the aforesaid land. He also deposed that since they belong to Lohar caste, which falls within the category of scheduled caste, therefore, accused Subhash Chand used to call them Lohar and he wanted to purchase that land and since they had purchased this land, therefore he developed some ill will against them and quarreled with them in the month of April, 2011. A case was registered against the accused persons in Police Station Bhoranj. On 11.08.2011, when he was at Chandigarh, his mother telephoned him and informed that accused Subhash Chand and his family members had beaten his father and kidnapped him. He hired a vehicle and reached on the spot at about 2:30 a.m. on the next day. He saw some blood stains on the passage, on the gate and inside the gate of the house of accused Subhash Chand. Police, villagers and his relatives were present there. They all searched for his father, but he could not be traced. The sleepers of his father were found near the house of Vidyasagar and his mother identified the sleepers that of his father. On 14.09.2011, when he was present at Baddi, a phone call was received from his mother and she informed that head of his father was found in the field of Parkasho Devi at Dathwin village. On this, he alongwith his mother and uncle Besari Ram reached on the spot where her maternal brother Manoj Kumar was present alongnwith police and other Panchayat members. They found there some round shaped bones in decomposed condition. Police inspected the object and took photograph of the same and took the same into possession. Thereafter, the police took that object to R.H., Bilaspur for post mortem. In his cross-examination, he admitted that when he reached at the house of Subhash Chand at 2:30 a.m., his mother was present there. He did not know whether Pushpa, Rekha and Baby were present or not, volunteered that number of ladies were present there at that time. He also tried to search his father. He alongwith his cousin brother Manoj Kumar and his brother-in-law Ravinder had gone to search his father. They kept on searching him till morning, but he could not tell the exact time till when he searched him. He had stated to the police in his statement that since they belong to Lohar caste, which falls within the category of Scheduled Caste and Subhash Chand used to call them Lohar (he was confronted with his statement Mark-DG, in which it was not so recorded). He had told the police that he had seen the blood stains on the passage (he was confronted with his statement Mark-DG, in which it was not so recorded). He did not remember whether he had told the police that accused Subhash wanted to purchase the land which was purchased by them. He did not know whether police had called dog squad in the village.

23. PW-19, Dr. Anil Dhiman, deposed that on 01.09.2011, police of Police Station Bhoranj had moved an application Mark-V for taking blood sample of Purshotam Dhiman and Rattan Chand for DNA test. Accordingly, he took blood sample of the aforementioned persons, sealed it and handed over the same to the police for further test at FSL, Junga on the same day.

24. PW-20, Dr. N.K. Sankhyan, Medical Officer, deposed that on 16.08.2011, police of Police Station Bhoranj moved an application Mark-W for conducting post mortem examination on the body of deceased Ramesh Chand. It was also mentioned in the application that other parts of the body were also recovered by the police and therefore, it was requested that post mortem may be conducted on 17.08.2011. He conducted the post mortem examination on 17.08.2011 of deceased Ramesh Chand. The parts of the body were brought by SI Desh Raj and other police officials. According to him, the probable time that elapsed between injuries and death could not be ascertained. The probable time that elapsed between death and post mortem was 4 days and 2 weeks. He prepared the post mortem report Ex. PW20/C. On receipt of chemical report from Forensic Science Laboratory, Junga, Mark-AC, police produced the same before him for obtaining final opinion of cause of death of the deceased. After perusal of report his opinion was that the cause of death could not be

ascertained due to advance decomposition of the body. His opinion is Ex. PW-20/D. On receipt of report from FSL, Junga, dated 24.10.2011, Mark-AD, police again sought final opinion. He finally opined that the different parts of mutilated body whose post mortem was conducted on 17.08.2011 were of deceased Ramesh Chand, father of Sh. Purshotam Dhiman, as per DNA matching profile report. DNA cross-matching could not be possible for the parts of the body whose post mortem was conducted on 21.08.2011 and 15.09.2011 probably due to advance decomposition of the body. The deceased had neither consumed alcohol nor poison. The cause of death of deceased could not be ascertained due to advance decomposition of the dead body. His opinion is Ex. PW20/E. He gave his opinion again vide Ex. PW 20/F to the effect whether the injuries could be caused with drat Ex. P5. In his cross-examination, he has admitted that the police has not shown the weapon of offence to him on 17.08.2011.

25. PW-21, Sh. Hanumant Rai, has deposed that on 12.08.2011 an e-mail was received for CDR of Mobile no. 94180-82515 and the same was provided on 18.08.2011, which was Ex. PW21/A. PW-22, Devender Verma has proved the bill Ex. PW 22/A of Cell No. 98162-59154. PW-23, Sh. Rup Chand, has prepared Tatima Ex. PW23/A. PW-24, Ms. Kamlesh Kumari, has proved copy of notification Ex. PW24/B. PW-25, Sh. Kashmir Singh has proved photographs Ex. PW25/A-1 to Ex. PW25/A-34 and DVC is Ex. PW25/A-35 and DVD is Ex. PW25/A-36. PW-26, HC Jaswant Singh deposed that the case property was deposited with him by SI Desh Raj on 12.08.2011, Inspector/SHO Sohan Lal on 13.08.2011 and by HHC Suresh Kumar on 18.08.2011. SI Desh Raj again deposited the case property with him on 19.08.2011 and Inspector/SHO Sohan Lal also deposited the case property with him on 21.08.2011. On the same day, Constable Surinder Kumar deposited the case property with him. The case property was also deposited with him on 14.09.2011 by Inspector/SHO Sohan Lal and on 15.09.2011 by ASI Karan Singh. He sent the case property to FSL, Junga on 18.08.2011, 22.08.2011, 05.09.2011 and 16.09.2011 vide RC No. 131/11, 132/11, 133/11, 134/11, 143/11 and 156/11.

26. PW-27, Constable Navneet Kumar, deposed that on 18.08.2011, MHC Jaswant Singh handed over to him two sealed parcels duly sealed alongwith relevant documents for depositing the same with FSL, Junga, which he deposited there on 19.08.2011 and handed over the RC to MHC, Police Station Bhoranj.

27. PW-28, Constable Surinder Singh and PW-29, Constable Rakesh Kumar, have deposed that MHC Jaswant Singh sent sealed parcels through them to FSL Junga and Finger Print Bureau at Bharari. PW-30, Constable Vijay Kumar, deposed that on 16.09.2011, MHC Jaswant Singh handed over to him one container duly sealed with seal Kshetriya Parishad containing round shaped bones and head of human being for depositing the same at FSL, Junga, which he has deposited on 16.09.2011. PW-31 ASI Vinod Kumar, has deposed that he remained associated with investigation in this case and SHO Police Station Bhoranj during investigation of the case, took into possession the clothes of accused Ruchi Kant and Anil Kumar, which were handed over to ASI Rakesh Kumar vide seizure memo Ex. PW31/A.

28. PW-32, ASI Rakesh Kumar deposed that on 15.08.2011, accused Anil Kumar was in police custody at Police Station, Bhoranj. During interrogation, he disclosed that he had concealed the trunk of deceased Ramesh Kumar at Chanth Khad and he could get it recovered. His statement was recorded vide Ex. PW9/A. Thereafter, Anil Kumar led the police party towards Chanth Khad and on reaching there, he pointed out the spot. On removing the boulders, a trunk of the human being was recovered. The photographs were taken and the trunk was taken into possession vide recovery memo Ex. PW9/B. In his

cross-examination, he has admitted that the trunk was in a decomposed and mutilated condition.

29. PW-33, ASI Karan Singh, deposed that on 16.08.2011, when accused Anil Kumar was in police custody and was present at Joh. He disclosed in his presence as well as of Onkar Singh and Rakesh Kumar that he had concealed the parts of body of deceased Ramesh Chand at Chanth Khad, which spot was known to him and he could get the same recovered. His statement was recorded vide Ex. PW9/C. Thereafter, Anil Kumar led the police party and witnesses to Chanth Khad. After clicking the photographs of the same, the body parts were taken into possession vide recovery memo Ex. PW9/D.

30. PW-34, Manmohan Singh, who has signed Ex. PW13/A, was declared hostile. He was cross-examined by the learned Public Prosecutor. PW-35, Sh. Anjani Jaswal, is a formal witness. PW-36, Sh. Surya Parkash, Civil Judge (Junior Division)-cum-Judicial Magistrate 1st Class, Karsog, District Mandi, H.P. proved the proceedings made vide Ex. PW36/A. He also proved Ex. PW4/B and Ex. PW4/C. PW-37, Sh. Jagdish Kumar is a formal witness.

31. PW-38, SI Desh Raj, deposed that on 11.08.2011, he received a phone call of Sukhdei, wife of Ramesh Chand in the Police Station, on which rapat No. 37-A, Ex. PW38/A was entered. He reached the spot. Statement of Sukhdei was recorded vide Ex. PW1/A. He conducted the investigation and took into possession the case property and deposited the same with MHC Police Station Bhoranj.

32. PW-39, Inspector Sohan Lal deposed that the statement of accused Anil Kumar was recorded under Section 27 of the Indian Evidence Act in the presence of witnesses Onkar Singh and Rakesh Kumar vide Ex. PW9/A. Thereafter, the accused alongwith police party and witnesses went to the spot from where a trunk of human being was recovered. The recovered trunk was taken into possession vide recovery memo Ex. PW9/B. A disclosure statement was made by accused Anil Kumar again on 16.08.2011 vide Ex. PW9/C and parts of the body were recovered vide Ex. PW9/B. Accused Anil Kumar also made a disclosure statement vide Ex. PW13/A that he could get the drat recovered from Chanth Khad. The drat was recovered vide Ex. PW9/G. The statement of Nazirdin was also recorded.

33. PW-40, Inspector Ramesh Chand, PW-41, MHC Raghujeet Singh, PW-42, SI Santokh Singh and PW-43, SI Des Raj are formal witnesses. PW-44, Inspector Sohan Lal deposed that he moved an application on 02.09.2011 to JMIC-II, Hamirpur vide Ex. PW44/A for recording the statement of Nazirdin under Section 164 Cr. P.C. On 07.09.2011, he moved an application Ex. PW44/B for issuance of caste certificate of deceased Ramesh Chand, on which caste certificate of deceased Ramesh Chand was issued by Patwari Halqua Deog vide Ex. PW44/C. He also moved an application Ex. PW44/F for post mortem of trunk of deceased Ramesh Chand.

34. PW-1, Sukhdei has testified that when her husband did not come at 7:30 p.m, she came out to her courtyard and waited for his arrival. She heard the cries of her husband from the side of house of accused Subhash. She was in the courtyard, at that time, Rekha Devi wife of Prem Chand came to her house and told that family of Subhash Chand was beating her husband Ramesh Chand. Then, she started weeping loudly and called Dina Nath. Thereafter, Dina Nath, Braham Dass, Gian Chand, Santosh Kumari, Pushpa Devi and Rekha Devi came to her house and then went towards the house of Subhash Chand. Pushpa Devi and Baby who were already present on the spot told them that accused Ruchikant, Anil Kumar, Subhash Chand, Raj Kumari and Asha Devi had beaten Ramesh

Chand and taken him towards Khad. According to her, in April, 2011, they had purchased 15 Marlas land from one Roshan Lal, which was quite adjacent to their house and the boundary of the land of the accused persons adjoins to that land and accused persons wanted to purchase that land and due to that reason, they had developed some enmity with them. In her cross-examination, she has admitted that Rekha was the daughter of maternal uncle of Baby. She also admitted that Pushpa and Baby were first cousins. Purshotam was her son. Witness Nanak was her brother and Ravi Kumar was her son-in-law. She visited the house of accused Subhash Chand, but did not know whether she visited there after half an hour or one hour. When they reached the house of Subhash Chand, Baby and Pushpa were already there. She had not gone to search for her husband, but her relatives had gone to search for her husband. She did not remember whether she had told the police that Santosh Kumari and Pushpa Devi had also come to her house alongwith Dina Nath (she was confronted with her statement Ex. PW1/A, where names of these ladies are not mentioned there). However, she volunteered that Pushpa Devi was not that Pushpa Devi who was a witness in this case. She had told the police that when they reached the house of accused Subhash, Subhash and his family members were not there (she was confronted with her statement Ex. PW1/A, in which it was not so recorded). She had also told the police that Pushpa Devi and Baby were already present there who had told her that the accused had beaten her husband and taken him towards Khad (she was confronted with her statement Ex. PW1/A, in which it is not so stated). She had told the police that accused Ruchikant and Anil Kumar had threatened to kill her entire family whenever they get an opportunity (she was confronted with her statement Ex. PW1/A, in which it was not so stated). She did not know whether her relatives searched her husband towards the Khad or not. She did not know whether police went towards the Khad to search her husband, however, volunteered that on that day about 40-50 police personnel were present there on the spot. There are improvements and variations in her statement recorded in the Court and the earlier statement recorded under Section 164 Cr. P.C., Ex. PW1/A. When she heard the cries of her husband, she would have rushed towards the house of accused. She did not know whether she visited the spot after half an hour or one hour. According to her, accused had taken her husband towards the Khad, but she did not know whether her relatives searched for her husband towards the Khad or not. She had not gone to search her husband, but her relatives had gone to search her husband. If she had reached in the house of Subhash Chand, what prevented her from searching her husband when she was accompanied by other persons also.

35. PW-2, Rekha Devi testified that she received a call from Pushpa Devi. She disclosed her that accused persons were beating Ramesh Chand. She went to the house of Ramesh Chand, where PW-1 was present in the courtyard. She told her that she got a telephonic call from Pushpa Devi, who disclosed her that the accused persons were beating Ramesh Chand. On this, PW-1 started weeping loudly and on hearing her cries, Dina Nath, Braham Dass, Gian Chand and two three other ladies of the locality gathered there. Thereafter, they all went to the house of accused Subhash Chand. PW-1, Sukhdei has also deposed that Pushpa Devi and Rekha Devi had come to their house, but PW-2 Rekha Devi deposed that Baby and Pushpa were present in their house when they went towards the house of accused. PW-2, Rekha Devi has also admitted that at times, there were altercations between her family members and family members of accused persons. The Khad was about 1 km. away from the house of the accused, but they had not searched the deceased Ramesh Chand on the next day of the occurrence. It was unusual conduct on the part of PW-1 Sukhdei and PW-2 Rekha Devi not to search for Ramesh Chand.

36. PW-3, Smt. Pushpa Devi deposed that she was cooking food in her kitchen on 11.08.2011 at about 7:45 p.m. In the meantime, her cousin sister Baby came to her and

told that Subhash Chand and his family members were beating Ramesh Chand. On this, she came out of her kitchen and saw Ramesh Chand was crying and requesting for his rescue in the gate of house of accused Subhash Chand. She narrated the incident to Smt. Rekha Devi on her landline telephone. Thereafter, she and Baby went to the house of accused persons where Ramesh Chand was lifted by accused Subhash Chand, Ruchikant and Anil and they went towards Khad side. PW-3, Pushpa Devi has categorically admitted that she never went to the house of Accused Subhash Chand, but had made a call to Rekha Devi. Even, she has not gone to the Khad to search Ramesh Chand along with other persons. She talked to Rekha about 15 minutes and thereafter, she came to the house of Baby. Father of the Baby was also present in the house.

37. PW-5, Baby deposed that she peeped through the window of her house and saw that Ramesh Chand was being beaten up by accused persons Subhash Chand, Ruchikant and Anil Kumar. Accused Raj Kumari and her daughter-in-law Asha Devi were also standing there. They were beating Ramesh Chand by giving kick and fist and blows. When she was peeping through the window, Subhash Chand and Anil Kumar saw her looking towards them. Thereafter, they started taking Ramesh Chand towards verandah. Thereafter, they went to the house of her cousin sister Pushpa Devi and she narrated about the beatings being given to Ramesh Chand by the accused person, on which she also came out and saw the beatings being given by accused persons. Thereafter, Pushpa tried to make phone call to Dina Nath, but the call could not mature. Then, Pushpa Devi made a telephone call on the landline phone of Rekha Devi and informed her regarding the beatings. Thereafter, she and Pushpa Devi came to her courtyard and saw that Ramesh Chand was being taken away by accused Subhash Chand, Ruchikant and Anil Kumar towards Khad while accused Asha Devi and Raj Kumari were following them at some distance. The father of Baby was present in the house. His statement has not been recorded. The explanation given by Baby is that after hearing about the incident, his blood pressure shot up and after taking medicine, he went to sleep. PW-1, Sukhdei in her cross-examination has deposed that she told the police that Pushpa Devi and Santosh Kumari had come to her house alongwith Dina Nath (she was confronted with her statement Ex. PW1/A, where names of these ladies were not mentioned).

38. According to the prosecution case, PW-4, Nazeer Deen has made a statement under Section 164 Cr. P.C. He was declared hostile while recording his statement in the Court. In his cross-examination by the learned Public Prosecutor, he has deposed that he was brought to the Court and the police has asked him to make the statement in the manner which was recorded by the police, otherwise he would be in trouble.

39. PW-36, Sh. Surya Parkash, Civil Judge (Junior Division)-cum-Judicial Magistrate 1st Class in his cross-examination has admitted that he has not seen in the police file as to where statements of the witnesses were recorded under Section 161 Cr. P.C. It did not come to his notice that witness Nazeer Deen remained in the police station from the date when his statement under Section 161 Cr. P.C. was recorded till he was produced before the Court. He also did not inquire from the police and from the witness that where from the witness was produced before him. However, the fact of the matter is that PW-4, Nazeer Deen remained in the police custody till his production before the Court. It casts doubt about the statement of PW-4 Nazeer Deen under section 164 of the Code of Criminal Procedure.

40. PW-7, Sh. Ishwar Dass has proved the memo Ex. PW1/B, whereby sleepers were taken into possession by the police. PW-9, Onkar Singh deposed that the accused Anil Kumar has made a disclosure statement vide Ex. PW9/A, Ex. PW9/B and Ex. PW9/C, on the basis of which the body parts were got recovered by him. There is overwriting on Ex. PW9/B as well as on Ex. PW9/C.

41. PW-33, ASI Karan Singh has admitted that there is overwriting in Ex. PW9/C. PW-39, Inspector Sohan Lal has also admitted that there is overwriting in Ex. PW9/C as well as Ex. PW9/D. The drat Ex. P5 was got recovered from the accused on the basis of disclosure statement Ex. PW13/A. PW-9, Sh. Onkar Singh, has admitted in his cross-examination that there was heavy rain from 12.08.2011 to 15.08.2011 and the flood had come in the Khad. 25-30 police officials used to come to the place of recovery on the aforesaid dates. PW-14, Sh. Harbans Lal has deposed the manner in which sim was recovered. His version does not inspire confidence. According to him, when he was on duty, he found a sim lying in the passage downward to the house of deceased Ramesh Chand.

42. The motive attributed to the cause of killing the deceased is the purchase of plot of land by the deceased family. According to PW-1, Smt. Sukhdei, they had purchased 15 marlas of land from PW-16, Sh. Roshan Lal. Accused were also interested in buying the same piece of land. This piece of land adjoins the property of the accused. PW-1, Smt. Sukhdei has categorically deposed in her cross-examination that there was some dispute with regard to the buying of piece of land from PW-16, Sh. Roshan Lal. According to PW-16, Sh. Roshan Lal, the accused has asked from him why he has sold the land to the family of deceased. He told them that since this land was situated near the house of deceased Ramesh Chand, therefore, he sold the same to him. In his cross-examination, he has admitted that Subhash Chand had never offered to purchase the land before they sold the land to Ramesh Chand.

43. The accused have also been charged under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. According to PW-18, Sh. Purshotam Dhiman, in April, 2011, they had purchased 15 Marlas land from one Roshan Lal of their village which was situated near their house. Accused Subhash Chand used to call them “***Lohar***” and he wanted to purchase that land and since they had purchased this land, therefore, he developed some ill will against them and quarreled with them in the month of April, 2011. A case was registered against the accused persons in Police Station Bhoranj. PW-24, Ms. Kamlesh Kumari deposed that on 23.10.2011, police moved an application for providing notification regarding SC & ST category. She prepared a photo copy of the notification and provided the same to the police at Police Station Bhoranj vide letter Ex. PW24/A.

44. PW-35, Sh. Anjani Jaswal, deposed that after adding the offence under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as ‘the Act’), the case file was handed over to him for further investigation. He did not know when the offence under the Act was added.

45. PW-38, SI Desh Raj deposed that at the time of his investigation, the offence under the SC/ST Act was not added and it was added later on by the SHO PW-39. PW-39, Inspector Sohan Lal did not remember when the offence under the SC/ST Act was added. It has come in the statement of PW-38, SI Desh Raj that there was nothing against the accused during the investigation to book the accused under the SC/ST Act, but it was only later on when SHO has booked the accused under the SC/ST Act. The accused could be charged under the Act only if they have committed the offence against the victim only because of the reason that he belonged to Scheduled Caste category. There was absolutely no material on record that the deceased was killed since he happened to be the member of Scheduled Caste category.

46. We have gone through the statement of PW-18, Sh. Purshotam Dhiman closely. He has stated to the police in his statement that since they belong to Lohar caste, which falls within the category of Scheduled caste, therefore, accused Subhash Chand used

to call them Lohar (he was confronted with his statement Mark-DG in which it was not so recorded). There should be sufficient material on record at the time of framing of the charge under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

47. Their Lordships of the Hon'ble Supreme Court in **Masumsha Hasanasha Musalman** Vs. **State of Maharashtra** (2000) 3 Supreme Court Cases 557 have held that to attract the provisions of Section 3(2)(v) of the Act, the sine qua non is that the victim should be a person who belongs to a Scheduled Caste or a Scheduled Tribe and that the offence under the Indian Penal Code is committed against him on the basis that such a person belongs to a Scheduled Caste or a Scheduled Tribe. In the absence of such ingredients, no offence under Section 3(2)(v) of the Act arises. Their Lordships have held as under:

> *"5. The trial Court accepted the evidence of Deubai (PW-4) and Manoj (PW-5). Manoj corroborated the evidence tendered by Deubai to the extent of having seen the appellant having a Jambiya in his hand when Deubai (PW-4) was following him and that he found something very suspicious so he followed both of them. That is how he witnessed the scuffle and the injuries caused by the appellant to the deceased. Deubai admitted in the course of her cross-examination that scuffle took place between the appellant and her husband and her husband fell on the ground, that for considerable time, the scuffle went on; that while on some occasions the appellant was on the ground, on some other occasions her husband was on the ground; that the appellant and the deceased were overpowering each other. PW-5 also stated that he saw that in front of the hospital of Dr. Kalwaghe the deceased coming and the appellant was following him with dagger and gave blows of dagger on the person of the deceased. The trial Court found from these circumstances that the appellant had no intention to kill the deceased and that after giving one blow, other injuries had been caused due to scuffle. This was amply supported by the evidence of the Medical Officer that injuries Nos. 2 and 4 to 10 could be caused in the scuffle, or injuries other than injury No. 1 could be caused due to obstruction by the deceased. Therefore, it could not be inferred that the appellant intended to inflict more injuries than injury No. 1. If this aspect is borne in mind, it would be clear that the appellant had given only one blow with the Jambiya resulting in his death and, therefore, the trial Court found that it would not be proper to convict the appellant under Section 302, I.P.C. The argument relating to private defence was straightway rejected for there were no injuries on the person of the appellant and the attack had been made by the appellant himself. The trial Court discarded the evidence relating to discovery of the weapon and jacket for the reasons set forth in the order. The trial Court also convicted the appellant for the offence arising under Section 3(2)(v) of the Act only on the basis that there was no controversy that the victim belonged to the scheduled caste and convicted him."*

In the instant case, the ingredients of Section 3(2)(v) of the Act were lacking from the very beginning and the prosecution has not led any evidence to prove this charge.

48. Their Lordships of the Hon'ble Supreme Court have reiterated the same principles in **Dinesh alias Buddha** Vs. **State of Rajasthan** (2006)3 Supreme Court Cases 771 and have held that sine qua non for Section 3(2)(v) is that the offence in question must have been committed against a person on the ground that such person is a member of SC/ST. Their Lordships have held as under:

> *"15. Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) has no application. Had Section 3(2)(v) of the Atrocities Act been applicable then by operation of law, the sentence would have been imprisonment for life and fine."*

49. Their Lordships of the Hon'ble Supreme Court **Ramdas and others** Vs. **State of Maharashtra** (2007) 2 Supreme Court Cases 170 have held that the mere fact that the victim happened to be a girl belonging to a Scheduled Caste does not attract the provisions of the Act. Their Lordships have held as under:

> *"11. At the outset we may observe that there is no evidence whatsoever to prove the commission of offence under Section 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The mere fact that the victim happened to be a girl belonging to a scheduled caste does not attract the provisions of the Act. Apart from the fact that the prosecutrix belongs to the Pardhi community, there is no other evidence on record to prove any offence under the said enactment. The High Court has also not noticed any evidence to support the charge under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and was perhaps persuaded to affirm the conviction on the basis that the prsecutrix belongs to a scheduled caste community. The conviction of the appellants under Section 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 must, therefore, be set aside."*

50. PW-20, Dr. N.K. Sankhyan, Medical Officer conducted the post mortem on the parts of the body collected by the police. His first opinion was that the cause of death could not be ascertained due to advance decomposition of the body. He has prepared post mortem reports Ex. PW20/A, Ex. PW20/B, Ex. PW20/C and Ex. PW20/D. His final opinion was also that the cause of death of the deceased could not be ascertained due to advance decomposition of the body. He was shown the weapon of offence, i.e., drat Ex. P5 on a subsequent date and not for the first time when he has conducted the post mortem on 17.08.2011. Police has collected various parts of the body. Firstly, the body parts were brought before Dr. N.K. Sankhyan on 16.08.2011 and secondly the body parts were received on 17.08.2011. PW-20, Dr. N.K. Sankhyan has not held any precipitant test for determining that all the parts belong to one person. He did not take any opinion regarding cause of death from specialist of anatomy. Thus, the opinion of Dr. N.K. Sankhyan remained that the cause of death could not be ascertained due to advance decomposition and mutilation of the body.

51. PW-32, ASI Rakesh Kumar has also admitted that the trunk was in a mutilated condition. PW-33, ASI Karan Singh has admitted that there is overwriting in Ex. PW9/C. PW-39, Inspector Sohan Lal has also admitted that there is overwriting in Ex. PW9/C as well as Ex. PW9/D. PW-9, Sh. Onkar Singh and PW-34 Manmohan Singh have also not supported the case of prosecution qua the recovery of drat. PW-34 Manmohan Singh was declared hostile. He has denied the suggestion that the person had disclosed before the police that he had concealed a drat in Chanth Khad and he could get the same recovered by giving demarcation. He also denied that police has recorded his statement.

52. Mr. Ramesh Thakur, learned Assistant Advocate General has vehemently argued that Anil Kumar has made an extra judicial confession before PW-6, Sh. Surjit Kumar. The statement of PW-6, Surjit Kumar cannot be believed. He was a planted witness. According to his version, he was working in the shop. Accused Anil Kumar came there. He inquired from the accused about his residence, on which he disclosed that he had to come from Bhareri side. On this, he inquired about the episode that took place at Bhareri side regarding missing of a person, on which accused Anil Kumar said that he had done his job. Thereafter, police had come to his shop for taking tea. After Anil Kumar left the shop, he disclosed the facts to the police. He did not remember the exact number of police officials sitting in his shop. He also did not remember whether the police officials to whom he disclosed the aforesaid facts were from the Police Station or from the Battalion. According to him, the police officials to whom he told the aforesaid facts, had not noted down the same in writing at that time. Moreover, extra judicial confession is not a substantive piece of evidence. What matters, is the statement of the witness made in the Court. According to the prosecution case, body parts of the deceased were recovered after a few days from the Khad. It is not believable that the parts of the body could still lying in the Khad, when there was heavy rain from 12.08.2011 to 15.08.2011 and the Khad was flooded. It is also the case of the prosecution that the deceased could not be traced and, therefore, Dy. SP has constituted as separate team to trace the deceased. However, the Dy. SP who had reached the spot and constituted a separate team for searching the deceased, has not been examined.

53. Most of the witnesses cited by the prosecution are closely related to each other. The statements of the closely related witnesses can be relied upon, but it must inspire confidence. In the present case, statement of these witnesses do not inspire confidence. Consequently, the prosecution has failed to prove the charges levelled against the accused beyond reasonable doubt.

54. Accordingly, in view of the observations and discussions made hereinabove, Criminal Appeal No. 4199 of 2013 is allowed and Criminal Appeal No. 37 of 2014 is dismissed. The judgment, dated 24.08.2013/26.08.2013, is set aside. The accused/appellants in Criminal Appeal No. 4199 of 2013 are acquitted of the charges framed against them. Fine amount, if already deposited, be refunded to the accused forthwith. They be released forthwith, if not required in any other case. The Registry is directed to prepare the release warrants and send the same to the concerned Superintendent of Jail.

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

Himachal Pradesh Rajkiya Prathmik Anubandh Adhayapak Sangh. .....Petitioner

Versus

Sh. P.C. Dhiman and another .....Respondents.

COPC No. 456/2014.
Judgment reserved on 3rd June, 2015.
Date of decision: 16th June, 2015.

Contempt of Courts Act, 1971- Section 12 – It was stated that respondent could not have complied with the directions issued by the Court as the directions issued in the judgment are contrary to the judgment delivered in LPA No.105 of 2012- held, that once judgment has

been upheld respondents are bound to obey the same or to seek clarification, if necessary- hence, respondents directed to comply with the directions within a period of 6 weeks.

(Para-4 to 8)

For the petitioner: Mr. Surender Sharma, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Additional Advocate General and Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

The petitioner has invoked the jurisdiction of this Court for drawing contempt against the respondents and for punishing them for the reasons taken in the contempt petition. It is specifically averred in the contempt petition that the respondents have not complied with the directions contained in the Judgment delivered by the learned Single Judge in CWP(T) No. 6037 of 2008 read with Division Bench Judgment delivered in LPA No.108 of 2012.

2. The respondents have filed the reply and have stated that they have complied with the directions contained in the aforesaid judgments, in letter and spirit.

3. Mr. Surender Sharma, Advocate, for the petitioner has argued that LPA No. 108 of 2012, came to be dismissed and the Division Bench has upheld the judgment passed by the learned Single Judge in CWP (T)No. 6037 of 2008 and passed the appropriate directions contained in para 18 of the said judgment whereby a batch of LPAs came to be disposed of in terms of the mandate of that judgment. It is apt to reproduce para 18 of the said judgment herein:

> *"18. In the above circumstances, the appeals and the writ petitions are disposed of as follows:*
>
> *The direction in the judgment in Rakesh Chand's case in CWP (T) No. 781 of 2008 for granting the running pay scale to the JBT teachers from the date of their initial appointment is set aside. However, it is held that the JBT teachers appointed on contract basis will be entitled to the initial of the pay scale attached to the post of JBT teachers and revised from time to time. It is also clarified that the principle that is applied in the case of the JBT teachers in equal force would apply to the School Lecturers appointed on contract basis.*
>
> *LPA No. 108 of 2012 is dismissed. All other appeals are partly allowed and the writ petitions are disposed of, so also the pending applications, if any."*

4. The judgment made by the Writ court in CWP (T) No. 781 of 2008 for granting the running pay scale to the JBT teachers from the date of their initial appointment was set aside in LPA No. 105 of 2010, and directions came to be passed, which governed the said writ petition and other writ petitions subject matter of that judgment. Further contended that the judgment earned by the Writ petitioner in CWP(T) No. 6037 of 2008, which was subject matter of LPA No. 108 of 2012 came to be dismissed and judgment of the writ Court stands upheld. The respondents have failed to comply with the writ Court judgment which stands upheld in LPA No. 108 of 2012, by the Division Bench.

5. The learned Advocate General argued that the directions contained in the writ Court judgment are contradictory with the judgment made in LPA No. 105 of 2012 and are not in tune with the directions passed in other writ petitions, details of which are given in para 18 of the judgment as quoted supra.

6. The argument advanced by the learned Advocate General though attractive, is devoid of any force, for the simple reason that LPA No. 108 of 2012 came to be dismissed, meaning thereby the judgment impugned in that LPA stands upheld and respondents had to comply with the judgment passed by the learned Single Bench in CWP(T) No. 6037 of 2008. It was for the State to seek appropriate remedy.

7. We have gone through the compliance report, is not in tune with the judgment made by the learned Single Judge in CWP(T) No. 6037 of 2008, upheld by the Division Bench in LPA No. 108 of 2012.

8. Accordingly, the respondents are directed to comply with the judgments referred to supra, within six weeks from today. In default, show-cause why Rule be not issued against them.

9. As a corollary, the Contempt petition stands disposed of.

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

LPA No.67 of 2014 & RSA No.75 of 2012.
Reserved on : 27.05.2015
Pronounced on: June 16, 2015.

LPA No.67 of 2014:

Jai Singh …Appellant.

VERSUS

State of H.P. and others …Respondents.

RSA No.75 of 2012:

Jai Singh …Appellant.

VERSUS

Kaul Singh and another …Respondents.

H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971- Section 54 - Consolidation proceedings concluded in the year 1997- a revision petition was filed in the year 2009 after 12 years- Divisional Commissioner ordered rectification in the revenue entries without considering the delay- litigation was also pending before Civil Court in which findings were recorded by Civil Court - such findings are binding on the revenue Court – Divisional Commissioner had upset those findings ignoring the fact that matter was pending before the Civil Court- in these circumstances, order was rightly quashed by the Writ Court. (Para-9 to 16)

Specific Relief Act, 1963- Section 34- Plaintiff claimed that he is owner in possession of the suit land - defendants were stacking construction material and laying pipeline without his permission- defendants had not laid any claim over the suit land and the suit was decreed by the trial Court- High Court should not interfere with the concurrent findings of the fact recorded by the Court- no substantial question of law arose – appeal dismissed.

(Para-31 to 38)

Cases referred:

Rajinder Singh vs. State of Jammu and Kashmir & others, 2008 AIR SCW 5157

Anathula Sudhakar vs. P. Buchi Reddy (Dead) By L.Rs. and others, 2008 AIR SCW 2692
Kashmir Singh vs. Harnam Singh & Anr., 2008 AIR SCW 2417
Gurdev Kaur & Ors. vs. Kaki & Ors., 2006 AIR SCW 2404

LPA No.67 of 2014:

For the Appellant: Mr.Lalit K. Sharma, Advocate.

For the Respondents: Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma & Mr.Anup Rattan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G., for respondents No.1 and 2.
Mr.G.R. Palsara, Advocate, for respondent No.3.

RSA No.75 of 2012:

For the Appellant: Mr.H.S. Rangra, Advocate.

For the Respondents: Mr.G.R. Palsara, Advocate, for respondent No.1.
Nemo for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

LPA No.67 of 2014:

This appeal is directed against the judgment and order, dated 20th June, 2013, passed by a learned Single Judge of this Court, in writ petition, being CWP No.5080 of 2010, titled Kaul Singh versus State of H.P. and others, whereby the order made by the Divisional Commissioner, Mandi, exercising the powers under Section 54 of the H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971, (for short, the Act), in Revision Petition No.913/2009, titled Jai Singh vs. Kaul Singh, came to be set aside, (for short, the impugned judgment).

2. Facts of the case, in brief, are that the writ petitioner Kaul Singh, (respondent No.3 herein), invoked the jurisdiction of the Writ Court by the medium of the writ petition, questioning the order made by the Divisional Commissioner (respondent No.2 herein), whereby the Revision Petition filed by the appellant/writ respondent was allowed.

3. It is apt to reproduce operative portion of the order passed by the Divisional Commissioner, hereunder:

> *"In view of the observations made above, the revision petition is accepted to the extent that Kh.No.443 land measuring 0-04-11 bigha be allotted to the petitioner and 1/4 share from Khasra No.439, 440, 441, 442 and 462 kita 5 total land measuring 0-17-06 i.e. 0-04-07 bigha be allotted to the respondent. A Copy of this order be sent to the Tehsildar Sadar, District Mandi for compliance. …………………"*

4. Against this order of the Divisional Commissioner, the writ petitioner Kaul Singh filed the writ petition, which was allowed by the learned Single Judge vide the impugned judgment and the order of the Divisional Commissioner was set aside.

5. Feeling aggrieved, writ respondent No.3 Jai Singh has filed the instant appeal against the impugned judgment passed by the learned Single Judge.

6. Admittedly, the consolidation proceedings were started in the year 1992-93 and concluded in the year 1997. The appellant Jai Singh invoked the jurisdiction of the Revenue Authorities after a lapse of around 12 years, i.e. in the year 2009 by filing a revision

petition. Without considering the factum of delay and laches and other aspects of the case, the Divisional Commissioner ordered rectification in the revenue entries in terms of the order reproduced supra.

7. The question is - Whether the Divisional Commissioner, exercising powers under the Act, was competent to make the order, which was barred by delay and laches? The answer is in the negative for the following reasons.

8. The Writ Court has examined the entire record while discussing the said issue and has rightly held that the Divisional Commissioner has fallen in error and has committed grave injustice while allowing the Revision Petition for the reason that the revision petitioner (appellant herein) has remained in deep slumber and has not questioned the proceedings concluded in the year 1997 for a considerable long period and what were the reasons for not questioning the same have not been spelled out in the revision petition. He has not been able to carve out a case for condonation of delay not to speak of sufficient cause.

9. Limitation period is not prescribed for exercising the revisional jurisdiction, but it can be exercised "at any stage". The Apex Court right from 1950 has discussed what does words "at any stage" mean in catena of judgments, which have been discussed by the learned Single Judge in paragraphs No.14 to 18 of the impugned judgment. Ratio laid down in those decisions has been applied by the learned Single Court and has rightly allowed the writ petition.

10. It is worthwhile to mention here that Kaul Singh had filed a Civil Suit seeking the relief of permanent prohibitory and mandatory injunction against the appellant Jai Singh and one Bhup Singh qua the property in dispute. Jai Singh and Bhup Singh (defendants) resisted the suit by filing written statements. The suit was decreed partly against Jai Singh, who challenged the same before the District Judge, Mandi, which also came to be dismissed, constraining Jai Singh to assail the said judgment by filing Regular Second Appeal in terms of Section 100 of the Code of Civil Procedure (for short, CPC).

11. Findings of the Civil Court are binding on the Revenue Court and the Revenue Court has no jurisdiction to sit over the findings recorded by the Civil Court. It is also well settled principle of law that revenue records confer no title on the party and substantive rights of the contesting parties, qua title and of ownership, can be determined only by a competent civil Court.

12. The Apex Court in **Rajinder Singh vs. State of Jammu and Kashmir & others, 2008 AIR SCW 5157,** has laid down the same principle. It is apt to reproduce paragraph 17 of the said decision hereunder:

> *"17. It is well settled that Revenue Records confer no title on the party. It has been recently held by this Court in Suraj Bhan and Ors. v. Financial Commissioner and Ors., that such entries are relevant only for "fiscal purpose" and substantive rights of title and of ownership of contesting claimants can be decided only by a competent civil Court in appropriate proceedings."*

13. In the instant case, the Divisional Commissioner, while exercising powers under the Act, has virtually upset the judgment and decree passed by the Civil Court, ignoring the fact that a civil suit was already pending between the parties qua the same property before the Civil Court.

14. Another aspect of the case, which cannot be ignored, is that defendants Jai Singh and Bhup Singh had filed joint written statement before the Court of Civil Judge

(Junior Division), Court No.4, Mandi, wherein it has been admitted that some raw material had been stacked by the son of Jai Singh over the land in dispute, but with the permission and consent of the plaintiff. It is apt to reproduce relevant portion of paragraph 2 of the written statement hereunder:

> *"..........No raw material for construction of house is being collected on khasra No.443 by replying defendant No.1 as alleged and therefore question of any request and alleged threatening with dire consequences does not arise at all. However, it is submitted that some raw material has been stacked by son of replying defendant No.1 namely Davinder Singh on some part of land owned by plaintiff with permission and consent of plaintiff which will be removed by him after rainy season.........................."* *Emphasis added.*

15. Keeping in view the pleadings contained in paragraph 2 of the written statement, reproduced above, the defendants i.e. Jai Singh and Bhup Singh, had admitted virtually the claim of the plaintiff Kaul Singh and have also stated that the son of defendant No.1 Jai Singh has stacked the raw material only with the consent of the plaintiff Kaul Singh, which would be removed shortly. Thus, it does not lie in the mouth of the appellant Jai Singh to lay claim before the Revenue Authority.

16. Having said so, we are of the view that the writ Court has rightly quashed the order made by the Divisional Commissioner.

17. We accordingly hold that there is no merit in the appeal filed by the appellant and the same is dismissed and the impugned judgment is upheld.

RSA No.75 of 2012:

18. Original defendant No.1 Jai Singh has filed the instant appeal under Section 100 of the Code of Civil Procedure, (for short, the CPC), against the judgment, dated 22nd September, 2011, passed by the District Judge, Mandi, in Civil Appeal No.145 of 2009, titled Jai Singh vs. Kaul Singh and another, whereby the judgment and decree, dated 23rd March, 2009, passed by the Civil Judge (Junior Division), Court No.4, Mandi, decreeing the suit of the plaintiff Kaul Singh (respondent No.1 herein), came to be affirmed.

19. Brief facts of the case, necessary to dispose of this appeal, are summarized as under:

20. The plaintiff filed a suit for permanent prohibitory and mandatory injunction on the ground that, despite the fact that the plaintiff was recorded as owner in possession of the land comprised in Khasra Nos.438, 443, 448, 455, 461, 619, 622, 638 and 640, measuring 5-18-11 bighas, situated in Mauja Panjehti, Tehsil Sadar, District Mandi, H.P., the defendants were stacking construction material in Khasra No.443 and also laid pipe line in khasra No.448, without his permission.

21. The defendants resisted the suit by filing the written statement.

22. The issues were struck and the parties led their evidence.

23. The learned trial Court, after appreciating the rival contentions of the parties, decreed the suit partly and defendant No.1 (appellant herein) was restrained not to stack any raw material over the suit land comprised in Khasra No.443, which findings of the learned trial Court came to be upheld by the learned District Judge, on appeal filed by defendant Jai Singh.

24. Feeling aggrieved, the defendant filed the instant Regular Second Appeal.

25. The appeal was admitted by this Court on 2nd May, 2013, on the following substantial questions of law:

> *"1. Whether learned lower Appellate Court has erred in dismissing the application under Order 41 Rule 27 CPC filed by the appellant before him?*
>
> *2. Whether the Courts below have erred in granting decree of permanent prohibitory injunction in favour of respondent No.1 as the land in question during the pendency of the litigation has been allotted to appellant in consolidation but that order has been stayed in writ petition filed by respondent No.1?"*

26. Appellant had filed an application under Order 41 Rule 27 of the CPC for placing on record the order, dated 17.2.2010, made by the Divisional Commissioner in Revision Petition No.913 of 2009, whereby the revision petition filed by the appellant was allowed, came to be stayed by the Writ Court and was, thus, under eclipse, (subject matter of the Letters Patent Appeal supra).

27. The civil suit was filed by the plaintiff Kaul Singh in the year 2006 and was decreed vide judgment and decree, dated 23rd March, 2009 and the Divisional Commissioner has passed the order in the Revision Petition on 17th February, 2010.

28. The Apex Court in **Rajinder Singh vs. State of Jammu and Kashmir & Ors, 2008 AIR SCW 5157** has held that when appropriate proceedings are drawn in a competent Civil Court for the determination of substantive rights of ownership, the observations made in the orders of Revenue Authorities shall not come in the way of the parties. It is apt to reproduce paragraphs 19 and 20 as under:

> *"19. The present appeal, therefore, deserves to be disposed of by leaving all the parties to take appropriate proceedings in accordance with law in a competent civil Court so far as substantive rights of ownership, title or inheritance are concerned. In view of the fact, however, that certain observations have been made and questions have been considered with regard to rights of sons and daughters in the property of father under the Hindu Succession Act as also under the Jammu and Kashmir Hindu Succession Act, we clarify that all those observations which were not relevant in view of the limited question before the Revenue Authorities, would have no effect in the proceedings before the Civil Court if such proceedings have been initiated in a competent Court.*
>
> *20. We, therefore, dispose of this appeal by granting liberty to the parties to take appropriate proceedings in a competent Civil Court by making it clear that the observations made in the orders of Revenue Authorities as also by the High Court will not come in the way of the parties in a suit as and when proceedings have been initiated for the purpose of determination of substantive rights of ownership."*

29. It is worthwhile to mention here that the plaintiff Kaul Singh had already questioned the said order of the Divisional Commissioner by the medium of writ petition, which was stayed vide order dated 20th October, 2010, thus, was under eclipse. Therefore, the District Judge has rightly dismissed the application moved under Order 41 Rule 27 CPC. The said order of the Divisional Commissioner stands quashed by the Writ Court, vide judgment dated 20th June, 2013.

30. Thus, substantial question of law No.1 is replied accordingly.

31. Coming to substantial question No.2, the same is dependant upon question No.1 and in view of the quashment of the order made by the Divisional Commissioner, as discussed hereinabove, this question also loses efficacy and is replied accordingly.

32. However, we have gone through the plaint, written statement, evidence, oral as well as documentary, and have also perused the judgment made by the District Judge and are of the considered view that no substantial question of law, as formulated, is involved in the present appeal.

33. The plaintiff in paragraph 1 of the plaint has laid claim that defendants Jai Singh and Bhup Singh, without any reason, are causing interference with his possession and have also stacked material. Defendants, in their joint written statement, have not laid any claim viz.a viz. the property in dispute and the learned trial Court accordingly passed the decree in favour of the plaintiff, which came to be affirmed by the District Judge. A reference has already been made to the relevant portion of the written statement of the defendants while dealing with the Letters Patent Appeal (supra) and the same is not being reproduced for the sake of brevity.

34. The Apex Court in series of cases has laid down the principle as to what question can be said to be substantial question of law. The Apex Court in **Anathula Sudhakar vs. P. Buchi Reddy (Dead) By L.Rs. and others, 2008 AIR SCW 2692,** has held that in the absence of pleadings and issue, no question of law relating to it could be formulated in second appeal. It was further observed that the question which has not been considered in the suit, cannot be gone into in second appeal. It is apt to reproduce paragraph 25 of the said decision hereunder:

> *"25. The High Court, in the absence of pleadings and issues, formulated in a second appeal arising from a suit for bare injunction, questions of law unrelated to the pleadings and issues, presumably because some evidence was led and some arguments were advanced on those aspects. The only averment in the plaint that plaintiffs were the owners of the suit property having purchased the same under sale deeds dated 9.12.1968, did not enable the court, much less a High Court in second appeal, to hold a roving enquiry into an oral gift and its validity or validation of ostensible title under section 41 of TP Act. No amount of evidence or arguments can be looked into or considered in the absence of pleadings and issues, is a proposition that is too well settled."*

35. It is also well settled proposition of law that the High Court under Section 100 of the CPC can interfere with the concurrent findings recorded by the Courts below only in case the said findings are perverse and arbitrary and are based upon non-appreciation of pleadings and evidence on record.

36. The Apex Court in **Kashmir Singh vs. Harnam Singh & Anr., 2008 AIR SCW 2417,** has held that as a general rule, the High Court should not interfere with concurrent findings of the Courts below. However, the Apex Court has also pointed out certain well recognized exceptions, where concurrent findings can be interfered with in a regular second appeal. It is apt to reproduce paragraph 17, as under:

> *"17. The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."*

37. The Apex Court in **Gurdev Kaur & Ors. vs. Kaki & Ors., 2006 AIR SCW 2404,** while dealing with the scope of Section 100 of the CPC, has held, in paragraphs 68 and 69, as under:

> *"68. The analysis of cases decided by the Privy Council and this Court prior to 1976 clearly indicated the scope of interference u/s. 100 of the Code of Civil Procedure by this Court. Even prior to amendment, the consistent position has been that the Courts should not interfere with the concurrent findings of facts.*
>
> *69. Now, after 1976 Amendment, the scope of Sec. 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering u/s. 100 of the Code of Civil Procedure only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:*
>
> > *(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;*
> >
> > *(ii) The substantial question of law to precisely state such question;*
> >
> > *(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;*
> >
> > *(iv) Another part of the Section is that the appeal shall be heard only on that question."*

38. The learned counsel for the appellant, during the course of hearing, was not in a position to point out as to how the concurrent findings recorded by both the Courts below are not based upon correct appreciation of pleadings and evidence on record. Moreover, as discussed hereinabove, the defendants have virtually not denied the claim of the plaintiff, is an admission in the eyes of law, which fact has weighed with the Courts below in granting the decree in favour of the plaintiff. The Courts below have not committed any illegality and have returned findings on question of fact read with the pleadings of the parties. Therefore, the findings recorded by both the Courts below are well reasoned and no ground has been made out for setting aside the same.

39. Having said so, we hold that there is no merit in the second appeal and the same is dismissed.

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

Dharam Pal & another. ….Revisionists

versus

Amar Nath & others. ….Non-revisionists.

Civil Revision No. 26 of 2015

Decided on: 17.6.2015.

Code of Civil Procedure, 1908- Section 115- Learned Counsel for the revisionists stated that he did not want to continue with the Revision Petition- hence, petition dismissed as withdrawn.

For the revisionist : Mr. Dheeraj K. Vashishta, Advocate.
For the non-revisionists: Mr. Neeraj Gupta, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Advocate appearing on behalf of the revisionists submitted that he has been instructed by the revisionists that they do not want to continue with the present revision petition and the same may be dismissed as withdrawn. In view of the submission of learned Advocate appearing on behalf of the revisionists present revision petition is dismissed as withdrawn. No order as to costs. Pending applications if any also stand disposed of.

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

NTPC Limited ....Appellant.
Versus
Sh. Jitender and others. ......Respondents.

CMP(M) No. 274 of 2015 in
RFA No. 80 of 2014
Decided on: 17th June, 2015

Code of Civil Procedure, 1908- Order 22 Rule 3- One of the petitioners in an appeal had expired during the pendency of the reference petition- this fact was not brought to the notice of the Court and the award was passed in ignorance of the death- held, that death of the petitioner and non-substitution of his legal representatives in Reference Petition does not affect the same – legal representatives are entitled to receive compensation, therefore, they are ordered to be brought on record. (Para-2 to 4)

Cases referred:
Collector Land Acquisition NHPC versus Khewa Ram and others, Latest HLJ 2007 (HP) 270

For the appellant: Mr. Neeraj Gupta, Advocate.
For the respondents: Mr. Sandeep Sharma, Advocate vice counsel for respondents No. 1 to 3, 5, 6 and proposed LRs 4(a) to 4(c).
Mr. D.S. Nainta, Addl. A.G with Mr. Pushpinder Jaswal, Dy. A.G for respondents No. 7 and 8.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Respondent No. 4, Shri Des Raj (one of the petitioner in the trial Court) in the main appeal has expired on 04.12.2008 i.e. during the pendency of the reference petition in the trial Court. The factum of his death was neither brought to the notice of the trial Court either by the surviving petitioners or legal representatives of the said respondent nor any steps for his substitution taken. To the contrary, the reference petition filed by said Sh.

Des Raj and his brothers S/Sh. Jitender, Prakash Chand, Diwakar, Gian Chand and Tipender came to be decided along with batch of petitions vide award dated 13.12.2013, under challenge in the present appeal, without taking notice of his death and substitution of his legal representatives.

2. The question for adjudication as arisen in this application is as to what is the impact of death of deceased respondent Des Raj and non-substitution of his legal representatives in these proceedings. The law in this regard is no more *res-integra* as this Court in **Collector Land Acquisition NHPC** versus **Khewa Ram and others, Latest HLJ 2007 (HP) 270**, after taking into consideration the provisions contained under the Land Acquisition Act and also under Order 22 of the Code of Civil Procedure, has held that a reference petition under Section 18 has to be answered by the Court and in case the claimant does not appear despite notice, he do so at his own risk. In the event of the sole claimant died during the course of proceedings and the Court unaware of his death answered the reference on the basis of the material available on record, in an appeal either filed by his legal representatives or the acquiring authority, the award has to be set aside and the proceedings deemed to have been abated, of course subject to the consideration of the question of setting aside the abatement on condonation of delay, however, only by the reference Court and not by the appellate Court. In a case where there are more claimants or where more than one petition (a batch of petitions) decided by a common award, death of one of the claimants or sole claimant during the course of proceedings in the trial Court do not render the award passed on common evidence led by all the parties a nullity and the legal representatives can even be brought on record during the pendency of the appeal also. The relevant portion of the judgment supra reads as follows:

> "13. The question that next arises is as to what happens if the claimant has died during the proceedings. This can also happen under various circumstances, some of which are being dealt with hereunder:
>
> f. In case there is only one claimant in an isolated case of land acquisition and the claimant dies, then obviously if the court is unaware about the death of the claimant, it will proceed to decide the reference on the material placed on record before it. In such a case, if either the legal representatives of the claimant or the acquiring authority files an appeal, then the award of the District Judge will have to be set aside and the reference proceedings deemed to have been abated. The questions whether abatement should be set aside and whether the delay, if any, should be condoned are questions to be decided by the District Judge alone and not by the appellate court.
>
> g. However even in the aforesaid situation, the award cannot be said to be nullity since the reference court is bound by law to answer the reference. In case none of the parties is aggrieved, the legal representatives can execute the award in accordance with law.
>
> h. In cases where there are more than one claimants and each is owner of a separate share, then the death of one of the claimants can never render the award to be a nullity. The award is answered in favour of all the claimants. Therefore, in an appeal filed either by the claimants or by the acquiring authority, the legal

representatives of the deceased claimant can be brought on record even during the course of the appeal and it is not necessary to refer the matter back to the reference court.

i. Where there are more than one petitions and they are decided by a common award and the sole claimant in one of the petitions has died during the pendency of the reference proceedings, the entire award cannot be termed a nullity. Since the award is a common award based on common evidence led by all the parties, the legal representatives of the deceased can be brought on record during the pendency of the appeal also.

j. In cases(c) and (d) above, the abatement, if any, will be qua the deceased and the entire proceedings will not abate. In both these cases the legal representatives can be brought on record even during the pendency of the appeal.

3. The present is a case which is covered by (b) and (c) of para 13 of the judgment supra, because deceased Des Raj was not the only petitioner in the reference petition but his brother S/Sh. Jitender, Prakash Chand, Diwakar, Gian Chand and Tipender being co-owners of the acquired land were also the petitioners with him. Above all, the reference petition, they preferred has been decided by a common award passed in a batch of petitions on the basis of common evidence available on record. Therefore, irrespective of the death of deceased respondent Des Raj during the course of the proceedings in the reference petition in the trial Court, the question of abatement of the appeal and substitution of his legal representative can be gone into by this Court in the present appeal. Since his brothers, petitioners No. 1 to 3, 5 and 6 were their on record to represent the estate of the deceased petitioner-respondent and to pursue the petition, therefore, the question of abatement does not arise. The proposed legal representatives of deceased respondent Des Raj named in para 3 of the application are otherwise also required to be brought on record being entitled to receive the compensation in respect of the acquired land to the extent of their share and also to straighten the record.

4. I, therefore, allow the application and on setting aside the abatement of the proceedings, order to substitute the proposed legal representatives named in para 3 of the application as respondents No. 4(a) to 4(c) in the main appeal. Necessary corrections be made in the records accordingly. Amended memo, in terms of this order be also filed within two weeks. The application stands disposed of. Record be sent back to learned trial Court along with an authenticated copy of this order for making necessary corrections therein, in terms of this order and remitting the same to this Court after doing the needful.

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

Puran Chand & anr. ……Petitioners.

Versus

Sanjay & ors. …….Respondents.

CMPMO No. 221 of 2014.

Decided on: 17.6.2015.

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiffs claimed an injunction pleading that defendants had started interfering with the path and the kuhal due to which

plaintiffs were unable to sow paddy in the suit land- defendant pleaded that they had not consented for the construction of the path- when the objection was raised Panchayat stopped the construction work- major portion of the path has been constructed over the land of the plaintiff- respondents have given no objection for the construction of the jeepable road- plaintiffs could not be deprived of their right of access to the houses- therefore, plaintiff was rightly held entitled for the relief of injunction by the trial court.

(Para-5 to 8)

Case referred:

Dorab Cawasji Warden vrs. Coomi Sorab Warden and ors., AIR 1990 SC 867

For the petitioners: Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Vishwa Bhushan, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is directed against the order dated 29.5.2014, rendered by the learned District Judge, Kangra at Dharamshala, in Civil Misc. Appeal No. 8/XIV-2014.

2. Key facts, necessary for the adjudication of this petition are that the petitioners-plaintiffs (hereinafter referred to as the plaintiffs) have instituted a suit for mandatory as well as prohibitory injunction against the defendants-respondents (hereinafter referred to as the defendants). The plaintiffs have their abadi and land comprised in Khata No. 175, Khatauni No. 317, Kh. No. 96, 97, 106 and 107, area measuring 0-19-32 hectares situated in Up Mohal Narwana, Mouza Yol, Tehsil Dharamshala, Distt. Kangra, H.P., as per jamabandi for the year 2009-10. There exists a village path shown in red colour in plan from State Highway Dharamshala-Palampur to go to the suit land. Two meter path has been cemented by the Gram Panchayat out of the funds provided by the State Government with the consent of effected persons. There was a Kuhal shown in blue colour in the plan and one of the Kuhal was drawn from the Nullah. The land and houses of the defendants were also situated on the spot. The defendants have started causing obstruction in the use of path and free flow of water in the Kuhal and have placed boulders at point 'A', as shown in the plan. The plaintiffs were not able to sow paddy crops in the suit land.

3. The suit was contested by the defendants. According to them, the path and Kuhal had not been constructed out of public funds. Defendant No. 1 had been living in Noida since 1994. He alongwith defendant No. 2 had not consented for the construction of the path. Defendant No. 1 during the year 2009-10, on coming to know that the suit path was being converted into a cemented path, rushed to the Village. He sought information under the RTI Act regarding construction of the path. He was informed by the Panchayat Secretary that construction work of suit path had been stopped. He placed rocks and stones on his land. The Kuhal did not exist on the spot.

4. The learned Civil Judge (Sr. Divn.), Kangra at Dharamshala, vide order dated 2.9.2013 directed the defendants to remove the heap of stones and rocks from the passage within a period of 30 days from the date of passing of the order. The defendants preferred an appeal before the learned District Judge, Kangra at Dharamshala. The learned District Judge, Kangra at Dharamshala, partly allowed the same on 29.5.2014 and the parties were directed to maintain status quo till the disposal of the suit.

5. It is evident from the facts enumerated hereinabove that the path is in existence. It was cemented by the Gram Panchayat. The path connects the State Highway Dharamshala-Palampur. The plaintiffs had been using this path to reach their houses. It is not in dispute that the path has been constructed by the Panchayat and it was cemented only in 2009-10. Defendant No. 1 Puran Chand came from Noida and stacked stones on the path.

6. The major portion of the path has been constructed from the land of the plaintiffs. The respondents have given no-objection for the construction of jeepable road from the house of Purvi Ram to the house of Panju Ram. The learned Civil Judge(Sr. Divn.), has rightly ordered to defendants to remove the stones and rocks from the passage. The learned District Judge, has erred in law by directing the parties to maintain status quo. The plaintiffs could not be deprived of their right of access to the houses. They had also been using the path to go to their fields. The defendants have not raised objection when the path was cemented by the Gram Panchayat.

7. Mr. Vishwa Bhushan, Advocate, has vehemently argued that the relief of interlocutory mandatory injunction could not be ordered by the learned Civil Judge (Sr. Divn.), Kangra at Dharamshala. Their lordships of the Hon'ble Supreme Court in the case of ***Dorab Cawasji Warden vrs. Coomi Sorab Warden and ors.,*** reported in ***AIR 1990 SC 867,*** have held as under:

> "14. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guid- lines. Generally stated these guidelines are:
>
> (1) The plaintiff has a strong case for trail. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
>
> (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
>
> (3) The balance of convenience is in favour of the one seeking such relief."

8. In the instant case, the plaintiffs have made out a strong case and they would have suffered irreparable loss and injury in case the right to access to their houses is denied. The balance of convenience also lies in their favour.

9. Accordingly, the petition is allowed. Order dated 29.5.2014 in Civil Misc. Appeal No. 8/XIV-2014 passed by the learned District Judge, Kangra at Dharamshala, H.P. is set aside. Order dated 2.9.2013 in Civil Suit No. 276 of 2013 passed by the learned Civil Judge (Sr. Divn.), Kangra at Dharamshala is restored.

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

Seli Hydro Electric Power Company Ltd. …Petitioner
Versus
State of H.P. and others …Respondents.

CWP No. 9566 of 2014
Judgment reserved on: 20.5.2015
Date of Decision : June 17th , 2015

Constitution of India, 1950- Article 226- Petitioner sought quashing of a letter stating that notification issued under Section 4 of Land Acquisition Act, 1984 stood lapsed and direction be issued to Land Acquisition Collector to initiate the proceedings under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- the record showed that there was unreasonable delay on the part of the respondents in finalizing the proceedings under Land Acquisition Act- therefore, respondents cannot take advantage of their wrong to claim that they will proceed under the new Act- provision of Section 6 will not come in to operation till the requirement laid down in part-VII of the Act are fulfilled – respondents had delayed the proceedings instead of promptly paying compensation- petitioner cannot be made to suffer for the default in discharge of statutory duties by the respondents- Writ Petition allowed and the letter issued by respondents quashed. (Para-34 to 55)

Cases referred:
Kusheshwar Prasad Singh vs. State of Bihar and others (2007) 11 SCC 447
Babu Barkya Thakur vs. State of Bombay and others (1961) 1 SCR 128
Larsen & Toubro Ltd. vs. State of Gujarat and others (1998) 4 SCC 387

For the Petitioner : Mr. M.H. Baig, Mr. Bhupinder Gupta, Senior Advocates, with Ms. Ritu Bhalla, Ms. Shivambika Sinha, Mr. Janesh Gupta and Ms. Jyotsna Rewal Dua, Advocates.
For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner has sought directions for quashing letter issued by the State on 5.8.2014 stating therein that the notification issued under Section 4 of the Land Acquisition Act, 1894 (for short 1894 Act) stands lapsed and directed the Land Acquisition Collector, Udaipur to initiate fresh acquisition proceedings under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short 2013 Act). The petitioner has further prayed for quashing the opinion of the Principal Secretary (Law) on the basis of which the impugned letter has been issued. The petitioner has lastly sought a writ of mandamus seeking directions to the respondents to proceed with deliberate speed to conclude the proceedings under Section 6 of the Land Acquisition Act, 1894 or in the alternative to proceed with the Land Acquisition proceedings

initiated by way of Section 4 Notification under the second proviso to Section 19 (7) of the Act of 2013.

2. The brief facts of the case are that on 9.6.2008 the Government of Himachal Pradesh invited bids for setting up of 320 MW Hydro Electric Power Plant in District Lahaul and Spiti. On 28.2.2009 SELI Project was awarded to M/s Hindustan Powerprojects Private Limited (then known as Moser Baer Projects Private Limited).

3. On 22.3.2011 Hindustan Powerprojects Private Limited entered into a Pre-Implementation Agreement with Government of Himachal Pradesh. Simultaneously, a tripartite agreement was executed between the Government of Himachal Pradesh, Hindustan Powerprojects Private Limited and petitioner for transferring all assets, liabilities, obligations, privileges, NOCs of Hindustan Powerprojects Private Limited arising under the terms of the Pre-Implementation Agreement to the petitioner.

4. On 9.9.2011 Directorate of Energy increased the installed capacity of the SELI Project from 320 MW to 400 MW subject to fulfillment of certain terms and conditions provided therein.

5. On 15.11.2011 a joint Inspection Committee consisting of respondent No.5, Divisional Forest Officer, Range Forest Officer, Assistant Engineer, H.P. Public Works Department, Assistant Engineer, HPSEB Limited and Assistant Engineer, I&PH Department, conducted a joint inspection of the project sites proposed by the petitioner and recommended diversion of forest land admeasuring 276.1875 Ha under Section 2 of the Forest Conservation Act, 1980 and acquisition of private land measuring 16.7779 Ha under the Land Acquisition Act, 1894.

6. On 28.2.2012 inescapability certificate dated 27.2.2012 was forwarded by the Deputy Commissioner, Lahaul and Spiti to respondent No.5 clearly stating therein that the land required for the construction of the SELI Project was inescapable and the landowners would not be rendered landless due to acquisition of the proposed land.

7. On 3.3.2012 petitioner submitted a proposal to respondent No.5 for acquisition of private land required for the construction of SELI Project under Section 4 of the 1894 Act. It was requested to acquire private land admeasuring 198-12-19 bigha under the 1894 Act.

8. On 9.3.2012 respondent No.5 wrote to the Deputy Commissioner, District Lahaul and Spiti, recommending acquisition of 198-12-19 bigha of land in revenue villages Udaipur, Salpat, Madgran, Kurched and Salgran in favour of the petitioner. It was also requested that the proposal for the acquisition be forwarded to respondent No.1 for approval and issuance of notification under Section 4 of the 1894 Act.

9. In compliance with Section 4 of the 1894 Act, the preliminary notification for acquisition of land was issued on 7.3.2013 by the Government of Himachal Pradesh. On various dates, Section 4 Notification was published in various newspapers and wide publicity was given to Section 4 notification in the locality through the field revenue agency of the area concerned.

10. On 25.4.2013 Section 4 Notification, being Notification No. Vidyut-CH: (5)-5/2012 was published in the official gazette and objections were invited from concerned persons within a period of 30 days from the date of said notification.

11. The Ministry of Environment and Forests (for short "MOEF") on 1.7.2013 in principle approved the divergence of forest land. The environmental clearance was granted by the MOEF to the petitioner vide letter No. J-12011/6/2010-1A.1 dated 3.7.2013.

12. On 10.10.2013 respondent No.5 after conducting proceedings under Section 5A of the 1894 Act, prepared his report under Section 5A (2) of the said 1894 Act.

13. On 19.10.2013 respondent No.5 forwarded the report dated 10.10.2013 under Section 5A (2) of the 1894 Act to the respondent No.1 for further action. The documents pertaining to the proceedings culminating in the report including copies of objections filed, statements recorded and the proceedings were also enclosed with the said letter.

14. On 3.12.2013 respondent No.1 wrote to respondent No.5 stating that report under Section 4 of the Land Acquisition (Companies) Rules, 1963 (for short 1963 Rules) had not been received and respondent No.5 was requested to forward such a report to respondent No.1.

15. On 1.1.2014 the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 came into force.

16. On 3.1.2014 respondent No.5 wrote to the petitioner calling upon it to file a representation on matters detailed in the said letter in terms of Rule 4 (1) of the 1963 Rules. The petitioner immediately responded to this letter on 6.1.2014 and provided all supporting documents.

17. On 1.2.2014 respondent No.5 wrote to the District Agriculture Officer, Lahaul and Spiti, requesting him to submit his report whether the agricultural land sought to be acquired was "Good Agricultural Land" and/or how much area of this land was of average or above average productivity.

18. On 13.2.2014 the District Agriculture Officer responded to the letter of respondent No.5 and furnished the desired information. On 17.2.2014 respondent No.1 wrote to respondent No.4 with reference to the 2013 Act alongwith a request to frame rules under the 2013 Act and to indicate the further course of action in cases where Section 4 notification under the 1894 Act already stood issued.

19. On 4.3.2014 respondent No.5 submitted to respondent No.1 a report in terms of Rule 4 of the 1963 Rules. The approximate amount payable in lieu of the land to be acquired in terms of the 2013 Act was stated in the said letter to be Rs.1,22,20,00,000/- (Rupees One Hundred and Twenty Two Crores Twenty Lacs).

20. On 13.3.2014 the respondent No.4 in response to respondent No.1 letter dated 17.2.2014 clarified that in terms of Section 24 (1) (a) of the 2013 Act, in cases where the proceedings for acquisition were initiated, no award was made under Section 11 of the 1894 Act, then the compensation should be determined as per the provisions of the 2013 Act.

21. On 2.5.2014 meeting of the Land Acquisition Committee were held under the Chairmanship of respondent No.4 and recommended that notifications under Sections 6 and 7 of the 1894 Act be issued. On 26.5.2014 respondent No.1 forwarded a draft of the agreement under Section 41 of the 1894 Act to the petitioner requesting it to execute the same.

22. On 19.6.2014 the agreement in terms of Section 41 of the 1894 Act was executed between the petitioner and the Governor of Himachal Pradesh. This agreement was directed to be published in the official gazette and the same was published in the official gazette on 1.7.2014.

23. On 5.8.2014 the respondent No.1 wrote to the respondent No.5 and sent intimation to the petitioner that as per advice received from respondent No.2, fresh acquisition proceedings under the 2013 Act should be commenced in respect of SELI Project since one year period from the date of Section 4 Notification had lapsed.

24. On 11.8.2014 the petitioner after receipt of the letter dated 5.8.2014 from respondent No.1, responded to it and pointed out that no delay whatsoever had occurred on account of the petitioner and requested that extension be granted for issuance of declaration of purpose notification and acquisition proceedings be continued.

25. On 28.8.2014 respondent No.4 wrote to the respondent No.1 stating that the Revenue Department was not in a position to render any advice on the representation of the petitioner dated 11.8.2014 and recommended that respondent No.1 may re-examine the issue in consultation with respondent No.2 under the power to remove difficulties Clause (Section 113 of the 2013 Act) considering the geographical/geological conditions of the project location in Chenab Valley, being a snow bound area.

26. When no response was received from the respondents, the petitioner again on 1.10.2014 sent a representation to the respondents reiterating therein its earlier representation dated 11.8.2014 and it set out the events of delay caused at the hands of the respondents.

27. On 4.11.2014 the petitioner followed up on its letter dated 1.10.2014, but has not received any response from the respondents. It thereafter has been consistently following up with the respondents, but are yet to receive any response on such representations. Left with no other option, it has approached this Court for the grant of following substantive reliefs:

(a) A writ of certiorari for quashing the impugned letter No. MPP-Chh(5)-5/2012 dated 05.08.2014 (Annexure P-1) issued by respondent No.1 and the impugned opinion of respondent No.2 relied upon and mentioned extensively in the impugned letter.

(b) A writ of mandamus directing the respondents to forthwith issue a declaration under Section 6 of the 1894 Act as the agreement under Section 41 of the 1894 Act has already been entered into.

(c) A writ of mandamus directing the respondents to proceed with deliberate speed to conclude the proceedings under Section 6 of the 1894 Act within a stipulated time.

(d) In the alternative to prayers (b) and (c) above, issue a writ of mandamus directing the respondents to proceed with the present case under the second proviso to Section 19 (7) of the 2013 Act and to extend the time for issuance of a notification for declaration of purpose and to continue with the Notifiction No. Vidyut-CH: (5)-5/2012 dated 25.04.2013 issued under Section 4 of the Land Acquisition Act, 1894.

28. The respondents in response to the writ petition have filed their reply and have averred that the department through the Director of Energy entered on 22.3.2011 a Pre-implementation Agreement with M/s Moser Bear Projects Private Limited and a

Tripartite Agreement was also executed through the Director of Energy with M/s Moser Bear Projects Pvt. Ltd and M/s Seli Hydroelectric Power Company for setting up of Seli Hydro Power Project (320 MW). The capacity of this project was subsequently enhanced from 300 MW to 400 MW.

29. The respondent department on receipt of a proposal from the Land Acquisition Collector-cum-Sub Divisional Officer (Civil), Udaipur i.e. Respondent No.5, for acquisition of land in favour of the petitioner for implementation of Seli (400 MW) HEP issued the preliminary notification on 7.3.2013 under provisions of Section 4 of the 1894 Act after completing codal formalities and obtaining concurrence of Forest, Tribal Development and Law Departments. The respondent department was further required to issue declaration i.e. Notification under Section 6 of the Act within a period of one year from the date of last publication in Rajpatra i.e. 24.4.2013 of Notification under Section 4, which could not be issued within stipulated period for the following reasons:

"(i) That the report under Section 5(2) of the Land Acquisition Act, 1894 was submitted by the Land Acquisition Collector on 19.10.2013 i.e. after a period of 7 months from the issue of notification under Section 4.During examination of this report, it was noticed that the report of Land Acquisition Collector under Section 4 of the Land Acquisition Companies Act, 1963 was not available which was, therefore, asked from the Land Acquisition Collector on 3.12.2013 and received subsequently on 5.3.2014.

(ii) That in the meanwhile, the Land Acquisition Act, 1894 was repealed and the new Act namely "The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013" came into force w.e.f. 1.1.2014 which provided that all fresh notifications for acquiring the land in any area for public purposes henceforth now shall be initiated as per provisions contained in the new Act ibid. Therefore, the case was returned to the Land Acquisition Collector on 6.3.2014 to facilitate required action under the provisions of new Act at his level with the following advice:

> *".....that since the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 has come into force w.e.f. 1.1.2014 and all fresh notifications for acquiring the land in any area for public purposes henceforth now shall be initiated as per provisions contained in the new Act ibid. As provided under Section 109 of the said Act bestows powers with the appropriate Government i.e.State Government to make rules for carrying out the provisions of this Act. As such in order to comply with the provisions contained under Sections 2 (2), 2(3) (a), 4 (1), 6 (1), 16, 19(2), 33 (3), 41 (4), 43 (2), 45 (3), 48(3), 50(3), 55 (3), 56, 60(1), 84 (2), 101 and (t) manner of publication whenever the provisions of this Act provide for; the statutory rules are being framed by the Revenue Department. However, Section 24 of the Act makes the position clear where award u/s 11 of the Land Acquisition Act 1894 has not been made and even otherwise.*
>
> *In view of the above mentioned facts and position the case is returned herewith to you with the request to facilitate required action at LAO level under the new Act, till new notification of Rules is made by Revenue Department".*

(iii) That the matter was taken up with the State Revenue Department vide letter dated 17.2.2014 for framing of required Rules under the provisions of New Act so that land acquisition cases could be processed accordingly. It was also

requested to clarify and advise the further course of action in such cases where proposals for acquisition of lands have already been initiated and Notification under Section 4 of the Land Acquisition Act, 1894 stands issued. A clarification in this regard was conveyed by the Revenue Department (respondent No.4.) on 13.3.2014 stating that "the question raised is squarely covered under the provisions of Section 24 (1) (a) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 which clearly states that in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, where no award under Section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply. Hence, you are advised to take action as per provisions of aforesaid section". Thus, it took about one month's time to have the advice from the Revenue Department.

(iv) That on receipt of above advice from the Revenue Department, proceedings were further processed by the respondent Department for issuance of declaration/ Notification under Sections 6 & 7 of the Land Acquisition Act, 1894 and the case proposal was sent to Revenue Department on 31.3.2014 to place the matter before the Land Acquisition Committee for its consideration and recommendations. This Committee considered the proposal in its meeting held on 2.5.2014 and recommended the acquisition of land measuring 197-14-15 bighas in Villages Udaipur, Saplat, Madgran, Kurched and Salgran of Sub Division Udaipur for construction of Seli HEP (400 MW) in favour of the petitioner and further recommended to issue the notifications under Sections 6 and 7 of the Land Acquisition Act, 1894. However, proceedings of this meeting was circulated by the Revenue Department only on 22.5.2014 (i.e. with a delay of 20 days) and received in the respondent department on 23.5.2014 i.e. after the expiry of limitation period as stipulated under the Land Acquisition Act, 1894."

30. We have heard learned counsel for the parties and have gone through the record of the case carefully.

31. Mr. M.H. Baig, learned Senior counsel for the petitioner has strenuously argued that the petitioner cannot be prejudiced for the inaction and delay caused by the respondents themselves. He has further argued that the respondents have completely misconstrued and misinterpreted the provisions of Section 6 of the 1894 Act. The impugned letter relies on proviso (1) (ii) to Section 6 (1) of the 1894 Act to the effect that no declaration under Section 6 can be made after the expiry of one year from the date of publication of the Section 4 notification. But the respondents have failed to take into consideration the opening sentence of Section 6 makes it clear that the said Section 6 alongwith all provisos is subject to Part VII of the 1894 Act as amended by Act 68 of 1984, which specifically deals with the acquisition of the land for companies. He further contended that it was only after the statutory requirement as envisaged in Part VII of the 1894 Act are fulfilled that the legal prohibition to "put in force" only Section 6 of the 1894 Act is lifted. Therefore, any provision of Section 6 including its provisos will not come into operation till the stipulated requirements of Part VII are fulfilled.

32. The sum and substance of the argument of the learned counsel for the petitioner is that Section 6 of the 1894 Act is subject to Part VII of the Act and execution of the agreement under Section 41 thereof, is not only reasonable but even necessary when a company is involved for whose use the proposed land is sought to be acquired. On the

question of limitation, it has been argued that the same shall not begin to run unless and until the proceedings under Part VII are complete. He further contended that the rigors of limitation set forth in proviso 1 (ii) to Section 6 of the 1894 Act have been relaxed under the 2013 Act inasmuch as the second proviso to Section 19 (7) thereof provides for and vests with the respondents the power to extend one year period for making a declaration of purpose in circumstances that justify such an extension.

33. While on the other hand, learned Advocate General has argued that once the Notification under Section 4 of the Land Acquisition Act, 1894 had lapsed prior to that the 1894 Act being repealed and the new 2013 Act had come into force on 1.1.2014, then in such situation there was no option with the respondents but to proceed for fresh land acquisition proceedings under the new Act. He further contended that insofar as the pending land acquisition proceedings as on 1.1.2014 are concerned, only the provision of Section 24 (1) (a) of the 2013 Act was relevant which reads as under:

> "(1) Notwithstanding anything contained in the Act in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 – (a) where no award under Section 11 of the said Land Acquisition Act has been made, than, all provisions of this Act relating to the determination of the compensation shall apply".

We now proceed to deal with the rival contentions of the parties.

<u>Delay on the part of the respondents</u>:

34. A perusal of the record would show that it was only on account of the respondents that there has been delay in commencing and taking to its logical end the proceedings under the Land Acquisition Act. The respondent No.5 received notification under Section 4 of the Act on 7.3.2013 and he promptly within three days on 11.3.2013 dealt with the same. The objections from the land owners were received and dealt with by respondent No.5 without any delay, but then the issuance of final report under Section 5 A (2) of the 1894 Act took six months and thereafter the report was prepared on 10.10.2013 and final report under Section 5 A (2) of the 1894 Act was issued.

35. The record further reveals that first, it took respondent No.5 almost five months and fifteen days from the date of publication of the Section 4 notification to complete the proceedings under Section 5A of the 1894 Act; second having prepared this report, it took the respondent No.5 nine days to forward the same to respondent No.1; third at the time of sending of the report under Section 5A(2) of the 1894 Act on 19.10.2013, respondent No.5 ought to have but failed to send the report under Rule 4 of the 1963 Rules; fourth, after having received the said report under Section 5A of the 1894 Act, respondent No.1 took almost forty-five days to realise that the report under Rule 4 of the 1963 Rules had not been received by it and pointed the same out only vide letter dated 3.12.2013; fifth respondent No.5 thereafter took a month to intimate the petitioner about the above and sought the information from it for preparing the Rule 4 report vide its letter dated 3.1.2014; sixth though the petitioner vide its letter dated 6.1.2014 promptly supplied the information sought within three days of the letter dated 3.1.2014 (though almost all the information was already otherwise with respondent No.5), respondent No.5 forwarded the report under Rule 4 of the 1963 Rules only on 4.3.2014; seventh the meeting of the Land Acquisition Committee dated 2.5.2014 was held after about one month twenty eight days of the report dated 4.3.2014 under Rule 4 of the 1963 Rules. The respondents in the meeting of even date recommended inter alia that the notification under Section 6 of the 1894 Act be issued. It took respondent No.4 about twenty-five days to reply the same and there is no explanation whatsoever for such delay. Here, it may be pertinent to note that while respondent No.1's

query dated 17.2.2014 was pending with respondent No. 4, respondent No.1 had already issued direction to respondent No.5 on 6.3.2014 to proceed under the 2013 Act.

36. After receipt of the reply from respondent No.4 on 13.3.2014 it took the respondent No.1 seventeen days for asking the respondent No.4 to place the matter before the Land Acquisition Committee vide his letter dated 31.3.2014. It took thirty-two days for holding the meeting of the Land Acquisition Committee which was finally convened by respondent No.4 on 2.5.2014. It took twenty days to circulate the proceedings of the Land Acquisition Committee which was circulated on 22.5.2014. It was eventually one month eighteen days after the decision had been taken by the Land Acquisition Committee that the agreement under Section 41 of the 1894 Act came to be executed on 19.6.2014 and after about twelve days of the execution of this agreement, the same was published in the official gazette on 1.7.2014. Draft notification under Sections 6 and 7 of the 1894 Act was sent to respondent No.2 for vetting on 7.7.2014 i.e. six days after publication of Section 41 agreement. It was eventually on 5.8.2014 i.e. after twenty-nine days after draft notification under Section 6 and 7 of the 1894 Act was sent to respondent No.2 for vetting that the impugned letter was issued by respondent No.1 on 5.8.2014 directing respondent No.5 to initiate fresh proceedings under the 2013 Act on the ground that one year period had lapsed from the date of issuance of the Section 4 notification.

37. Not only this, the representations made by the petitioner against the impugned letter dated 11.8.2014, 1.10.2014 and 4.11.2014 were left unattended and it is only pursuant to the directions passed by this Court on 19.12.2014 that the same came to be decided.

38. The aforesaid narration of facts clearly reveals that there has been an unreasonable delay at the instance of the respondents in finalizing the proceedings under the Land Acquisition Act. The respondents ought to had dealt with the case immediately or in any case within "reasonable time". The authority cannot neglect to do that which the law mandates and requires doing. By not promptly issuing notifications as envisaged under the Land Acquisition Act, it can safely be concluded that the respondents have failed to discharge their statutory duty and the petitioner is therefore fully justified in urging that such default in discharge of statutory duty by respondents under the Act cannot prejudice it.

39. We also find merit in the contention of the petitioner that once the respondents had itself failed to discharge its statutory duty, they cannot claim any advantage of the same by directing the respondent No.5 to initiate fresh proceedings under the 2013 Act on the ground that one year period had lapsed from the date of issuance of Section 4 notification.

40. In drawing such conclusion, we are supported by the observations of the Hon'ble Supreme Court in ***Kusheshwar Prasad Singh vs. State of Bihar and others (2007) 11 SCC 447*** wherein it has been held as follows:

> *"12. Having considered the rival submissions of the learned counsel for the parties, in our opinion, the appeal deserves to be partly allowed. So far as the contention of the appellant that the proceedings had been initiated in 1973-74 and final order was passed on 7.1.1976 is not disputed and cannot be disputed. If it is so, submission of the appellant is well founded that final statement as required by sub section (1) of Section 11 ought to have been issued and effect ought to have been given to the final order. Admittedly, no appeal was filed. Nor the order was challenged by any party. The appellant is right in contending that final statement ought to have been issued immediately*

or in any case within "reasonable time". The authority cannot neglect to do that which the law mandates and requires doing. By not issuing consequential final statement under Section 11 (I) of the Act, the authority had failed to discharge its statutory duty. Obviously, therefore, the appellant is justified in urging that such default in discharge of statutory duty by the respondents under the Act cannot prejudice him. To that extent, therefore, the grievance of the appellant is well founded.

13. The appellant is also right in contending before this Court that the power under Section 32-B of the Act to initiate fresh proceedings could not have been exercised. Admittedly, Section 32-B came on the statute book by Bihar Act 55 of 1982. The case of the appellant was over much prior to the amendment of the Act and insertion of Section 32-B. The appellant, therefore, is right in contending that the authorities cannot be allowed to take undue advantage of their own default in failure to act in accordance with law and initiate fresh proceedings."

Position of law:

41. Before we proceed further, certain provisions of the Land Acquisition Act, 1894, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 and The Land Acquisition (Companies) Rules, 1963 may be noticed.

Section 4 of the Land Acquisition Act, 1894 reads thus:

*"**4. Publication of preliminary notification and power of officers thereupon. -***

(1) Whenever it appears to the [appropriate Government] the land in any locality [is needed or] is likely to be needed for any public purpose [or for a company], a notification to that effect shall be published in the Official Gazette [and in two daily newspapers circulating in that locality of which at least one shall be in the regional language], and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality [(the last of the dates of such publication and the giving of such public notice , being hereinafter referred to as the date of the publication of the notification)].

(2) Thereupon it shall be lawful for any officer, either generally or specially authorized by such Government in this behalf, and for his servants and workman,-

to enter upon and survey and take levels of any land in such locality; to dig or bore into the sub-soil;

to do all other acts necessary to ascertain whether the land is adapted for such purpose;

to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon;

to mark such levels, boundaries and line by placing marks and cutting trenches; and,

where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crop, fence or jungle;

Provided that no person shall enter into any building or upon any enclosed court or garden attached to a dwelling house (unless with the consent

of the occupier thereof) without previously giving such occupier at least seven days' notice in writing of his intention to do so."

Section 5A of the 1894 Act, reads thus:

*"**5A. Hearing of objections**. - (1) Any person interested in any land which has been notified under section 4, sub-section (1), as being needed or likely to be needed for a public purpose or for a Company may, [within thirty days from the date of the publication of the notification], object to the acquisition of the land or of any land in the locality, as the case may be.*

(2) Every objection under sub-section (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard [in person or by any person authorized by him in this behalf] or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, [either make a report in respect of the land which has been notified under section 4, sub-section (1), or make different reports in respect of different parcels of such land, to the appropriate Government, containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision of that Government]. The decision of the [appropriate Government] on the objections shall be final.

(3) For the purpose of this section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act.]

Section 6 of the 1894 Act, reads thus:

"6. Declaration that land is required for a public purpose. *- (1) Subject to the provision of Part VII of this Act, [appropriate Government] is satisfied, after considering the report, if any, made under section 5A, sub-section (2)], that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorized to certify its orders [and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under section 4, sub-section (I) irrespective of whether one report or different reports has or have been made (wherever required) under section 5A, sub-section (2)];*

[Provided that no declaration in respect of any particular land covered by a notification under section 4, sub-section (1)-

(i) published after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967 (1 of 1967), but before the commencement of the Land Acquisition (Amendment) Act, 1984 (68 of 1984), shall be made after the expiry of three years from the date of the publication of the notification; or

(ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984 (68 of 1984), shall be made after the expiry of one year from the date of the publication of the notification:]

Provided further that] no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.

[Explanation 1. - In computing any of the periods referred to in the first proviso, the period during which any action or proceeding to be taken in pursuance of

the notification issued under section 4, sub-section (1), is stayed by an order of a Court shall be excluded.

Explanation 2. - Where the compensation to be awarded for such property is to be paid out of the funds of a corporation owned or controlled by the State, such compensation shall be deemed to be compensation paid out of public revenues.]

(2) [Every declaration] shall be published in the Official Gazette [and in two daily newspapers circulating in the locality in which the land is situated of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such declaration to be given at convenient places in the said locality (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the declaration), and such declaration shall state] the district or other territorial division in which the land is situate, the purpose for which It is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected.

(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a company, as the case may be; and, after making such declaration, the [appropriate Government] may acquire the land in manner hereinafter appearing."

Sections 39, 40 and 41 of the 1894 Act reads thus:

***"39. Previous consent of appropriate Government and execution of agreement necessary**. - The provisions of [sections 6 to 16 (both inclusive) and sections 18 to 37 (both inclusive)] shall not be put in force in order to acquire land for any company [under this Part], unless with the previous consent of the [appropriate Government], not unless the Company shall have executed the agreement hereinafter mentioned.*

***40. Previous enquiry**. - (1) Such consent shall not be given unless the [appropriate Government] be satisfied. [either on the report of the Collector under section 5A, sub-section (2), or] by an enquiry held as hereinafter provided, -*

[(a) that the purpose of the acquisition is to obtain land for the erection of dwelling houses for workmen employed by the Company or for the provision of amenities directly connected therewith, or

[(aa) that such acquisition is needed for the construction of some building or work for a Company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, or]

(b) that such acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public].

(2) Such enquiry shall be held by such officer and at such time and place as the [appropriate Government] shall appoint.

(3) Such officer may summon and enforce the attendance of witnesses and compel the production of documents by the same means and, as far as possible, in the same manner as is provided by the [Code of Civil Procedure, 1908 (5 of 1908)] in the case of a Civil Court."

***41. Agreement with appropriate Government.** - If the [appropriate Government] is satisfied [after considering the report, if any, of the Collector under section 5A, sub-section (2), or on the report of the officer making an*

inquiry under section 40] that [the proposed acquisition is for any of the purposes referred to in clause (a) or clause (aa) or clause (b) of sub-section (1) of section 40], it shall require the Company to enter into an agreement [with the [appropriate Government]], providing to the satisfaction of the [appropriate Government] for the following matters, namely:-

(1) the - [payment to the [appropriate Government]] of the cost of the acquisition;

(2) the transfer, on such payment, of the land to the Company.

(3) the terms on which the land shall be held by the Company,

[(4) where the acquisition is for the purpose of erecting dwelling houses or the provision of amenities connected therewith, the time within which, the conditions on which and the manner in which the dwelling houses or amenities shall be erected or provided;

[(4A) where the acquisition is for the construction of any building or work for a Company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, the time within which, and the conditions on which, the building or work shall be constructed or executed; and]

(5) where the acquisition is for the construction of any other work, the time within which and the conditions on which the work shall be executed and maintained and the terms on which the public shall be entitled to use the work.]"

Section 19 (7) of the 2013 Act reads thus:

"19. Publication of declaration and summary of Rehabilitation and Resettlement. *– (1) when the appropriate Government is satisfied, after considering the report, if any, made under sub-section (2) of Section 15, that any particular land is needed for a public purpose, a declaration shall be made to that effect, alongwith a declaration of an area identified as the "resettlement area" for the purposes of rehabilitation and resettlement of the affected families, under the hand and seal of a Secretary to such Government or of any other officer duly authorized to certify its orders and different declarations may be made from time to time in respect of different parcels of any land covered by the same preliminary notification irrespective of whether one report or different reports has or have been made (wherever required).*

(2) to (6). xxx xxx xxx

(7) Where no declaration is made under sub-section (1) within twelve months from the date of preliminary notification, then such notification shall be deemed to have been rescinded:

Provided that in computing the period referred to in this sub-section, any period or periods during which the proceedings for the acquisition of the land were held up on account of any stay or injunction by the order of any Court shall be excluded:

Provided further that the appropriate Government shall have the power to extend the period of twelve months, if in its opinion circumstances exist justifying the same:

Provided also that any such decision to extend the period shall be recorded in writing and the same shall be notified and be uploaded on the website of the authority concerned."

Section 24 of the 2013 Act reads thus:

***"24. Land acquisition process under Act No.1 of 1894 shall be deemed to have lapsed in certain cases**.- (1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), -*

(a) where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or

(b) where an award under said section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed.

(2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act:

Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under Section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act."

Section 114 of the 2013 Act, reads thus:

***"114. Repeal and saving**.- (1) The Land Acquisition Act, 1894 (1 of 1894) is hereby repealed.*

(2) Save as otherwise provided in this Act the repeal under sub-section (1) shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeals."

Rule 4 of 1963 Rules reads thus:

*"**4. Appropriate Government to be satisfied with regard to certain matters before initiating acquisition proceedings**.- (1) Whenever a Company makes an application to the appropriate Government for acquisition of any land, that Government shall direct the collector to submit a report to it on the following matters, namely:*

(i) that the company has made its best endeavour to find out lands in the locality suitable for the purpose of acquisition;

(ii) that the company has made all reasonable efforts to get such lands by negotiation with the persons interested therein on payment of reasonable price and such efforts have failed;

(iii) that the land proposed to be acquired is suitable for the purpose;

(iv) that the area of land proposed to be acquired is not excessive;

(v) that the company is in a position to utilize the land expeditiously; and

(vi) where the land proposed to be acquired is good agricultural hand, that no alternative suitable site can be found so as to avoid acquisition of that land.

(2) The collector shall, after giving the company a reasonable opportunity, to make any representation in this behalf, hold an enquiry into the matters referred to in sub-rule (1) and while holding such enquiry he shall:

(i) in any case where the land proposed to be acquired is agricultural land, consult the Senior Agricultural Officer of the district whether or not such land is good agricultural land;

(ii) determine, having regard to the provisions of sections 23 and 24 of the Act, the approximate amount of compensation likely to be payable in respect of the land, which, in the opinion of the Collector, should be acquired for the Company; and

(iii) ascertain whether the company offered a reasonable price (not being less than the compensation so determined), to the persons interested in the land proposed to be acquired.

Explanation.- For the purpose of this rule "good agricultural land" means any land which, considering level of agricultural production and the crop pattern of the area in which it is situated, is of average or above average productivity and includes a garden or grove land.

(3) As soon as may be after holding the enquiry under sub-rule (2) the collector shall submit a report to the appropriate Government and a copy of the same shall be forwarded by that Government to the Committee.

(4) No declaration shall be made by the appropriate Government under section 6 of Act unless –

(i) the appropriate Government has consulted the committee and has considered the report submitted under this rule and the report, if any, submitted under section 5-A of the Act; and

(ii) the agreement under section 41 of the Act has been executed by the company."

42. The only justification sought to be put forward by the respondents for directing the initiation of fresh proceedings under 2013 Act is that one year period had lapsed from the date of issuance of Section 4 notification dated 25.4.2013. But then, the respondents appear to have misinterpreted the provisions of Section 6 of the Act. The very opening sentence wherein makes it clear that the said Section 6 alongwith all provisos is subject to Part VII of the 1894 Act, as amended by Act 68 of 1984.

43. Part VII of the 1894 Act deals specifically with the acquisition of land for companies. Section 39 of the Act provides that when land is to be acquired under Part VII, i.e. for a company, then Section 6 of the Act will not be "put in force" unless two conditions are fulfilled:

(i) There must be a previous consent of the appropriate Government that land be acquired for a company; and

(ii) The Company shall have executed an agreement as provided under Section 41 of the 1894 Act.

44. As per Section 40 of the Act, the appropriate Government can give such consent (required under Section 39) only after an enquiry is held, either under Section 5A or

under Section 40 of the Act. Since the enquiry in the present case had already been held under Section 5A, therefore, no further enquiry as envisaged under Section 40 of the Act was necessary. Moreover, once the Government was satisfied with the report of the Collector under Section 5A of the Act, then it was required to ask the Company to enter into an agreement with the appropriate Government in terms of Section 41 of the Act providing for various matters including payment of the cost of acquisition specified therein.

45. This was so held by the Hon'ble Supreme Court in ***Babu Barkya Thakur vs. State of Bombay and others (1961) 1 SCR 128*** in the following terms:

> *"9. From the preamble as also from the provisions of Sections 5A, 6 and 7, it is obvious that the Act makes a clear distinction between acquisition of land needed for a public purpose and that for a Company, as if land needed for a Company is not also for a public purpose. The Act has gone further and has devoted Part VII to acquisition of land for Companies and in sub-s. (2) s. of 38, with which Part VII begins, provides that in the case of an acquisition for a Company, for the words " for such purpose " the words " for purposes of the Company " shall be deemed to have been substituted. It has been laid down by s. 39 that the machinery of the Land Acquisition Act, beginning with s. 6 and ending with s. 37, shall not be put into operation unless two conditions precedent are fulfilled, namely, (1) the previous consent of the appropriate Government has been obtained and (2) an agreement in terms of s. 41 has been executed by the Company.*
>
> *10. The condition precedent to the giving of consent aforesaid by the appropriate Government is that the Government has to be satisfied on the report of the enquiry envisaged by s. 5A(2) or by enquiry held under s. 40 itself that the purpose of the acquisition is ;to obtain land for the erection of dwelling house-, for workmen employed by the Company or for the provision of amenities directly connected therewith or that such acquisition is needed for the construction of some work which is likely to prove useful to the public. When the Government is satisfied as to the purposes aforesaid of the acquisition in question, the appropriate Government shall require the Company to enter into an agreement providing for the payment to the Government (1) of the cost of the acquisition, (2) on such payment, the transfer of the land to the Company and (3) the terms on which the land shall be held by the Company. The agreement has also to make provision for the time within which the conditions on which and the manner in which the dwelling houses or amenities shall be erected or provided and in the case of a construction of any other kind of work the time within which and the conditions on which the work shall be executed and maintained and the terms on which the public shall be entitled to use the work.*

46. In view of the aforesaid exposition of law, it can safely be held that it was only after the statutory requirement under Sections 39, 40 and 41 of Part VII of the 1894 Act are fulfilled that the legal prohibition to "put in force' inter alia Section 6 of the 1894 Act is lifted. In other words, any provision of Section 6 including its provisos will not come into operation till the stipulated requirements of Part VII are fulfilled.

47. Further, the combined reading of proviso (1) of Section 6 (1) and Sections 39, 40 and 41 of Part VII of the 1894 Act, leads to the following inescapable conclusions:

> Where acquisition is for a company, proviso (1) of Section 6 (1) of the 1894 Act will not operate. The statute has to be read down and the relevant provisions of Part VII will override proviso (1) of Section 6 (1) and in this process the time spent for fulfilling the legal requirements will have to be excluded in computing the limitation period of one year indicated in proviso (1) (ii) of Section 6 (1) of the 1894 Act. This will be in accordance with the principles clearly accepted in accordance with Explanation (1) to the second proviso of Section 6 (1) of the Act which provides that the period spent in legal proceedings shall be excluded from the limitation period indicated in the first proviso to Section 6 (1) of the Act. The first proviso to Section 6 stipulates that declaration should be made within one year of notification issued under Section 4 of the 1894 Act. Whereas, second proviso, which qualifies and modifies the first proviso, *inter alia* mandates that no declaration shall be made under Section 6 of the Act unless compensation is to be paid by the company. The obligation of the company to pay compensation is undertaken by the Company only after an agreement is signed with the appropriate Government in terms of Section 41 of the Act. Therefore, the limitation of one year will come into operation only after the proceedings under Sections 39, 40 and 41 of the Act are complete.

48. It is basic rule of interpretation that there has to be a harmonious construction between different sections of the Act so that reading of one section of the statute does not render otiose another section of the same statute. From the harmonious construction of Section 6 and Sections 39, 40 and 41 of the Act, it can safely be concluded that proviso 1 (ii) to Section 6 (1) of the 1894 Act would be excluded in case of acquisition of land for a company. If in case these provisions are construed in the manner aforesaid, Sections 39 to 41 of Part VII of the Act to which Section 6 has been made subject to as is clear from the opening words of Section 6 itself would be rendered otiose. Once the applicability of proviso 1 (ii) of Section 6 of the 1894 Act is excluded, then the applicability of period of limitation of one year is excluded.

49. The Hon'ble Supreme Court in ***Larsen & Toubro Ltd. vs. State of Gujarat and others (1998) 4 SCC 387*** has clearly held that declaration under Section 6 of the Act is made by the notification only after formalities under Part VII of the Act which contains Sections 39 to 42 have been complied and the report of the Collector under Section 5-A (2) of the Act is before the State Government, who consents to acquire the land on its satisfaction that it is needed for the company. The relevant observations read thus:

> *"31………. After notification under Section 4 is issued, when it appears to the State Government that the land in any locality is needed for a company, any person interested in such land which has been notified can file objections under Section 5-A (1) of the Act. Such objections are to be made to the Collector in writing and who after giving the objector an opportunity of being heard and after hearing of such objections and after making such further enquiry, if any, as the Collector thinks necessary, is to make a report to the State Government for its decision. Then the decision of the State Government on the objections is final. Before the applicability of other provisions in the process of acquisition, in the case of a company, previous consent of the State Government is required under Section 39 of the Act nor (sic) unless the company shall have executed the agreement as provided in Section 41 of the Act. Before giving such consent, Section 40 contemplates a previous enquiry. Then compliance with Rules 3 and 4 of the Land Acquisition (Company) Rules, 1963 is mandatorily required.*

After the stage of Sections 40 and 41 is reached, the agreement so entered into by the company with the State Government is to be published in the Official Gazette. This is Section 42 of the Act which provides that the agreement on its publication would have the same effect as if it had formed part of the Act. After having done all this, the State Government cannot unilaterally and without notice to the company withdraw from acquisition. Opportunity has to be given to the company to show cause against the proposed action of the State Government to withdraw from acquisition. A declaration under Section 6 of the Act is made by notification only after formalities under Part VII of the Act which contains Sections 39 to 42 have been complied and the report of the Collector under Section 5-A (2) of the Act is before the State Government, who consents to acquire the land on its satisfaction that it is needed for the company."

50. Now, insofar as the 2013 Act is concerned, it addresses the issues which are more equitable and realistic. Section 93 of the 2013 Act states that completion of acquisition is not necessary, but in that case, complete and fair compensation has to be awarded to the land owners. Even the rigors of limitation as set forth in proviso 1 (ii) of Section 6 (1) of the Act have been relaxed under the 2013 Act inasmuch as the second proviso to Section 19 (7) thereof clearly provides for and vests with the respondents the power to extend one year period for making a declaration of purpose in circumstances that justify such an extension.

51. We have no hesitation to hold that the respondents have failed to appreciate that the intent expressed under Section 19 (7) read with Section 24 (1) (a) of the 2013 Act has to be construed so as to facilitate the acquisition of land for projects of general public interest in a timely and transparent manner. The respondents rather than working in accordance with the stated object of the 2013 Act and by reversing the clock back by relegating the petitioner's case to be started *de novo* under the 2013 Act, have only delayed the acquisition proceedings for the project and resultantly even the implementation, construction and operation of the project has been delayed.

52. Therefore, in the given circumstances, we are of the considered view that instead of directing the initiation of fresh acquisition proceedings the respondents ought to have extended the benefit of second proviso to Section 19 (7) of the 2013 Act. They ought to have taken into consideration the express provision of Section 24 (1) (a) of the 2013 Act which extended the benefit of compensation as envisaged under the 2013 Act to the land owners for the proceedings which had been initiated under the 1894 Act.

53. In addition to the above, it has come on record that the petitioner's has so far already invested a huge amount of `1,02,88,61,000/- (Rupees One Billion two Million Eighty Eight Lacs, Sixty One Thousand only) towards the project execution and implementation and has committed additional funds to the tune `2,96,26,88,000/- (Two Billion Ninety Six Million Twenty Six Lacs Eighty Eight Thousand only) towards project allotment costs, identification, marking, preparation etc. of forest land, additional bank guarantees and preparation and approval of CAT plan. Therefore, the initiation of fresh acquisition proceedings at this stage would only entail further expenditure thereby causing further loss to the petitioner.

54. Now, we proceed to deal with the contention of learned Advocate General that once the notification under Section 4 of the Land Acquisition Act, 1894 had lapsed prior to the Act being repealed and the new Act having come to force only on 1.1.2014, then in such a situation, the State Government had no option but to proceed afresh acquisition proceedings under the new Act.

55. We have considered this submission and are of the considered opinion that the respondents have clearly misdirected themselves in arriving at the decision that the proceedings for acquisition of land had lapsed. Sections 114 (2) and 24 (1) (a) of the 2013 Act have to be read with Section 6 of the General Clauses Act, 1897. The Section 4 notification issued under the 1894 Act was valid and subsisting at the time of coming into force of the 2013 Act, that being so, the benefit of second proviso to Section 19 (7) of the 2013 Act had to be invoked and applied to the facts of the present case. Moreover, had the respondents acted with the sense of responsibility by ensuring that there was no inordinate delay, probably such a situation may not have arisen. The respondents have been procrastinating the taking of action under the 1894 Act in a swift, timely and apposite manner. In addition, the petitioner cannot be made to suffer for the default in discharge of statutory duties by the respondents and in no event can the same work to its prejudice as that would amount to allowing the respondents to take undue advantage of their own fault in failing to act promptly in accordance with law.

56. In view of the aforesaid discussion, the writ petition is allowed, impugned letter No. MPP-Chh (5)-5/2012 dated 5.8.2014 (Annexure P-1) issued by respondent No.1 and the impugned opinion of respondent No.2 relied upon and mentioned extensively in the impugned letter are quashed. Since the 2013 Act is more equitable and realistic, more especially to the claimants whose lands have been sought to be acquired, we direct the respondents to proceed with the present case under the second proviso to Section 19 (7) of the 2013 Act and extend the time for issuance of a notification for declaration of purpose and the respondents are further directed to continue with the notification No. Vidyut-CH: (5)-5/2012 dated 25.4.2013 issued under Section 4 of the Land Acquisition Act, 1894. Pending application also stands disposed of. The parties are left to bear their own costs.

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

OSA No.2 of 2014 alongwith Cross Objections No.19 of 2014 and OSA No.4002 of 2013.
Judgment reserved on : 05.05.2015.
Date of decision: June 17, 2015.

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1. <u>OSA No.2 of 2014 alongwith Cross Objections No.19 of 2014.</u>

The Reserve Bank of India and another .....Appellants.
Versus
M/s A.B.Tools (P) Ltd., and another .....Respondents.

For the Appellants : Mr.J.L.Kashyap, Advocate.
For the Respondents : Mr.J.S.Bhogal, Senior Advocate with Mr.Parmod Negi, Advocate.

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2. <u>OSA No.4002 of 2013</u>

M/s A.B.Tools Pvt. Ltd., and another .....Appellants.
Versus
The Reserve Bank of India and another .....Respondents.

For the Appellants : Mr. J.S.Bhogal, Senior Advocate with Mr.Parmod Negi, Advocate.
For the Respondents : Mr.J.L.Kashyap, Advocate.

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff sought the amendment of the plaint for claiming the outstanding charges from the defendants- defendants contended that

evidence had been led and the proposed amendment will change the nature of the suit - held, that no new fact was being introduced- the power to allow amendment is wide and can be exercised at any stage- plaintiff had claimed any other relief to which he is entitled, therefore, application allowed and plaintiff permitted to amend the plaint. (Para-3 to 5)

Indian Contract Act, 1872- Section 70- Plaintiff No. 1 had sold 8 flats in the Valley Side Estate to the defendants together with lease- it was specifically agreed that the seller will not be bound to carry out any repair after one year and alternate arrangement will be made by Flat Owners' Association- plaintiff spent Rs. 26,000,00/- towards the maintenance of common area- held, that no Flat Owners' Association was formed in area and services were rendered by the plaintiff- once the defendants had taken the advantage of the services, they were bound to pay for the same- Article 113 of Limitation Act will be applicable in such a situation - cause of action arose on 20.9.2004 and the suit was filed on 18.1.2006 within limitation- hence, suit decreed. (Para- 24 to 55)

Cases referred:

State of West Bengal versus M/s B.K. Mondal and Sons AIR 1962 SC 779
V.R.Subramanyam versus B.Thayappa (deceased) and others AIR 1966 SC 1034
Fibrosa versus Fairbairn (1943) A.C. 32
Nelson versus Larholt (1948) 1 K.B. 339
Mulamchand versus State of Madhya Pradesh, AIR 1968 SC 1218
M/s Hansraj Gupta and Co. versus Union of India AIR 1973 SC 2724
Renusagar Power Co. Ltd. Vs. General Electric Co. 1994 Supp (1) SCC 644
Indian Council for Enviro-Legal Action Vs. Union of India and Others (2011) 8 SCC 161
Hole versus Chard Union reported in 1894 (1) Ch. 293
Union of India and others versus Tarsem Singh (2008) 8 SCC 648
Upendra Krishna Mandal and another versus Naba Kishore Mandal and others AIR 1921 Calcutta 93
Nalini Ranian Guha versus Union of India (1954) 93 Calcutta Law Journal 373
Kora Lukose versus Chacko Uthuppan AIR 1957 Kerala 19 (Full Bench)
State of Bihar versus Thawardas Pherumal AIR 1964 Patna 225
Keshab Kishore Narain Saraswati versus State of Bihar and another AIR 1971 Patna 99
Union of India versus Kamal Kumar Goswami and others AIR 1974 Calcutta 231

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.
CMP No.13380 of 2014.

This application has been preferred by the plaintiffs-appellants (hereinafter referred to as the plaintiffs) for the amendment of the plaint. It is averred that the plaintiffs had prayed for a decree of Rs.26 lacs on account of outstanding charges due from the defendants/respondents (hereinafter referred to as the defendants) for the maintenance charges of the common areas, but due to sheer inadvertence they could not claim maintenance charges from the date of filing of the suit till its disposal and, therefore, now seek to incorporate amended para 13 of the plaint to the following effect:-

> "The plaintiff is also entitled to future maintenance costs at the rate of Rs.1089/- per flat per month from the date of filing of this suit together with interest thereon till the date of decree and the plaintiff undertakes to pay the court fee on the amount so decreed."

2. In addition, the plaintiffs have sought permission to amend the prayer clause by adding in the prayer clause the following sentence:-

> "The plaintiff may also be allowed maintenance charges from the filing of the suit till decree at the rate of Rs.1089/- per month per flat and interest thereon."

3. The defendants have vehemently opposed this application by raising various objections like amendment if allowed would change nature of the case and a new cause of action would be introduced in the case, the amendment was belated and has been moved only when the case has been fixed for arguments. The parties have already led evidence in the case and, therefore, the application was not maintainable and lastly that the proposed amendment was not permissible inasmuch as the plaintiffs have restricted the whole of their claim in the suit to Rs.26 lacs and it was not permissible under Order 2 Rule 2 of the Code of Civil Procedure to sue for the portion of the claim so omitted or relinquished at this stage. These very objections have been reiterated in reply to the merits of the application.

We have heard the learned counsel for the parties.

4. It is not in dispute that by way of amendment, the plaintiffs are not seeking to introduce any new fact and the parties are alive to the real nature of the dispute. It can also not be disputed that wide discretion is vested with the Court in matters of amendment of pleadings. The power to allow amendment is wide and can be exercised at any stage of the proceedings in the interest of justice, though the same has to be exercised with great care and circumspection.

5. By way of amendment, the plaintiffs have only sought maintenance charges that too from the date of filing of the suit till the date of decree and, therefore, even bar of Order 2 Rule 2 CPC is not attracted to such a case. That apart, even in the suit, the plaintiffs have already by an abundant caution prayed for any other relief to which the plaintiffs may be found entitled which prayer in itself takes care even of the proposed amendment.

6. In view of the aforesaid discussion, the application is allowed, as prayed for and the amended plaint is ordered to be taken on record.

OSA No.2 of 2014 alongwith Cross Objections No.19 of 2014 & OSA No.4002 of 2013.

7. The plaintiff-Company A.B.Tools (P) Ltd. and its Managing Director filed a suit against the defendants, the Reserve Bank of India, for recovery of Rs.26 lacs alongwith interest at the rate of 21% per annum with quarterly rests from the date of filing of the suit till its realization. The plaintiffs have also prayed for future maintenance costs at the rate of Rs.1089/- per month per flat from the date of filing of the suit together with interest till the date of decree.

8. The plaintiff No.1 vide deed of lease and conveyance dated 08.06.1995 sold to the defendants blocks No.C-2 and C-3 containing 8 flats in the Valley Side Estate, measuring approximately 981.84 sq. mtrs. (10565 sq.ft.) a built up area alongwith attic in the said blocks measuring 247.63 sq. mtrs (2665 sq. ft.) together with lease of land measuring 600 sq. mtrs (approx.) underneath and appurtenant to blocks No.C-2 and C-3, situated at Station Ward, Bada Shimla, Tehsil and District Shimla (H.P.) for a sum of Rs.1,01,07,000/- (Rupees One Crore One Lac Seven Thousand Only).

9. Prior to the execution of the conveyance-cum-lease deed, an agreement for purchase of 8 apartments in blocks No.C-2 and C-3 was executed between the parties on 17.12.1994 and para-xviii thereof reads as under:-

> "(xviii) That the Vendors after one year of the execution of the Sale deed and Lease Deed in favour of the Purchaser, shall not be bound in any way to

carry out repair or maintenance work of the property hereby intended to be sold. After the period of one year and till alternate arrangements are made by the flat owners Association to be formed for this purpose, if required by the Purchaser, the vendors shall look after and maintain the common areas, services, green areas etc. at the cost of all the flat owners of the Valley Side Estate. The Vendors shall maintain, at its cost, all such areas and services during the defects liability period of one year from the date of the execution of the Sale Deed and the Lease Deed."

10. It is claimed that the terms of the agreement of purchase were incorporated and infact formed an integral part of the sale-cum-lease deed executed between the parties as Appendix 'A' and, therefore, all the conditions became inseparable part of the registered deed executed between the parties. The lease-cum-conveyance deed specifically incorporated and mentioned that by agreement dated 17.12.1994, 8 apartments in blocks C-2 and C-3 had been purchased by the defendants. The plaintiffs claim to have spent Rs.26 lacs towards maintenance of the common areas/facilities provided to the entire estate holders and thereafter future maintenance at the rate of Rs.1089/- per month.

11. The defendants contested the suit wherein preliminary objections regarding maintainability, locus-standi, cause of action, limitation, want of notice under Section 80 CPC and the suit being abuse of process of law, false, frivolous, vexatious and vague. On merits, it was pleaded that the defendants are not liable to pay any maintenance charges and placed reliance on clause (vi) of the deed of lease and conveyance dated 08.06.1995 which reads as under:-

> "(vi) THAT the Vendors hereby grant to the Purchaser the rights pertaining to (i) use of the main access road connecting the Valley Side Estate to the Municipal and main road, (ii) use of the common green areas, (iii) maintenance of Electrical cables water supply and drainage lines, sewer and storm water drains, (iv) use of internal path ways together with the use of steps connecting the pathways with the main access road on both ends, more particularly delineated and marked green in Annexure 'P' and 'Q' (v) access to common facilities and use thereof etc. without any further consideration whatsoever over and above the aforesaid total consideration of Rs.1,01,07,000/- (Rupees One Crore One Lakh Seven Thousand Only)."

12. The plaintiffs filed replication and reiterated the averments made in the plaint and, at the same time, refuted the allegations as set out in the written statement.

13. On the pleadings of the parties, the following issues were framed:-

1. Whether in terms of the agreement, whereby the suit property was sold to the defendants, the defendants are liable to pay certain charges for the maintenance of roads and common facilities, as alleged? OPP.
2. If issue No.1 is proved, whether the plaintiffs are entitled to the suit amount or any other amount of money on account of the charges, referred to in issue No. 1? OPP
3. Whether the claim of the plaintiffs is barred by time? OPD
4. Whether defendants are Government, within the meaning of Section 80 of the Code of Civil Procedure and, hence, notice under the aforesaid provision was required to be served before the institution of the suit and no such notice having been served, whether the plaint is liable to be rejected? OPD.

5. Whether the plaint lacks material particulars, especially the details of the claim? If so, its effect? OPD
6. Whether the plaintiffs are estopped to file the present suit by their acts of omission and commission and conduct of their functionaries? OPD
7. Relief.

14. After recording the evidence and evaluating the same, the suit of the plaintiffs was partly decreed for a sum of Rs.3,13,632/- along with past, pendente lite and future interest at the rate of 12% per annum as maintenance charges for the aforesaid facilities for a period of three years preceding institution of the suit i.e. from 18.01.2003 to 17.01.2006 at the rate of Rs.1089/- per flat per month.

15. Aggrieved by the judgment and decree passed by the learned single Judge, both the parties have filed separate appeals before this Court. The plaintiffs have filed OSA No.4002 of 2013 against the part dismissal of the suit and have prayed for decreeing the suit in its entirety, whereas, the defendants have not only filed the Cross Objections registered as Cross Objections No.19 of 2014 in the appeal filed by the plaintiffs being OSA No.4002 of 2013, but have also filed on the same allegations separate appeal being OSA No.2 of 2014 against the decree passed by the learned single Judge.

16. The plaintiffs (appellants in OSA No.4002 of 2013) have vehemently argued that the learned single Judge while partly deciding issue No.3 in their favour has misappreciated the provisions of Section 22 of the Limitation Act, 1963. They have further contended that the learned single Judge while applying the provisions of Section 70 of the Indian Contract Act failed to appreciate that it also contains the provisions of "quasi contract" and, therefore, the provisions of Section 22 of the Limitation Act, 1963, will also apply to the claim preferred under Section 70 of the Indian Contract Act. It is also claimed that the learned single Judge had not given due consideration to the fact that the plaintiffs had been raising the demand right from the date the amounts became due in 1996 and the defendants had been assuring them that the matter was under consideration and it was only in the year 2005 that the claim of the plaintiffs came to be repudiated by the defendants, for the first time, and immediately thereafter in January, 2006, the plaintiffs had instituted the suit.

17. On the other hand, the defendants (appellants in OSA No.2 of 2014) have argued that the learned single Judge while deciding against the appellants and even while decreeing the suit of the plaintiffs for a sum of Rs.3,13,632/- had lost sight of the fact that between 12.02.1999 and 20.09.2004 there had not been given any acknowledgement on behalf of the appellants and, therefore, admittedly the suit was barred by time even as on 20.09.2004. It is further contended that the learned single Judge had erred in recording a finding that the defendants are also responsible for formation of the association and the plaintiffs alone cannot be held responsible for non-formation of the association which findings are contrary to clause xxiii of the purchase agreement whereby responsibility of the vendor (plaintiff) was to form the association. It is also argued that the plaintiffs in their letter dated 04-18/06/2005 had clearly admitted that the common areas had not been transferred and are with the plaintiffs. In such circumstances, if the plaintiffs were maintaining those premises without any express authority or an agreement that they would be entitled to receive maintenance charges, the plaintiffs were not entitled to make any claim for the same. It was further contended that the learned single Judge has not appreciated that the provisions of Clause xviii of purchase agreement clearly envisage that the plaintiffs after one year of the execution of the sale deed and lease deed in favour of the defendants shall not be bound to carry out any repair or maintenance work and having said so, it was

not permissible for the plaintiffs without express authority and permission of the defendants to carry out the maintenance work as per the provisions of Section 70 of the Indian Contract Act.

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

19. It is the specific case of the plaintiffs that till the flat owners' association had not been formed, it was the plaintiffs, who were required to look after and maintain the common areas, services green areas etc. at the cost of all the flat owners of the Valley Side Estate. Records reveal that no such association was formed, though as per Clause xix, the defendant No.1 had undertaken to become a member of such association. The plaintiffs admittedly vide notice Ex.PW-1/B dated 10.06.1995 had raised a demand with the defendants for maintenance charges at the rate of Rs.1058/- per flat per month. However, the defendants in their reply dated 28.07.1995 (Ex.PW-1/C) informed that no such claim was tenable for the period of one year from the date of registration of deed of lease and conveyance dated 08.06.1995. The plaintiffs thereafter issued notice dated 17.12.1996 Ex.PW-1/ZC wherein a fresh demand of Rs.1058/- per flat per month for the period 08.06.1996 to 08.12.1996 (six months) was raised. It was after prolonged correspondence that the plaintiffs on 6th July, 2004 asked the defendants to settle the issue of maintenance charges which was pending for years together.

20. The defendants in response to this letter informed the plaintiffs that the matter was still under consideration and as and when any decision is taken, they would be informed accordingly. However, when even after six months, nothing was heard from the defendants, the plaintiffs again sent a reminder on 22.01.2005, however, the defendants vide letter dated 08.02.2005 (Ex.PW-1/Z) repudiated the claim of the plaintiffs and this was again reiterated in letter dated 17.09.2005.

21. Undoubtedly, the property requires maintenance, but the question is who is to maintain the same. As per the deed of lease and conveyance, the right of use/maintenance viz:-

- i) use of the main access road connecting the Valley Side Estate to the Municipal and main road;
- ii) Use of the common green areas;
- iii) maintenance of electrical cables, water supply and drainage lines, sewer and storm water drains;
- iv) use of internal pathways together with the use of steps connecting the pathways with the main access road on both ends;
- v) access to common facilities and use thereof were granted by the plaintiff No.1 to the defendant No.2 without any further consideration whatsoever over and above the aforesaid total sale consideration of Rs.1,01,07,000/-.

22. The rights of user were implicit in the property sold and, therefore, no further consideration was to be charged by the plaintiffs from the defendant No.1 on this score. But, then who was to bear expenditure which would be incurred on the maintenance of these facilities in future is the moot question.

23. DW-1 Shri Pankaj Arora has stated that the defendants had an Annual Maintenance Contract (AMC) for maintaining their part of the premises from the date of sale, but he was unable to produce on record any document to this effect. While, on the other hand, plaintiff No.2 Shri Satish Jain while appearing as PW-1 has stated in unequivocal

terms that the plaintiff had been providing all services to the defendants which obviously were not gratuitous nor was there any undertaking given to this effect to any of the residents. It is not even the case of the defendants that the plaintiffs were providing such facilities gratuitously. The plaintiffs have calculated the maintenance cost at Rs.1089/- per month per flat for eight flats and the defendants have not seriously disputed this.

24. Section 70 of the Indian Contract Act, 1872, (for short the 'Act') reads thus:-

> "**70. Obligation of person enjoying benefit of non-gratuitous act.-** Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

25. The conditions to be satisfied for invoking of Section 70 of the Act are three-fold.

- i) A person must lawfully do anything for another person or deliver anything to him.
- ii) The person so doing must have done it with no intention to do so gratuitously.
- iii) The other person must have enjoyed the benefit thereof.

If these three conditions stand fulfilled, then the latter is bound to make compensation to the former in respect of or to restore the things so done or delivered.

26. In ***State of West Bengal*** *versus* ***M/s B.K. Mondal and Sons AIR 1962 SC 779*** with regard to the conditions to be fulfilled for invoking the provisions of Section 70, it was observed as follows:-

> "(13) Section 70 reads thus:
>
> "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."
>
> (14) It is plain that three conditions must be satisfied before this section can be invoked. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. When these conditions are satisfied S. 70 imposes upon the latter person, the liability to make compensation to the former in respect of or to restore, the thing so done or delivered. In appreciating the scope and effect of the provisions of this section it would be useful to illustrate how this section it would operate. If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case S. 70 would not come in to operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again S. 70 would not apply. In other words, the person said to be made liable under S. 70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under S. 70 arises. Taking the facts in the case before us, after the respondent constructed the warehouse,

for instance, it was open to the appellant to refuse to accept the said warehouse and to have the benefit of it. It could have called upon the respondent to demolish the said warehouse and take away the materials used by it in constructing it; but; if the appellant accepted the said warehouse and used it and enjoyed its benefit then different considerations come into play and S. 70 can be invoked. Section 70 occurs in chapter V which deals with certain relations resembling those created by contract. In other words, this chapter does not deal with the rights or liabilities accruing from the contract. It deals with the rights and liabilities accruing from relations which resemble those created by contract. That being so, reverting to the facts of the present case once again after the respondent constructed the warehouse it would not be open to the respondent to compel the appellant to accept it because what the respondent has done is not in pursuance of the terms of any valid contract and the respondent in making the construction took the risk of the rejection of the work by the appellant. Therefore, in cases falling under S. 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract nor ask for damages for the breach of the contract for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. All that Section 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for compensation is made by one person against another under S. 70, it is not on the basis of any subsisting contract between the parties, it is on the basis of the fact that something was done by the party for another and the said work so done has been voluntarily accepted by the other party. That broadly stated is the effect of the conditions prescribed by S. 70."

27 In ***V.R.Subramanyam*** *versus* ***B.Thayappa (deceased) and others AIR 1966 SC 1034***, it has been held that if a party to the contract has rendered service to the other, not intending to do so gratuitously and other person has obtained some other benefit, the former is entitled to compensation for the value of the services rendered by him.

28. In a case falling under Section 70 of the Act, a person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person. So, when a claim for compensation is made by one person against another under Section 70 of the Act, the juristic basis of the obligation is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution.

29. In ***Fibrosa*** *versus* ***Fairbairn (1943) A.C. 32,*** Lord Wright stated the legal position as follows:-

"……any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generally different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

30. In ***Nelson*** *versus* ***Larholt (1948) 1 K.B. 339, Lord Denning observed as follows:***

> *"….*It is no longer appropriate to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."

31. In ***Mulamchand*** *versus* ***State of Madhya Pradesh, AIR 1968 SC 1218***, the observations of Lord Wright and of Lord Denning, extracted above, were adverted to and it was further observed as follows:-

> "…..The important point to notice is that in a case falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. So where a claim for compensation is made by one person against another under Section 70, it is not on the basis of any subsisting contract between the parties but on a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi contract or restitution….."

32. In ***M/s Hansraj Gupta and Co.*** *versus* ***Union of India AIR 1973 SC 2724***, it has been countenanced that the liability under Section 70 of the Act arises on equitable grounds, even though express agreement or a contract may not be proved.

33. Thus, what would be seen is that Section 70 is not founded on contract, but embodies the equitable principle of restitution and prevention of unjust enrichment.

34. The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the expense of another person. This was so held by the Hon'ble Supreme Court in ***Renusagar Power Co. Ltd. Vs. General Electric Co. 1994 Supp (1) SCC 644****:-*

> "98. The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the expense of another person. It provides the theoretical foundation for the law governing restitution. The principle has, however, its critics as well as its supporters. In the words of Lord Diplok: "…there is no general doctrine of unjust enrichment in English law. What it does is to provide specific remedies in particular cases of what might be classed as unjust enrichment in a legal system that is based upon civil law." (See: Orakpo V. Manson Investments Ltd. 1978 AC, 104). In The Law of Restitution by Goff and Jones, it has, however, been stated "that the case-law is now sufficiently mature for the courts to recognize a generalized right of restitution" (3rd Edn., P. 15). In Chitty on Contracts, 26th Edn., Vol. I, p. 1313, para 2037, it has been stated that "the principle of unjust enrichment is not yet clearly established in English law". The learned editors have, however, expressed the view:

"Even if the law has not yet developed to that extent, it does not follow from the absence of a general doctrine of unjust enrichment that the specific remedies provided are not justifiable by reference to the principle of unjust enrichment even if they were originally found without primary reference to it." (pp. 1313-1314, para 2037)."

35. The issue regarding undue enrichment thereafter came up before the Hon'ble Supreme Court in ***Indian Council for Enviro-Legal Action Vs. Union of India and Others (2011) 8 SCC 161*** and it was held as follows:-

"**UNJUST ENRICHMENT**

151. Unjust enrichment has been defined as:

"Unjust enrichment.---A benefit obtained from another, not

intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense."

See Black's Law Dictionary, 8th Edition (Bryan A. Garner) at page

1573. A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."

152. "Unjust enrichment" has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

153. Unjust enrichment is "the unjust retention of a benefit to the

loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." A defendant may be liable "even when the defendant retaining the benefit is not a wrongdoer" and "even though he may have received [it] honestly in the first instance." (Schock v. Nash, 732 A.2d 217, 232-33 (Delaware. 1999). USA)

154. Unjust enrichment occurs when the defendant wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain. In the leading case of Fibrosa v. Fairbairn, [1942] 2 All ER 122, Lord Wright stated the principle thus : (AC p.61)

"... .Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

155. Lord Denning also stated in Nelson v. Larholt, [1947] 2 All ER 751 as under:-

"..... It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light

of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."

156. The above principle has been accepted in India. This Court in several cases has applied the doctrine of unjust enrichment.

Restitution and compound interest

157. American Jurisprudence 2d. Volume 66 Am. Jur. 2d defined Restitution as follows:

"The word `restitution' was used in the earlier common law to denote the return or restoration of a specific thing or condition. In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another. As a general principle, the obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation."

158. While Section 3 (unjust enrichment) reads as under:

"The phrase "unjust enrichment" is used in law to characterize the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly."

159. Unjust enrichment is basic to the subject of restitution, and is indeed approached as a fundamental principle thereof. They are usually linked together, and restitution is frequently based upon the theory of unjust enrichment. However, although unjust enrichment is often referred to or regarded as a ground for restitution, it is perhaps more accurate to regard it as a prerequisite, for usually there can be no restitution without unjust enrichment. It is defined as the unjust retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

160. While the term `restitution' was considered by the Supreme Court in South-Eastern Coalfields 2003 (8) SCC 648 and other cases excerpted later, the term `unjust enrichment' came to be considered in Sahakari Khand

Udyog Mandal Ltd vs Commissioner of Central Excise & Customs (2005) 3 SCC 738). This Court said:

> "31. …'unjust enrichment' means retention of a benefit by a person that is unjust or inequitable. `Unjust enrichment' occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else."

161. The terms `unjust enrichment' and `restitution' are like the two shades of green - one leaning towards yellow and the other towards blue. With restitution, so long as the deprivation of the other has not been fully compensated for, injustice to that extent remains. Which label is appropriate under which circumstances would depend on the facts of the particular case before the court. The courts have wide powers to grant restitution, and more so where it relates to misuse or non-compliance with court orders.

162. We may add that restitution and unjust enrichment, along with an overlap, have to be viewed with reference to the two stages, i.e., pre-suit and post-suit. In the former case, it becomes a substantive law (or common law) right that the court will consider; but in the latter case, when the parties are before the court and any act/omission, or simply passage of time, results in deprivation of one, or unjust enrichment of the other, the jurisdiction of the court to levelise and do justice is independent and must be readily wielded, otherwise it will be allowing the Court's own process, along with time delay, to do injustice.

163. For this second stage (post-suit), the need for restitution in relation to court proceedings, gives full jurisdiction to the court, to pass appropriate orders that levelise. Only the court has to levelise and not go further into the realm of penalty which will be a separate area for consideration altogether.

164. This view of law as propounded by the author Graham Virgo in his celebrated book on "The Principle of Law of Restitution" has been accepted by a later decision of the House of Lords (now the UK Supreme Court) reported as 136 Sempra Metals Ltd (formerly Metallgesellschaft Limited) v Her Majesty's Commissioners of Inland Revenue and Another [2007] UKHL 34 = [2007] 3 WLR 354 = [2008] 1 AC 561 = [2007] All ER (D) 294.

165. In similar strain, across the Altantic Ocean, a nine judge Bench of the Supreme Court of Canada in Bank of America Canada vs Mutual Trust Co. [2002] 2 SCR 601 = 2002 SCC 43 (both Canadian Reports) took the view :

> "There seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the plaintiff should have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also. By the same token the defendant will have had the benefit of compound interest. Although not historically available, compound interest is well suited to compensate a plaintiff for the interval between when damages initially arise and when they are finally paid."

This view seems to be correct and in consonance with the principles of equity and justice.

166. Another way of looking at it is suppose the judgment- debtor had borrowed the money from the nationalised bank as a clean loan and paid the money into this court. What would be the bank's demand.

167. In other words, if payment of an amount equivalent of what the ledger account in the nationalised bank on a clean load would have shown as a debit balance today is not paid and something less than that is paid, that differential or shortfall is what there has been : (1)failure to restitute; (2) unfair gain by the non-complier; and (3) provided the incentive to obstruct or delay payment. Unless this differential is paid, justice has not been done to the creditor. It only encourages non-compliance and litigation. Even if no benefit had been retained or availed even then, to do justice, the debtor must pay the money. In other words, it is this is not only disgorging all the benefits but making the creditor whole i.e. ordering restitution in full and not dependent on what he might have made or benefited is what justice requires."

36. What therefore can be gathered from the aforesaid exposition of law is that the terms of Section 70 of the Contract Act are unquestionably wide, but they have to be applied with discretion so as to enable the Courts to do substantial justice in cases where it would be difficult to impute to the person's concerned relations actually created by contract. Section 70 prevents undue enrichment and it applies as much to individuals as to Corporation and Government and where one voluntarily accepts the things and enjoys the work done that the liability under Section 70 arises voluntarily accepts all the benefits of the work done or the things delivered is the foundation of the claim under Section 70. If once the benefit of the work done or the things delivered is accepted, it can be presumed that the said work was done or thing was delivered, not intending to do so gratuitously. Similarly, it can as well be presumed that the person who has accepted the work done or thing delivered has enjoyed the benefit also.

37. Clause xviii of the agreement dated 17.12.1994 provides as under:-

"*After the period of one year and till alternate arrangements are made by the flat owners association to be formed for this purpose, if required by the purchaser, the vendors shall look after and maintain the common areas, services, green areas etc. at the cost of all the flat owners of the Valley Side Estate.*"

38. Indisputably, no flat owners association was formed and there is positive evidence on record that the common areas and the services were maintained by the plaintiffs, who had been maintaining the other areas also for which the flat owners had been paying for the same. Therefore, once the defendants have taken advantage of the services which obviously were not rendered by the plaintiff gratuitously, they cannot escape their liability to pay for such services as per the provisions of Section 70 of the Act. The mere fact that the defendants may not have requested the plaintiffs to do maintenance and even if there is no express agreement qua the same, it is of no consequence since this aspect could have been considered only in the event of all the flat owners association having been formed.

39. Thus, it can be safely concluded that all the three conditions as envisaged under Section 70 of the Contract Act have been fulfilled in this case. The plaintiffs have undertaken the maintenance work for the defendants and the said work was done with no intention to do so gratuitously and the defendants have enjoyed the benefit thereof.

40. Now the further question that arises as to what provisions of the Limitation Act would be applicable to the facts of the present case.

41. The learned counsel for the plaintiffs has strenuously argued that the learned single Judge erred in invoking the provisions of Article 113 of the Limitation Act and held the plaintiffs entitled to the amount only for the period of three years preceding the

institution of the suit, whereas, the breach on behalf of the defendants was continuous and, therefore, it was Section 22 of the Limitation Act which was applicable.

42. Section 22 of the Limitation Act provides as under:-

> *“**22. Continuing breaches and torts**-In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues.”*

43. Section 22 deals with the question as to when the period of limitation commences for a suit or other proceedings in respect of various cause of action may arise from the wrongful act of the parties. It provides that in case of a continuing breach, or of a continuing tort, a fresh period of limitation begins to run at every moment of time during which the breach or the tort, as the case may be, continues.

44. The underlying principle of this Section is that the plaintiff is not bound to launch an endless succession of suits each day wrong persists. He can wait and include in the action all damages sustained by a reason of the wrong down to the date of filing of the suit. The criteria for application of Section 22 is not whether the *right* or its corresponding obligation is a continuing one, but whether the *wrong* is a continuing one.

45. Where rights and duties are created by the terms of a contract between the parties, a breach of duty is a wrong arising out of contract. Where they are created otherwise than under a contract, the breach of a duty is a wrong independent of a contract. The duty may be either positive or negative. In the case of a positive duty, the test to find out whether a breach of duty would amount to a continuous wrong is to see whether the duty is one to continue to do the act. In other words, where the wrong commences in the omission of the legal duty to continue to do something the omission to do it is a continuous wrong. Where the duty is negative, the test would be to see whether the act produces, a state of affairs whose continuous every moment amounts to a new injury and renders its doers responsible for its being continuous. If the wrongful act is of such a nature, it is a continuing wrong.

46. Thus, it can safely be concluded that the very essence of a continuing wrong is that it is an act which creates a continuing source of injury and renders the doers of the act responsible and liable for the continuance of the said injury.

47. A cause of action may be either single or continuing. When an Act is final and complete and becomes a cause of action for injury to the plaintiff, it is single, arises once and for all and the plaintiff is entitled to sue for compensation at one time. But if there is a repetition of a wrongful act or omission, it will comprise a continuing cause of action.

48. In ***Hole*** *versus* **Chard Union** reported in ***1894 (1) Ch. 293*** Lord Justice Lindley held:-

> “What is a continuing cause of action? Speaking accurately, ‘ there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought.”

What is emphasized is that there has to be repetition of acts or omissions in respect of repeated wrongs.

49. The principles underlying continuous wrongs and recurring and successive wrongs were lucidly explained by the Hon'ble Supreme Court in ***Union of India and others*** *versus* ***Tarsem Singh (2008) 8 SCC 648*** wherein it was held as under:-

> "4. The principles underlying continuing wrongs and recurring/ successive wrongs have been applied to service law disputes. A "continuing wrong" refers to a single wrongful act which causes a continuing injury. "Recurring/successive wrongs" are those which occur periodically, each wrong giving rise to a distinct and separate cause of action. This Court in Balakrishna Savalram Pujari Waghmare vs. Shree Dhyaneshwar Maharaj Sansthan AIR 1959 SC 798, explained the concept of continuing wrong (in the context of section 23 of Limitation Act, 1908 corresponding to section 22 of Limitation Act, 1963) : (AIR p.807, para 31)
>
> > "31......It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury."
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> 5. In M. R. Gupta vs. Union of India (1995) 5 SCC 628, the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. This Court applied the principles of continuing wrong and recurring wrongs and reversed the decision. This Court held: (SCC pp.629-30, para 5)
>
> > "5......The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited

extent of proper pay fixation, the application cannot be treated as time barred........."

6. In Shiv Dass vs. Union of India (2007) 9 SCC 274, this Court held: (SCC p.277, paras 8 & 10)

"8......The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction.

* * *

10. In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition.......If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years."

7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. In so far as the consequential relief of recovery of arrears for a past period, the principles relating to recurring/successive wrongs will apply. As a consequence, High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition."

50. The plaintiffs in Para-14 of the plaint have raised the plea of cause of action which reads thus:-

"That the cause of action arose in favour of the plaintiffs and against the defendants on various dates specially on 17.12.1994 when the agreement was executed between the plaintiffs and defendants on 8th June, 1995 when the lease and conveyance deed was executed between the plaintiffs and defendants and on various dates when the defendants acknowledged and

accepted the fact that the estate had to be maintained and the common facilities were being enjoyed regularly the defendants, on 10.6.1995, 28.7.1995, 2.8.1995, 17.12.1996, 6.5.1997, 21.2.1998, 2.1.1999, 18.1.1999, 12.2.1999, 5.5.1999, 7.6.1999, 14.8.1999, 23.10.1999, 6.11.1999, 7.12.1999, 28.4.2000, 19.5.2000,24.10.2000, 23.1.2001, 26.5.2004, 6.7.2004. 10.9.2004, 20.9.2004, 22.1.2005, 8.2.2005, 4/18.6.2005 when the letters were addressed by the plaintiff to the defendants or by the defendants to the plaintiffs and finally on 17.9.2005 when the claim of the plaintiff was rejected by the defendants when the right to use arose on the rejection of the claim as in none of the previous communications the claim of the plaintiffs had been rejected rather the plaintiffs were assured that the claim would be accepted. The cause of action still continues to subsist in favour of the plaintiffs and against the defendants. The cause is a continuing cause with each day on which the defendants are enjoying the facilities provided by the plaintiffs without bearing the proportionate cost payable by them."

51. The learned single Judge held that since the plaintiffs' case was based on Section 70 of the Indian Contract Act, therefore, it was Article 113 of the Limitation Act which was applicable in the instant case and consequently the plaintiffs were held entitled to the maintenance charges but only for a period of three years preceding institution of the suit.

52. It is the consistent view of the various High Courts that since the obligation under Section 70 is statutory and not contractual, it would be Article 113 of the Limitation Act, 1963 (Article 120 of the Limitation Act, 1908) which would be applicable to such cases. (Refer: ***Upendra Krishna Mandal and another*** *versus* ***Naba Kishore Mandal and others AIR 1921 Calcutta 93, Nalini Ranian Guha*** *versus* ***Union of India (1954) 93 Calcutta Law Journal 373, Kora Lukose*** *versus* ***Chacko Uthuppan AIR 1957 Kerala 19 (Full Bench), State of Bihar*** *versus* ***Thawardas Pherumal AIR 1964 Patna 225, Keshab Kishore Narain Saraswati*** *versus* ***State of Bihar and another AIR 1971 Patna 99*** and ***Union of India*** *versus* ***Kamal Kumar Goswami and others AIR 1974 Calcutta 231)***.

53. Article 113 of the Limitation Act reads thus:

"

Description of Application	Period of limitation	Time from which period begins to run
113. Any suit for which no period of limitation is provided elsewhere in this Schedule."	Three years	When the right to sue accrues.

54. It is established on record that the defendants had impliedly admitted the liability vide their letter dated 28.07.1995 Ex.PW-1/C and thereafter vide their letter dated 03.05.1997 Ex.DX had requested the plaintiffs to send their representatives for discussion and again vide letter dated 12.02.1999 Ex.PW-1/J had informed plaintiff No.1 that the matter was being examined and they would revert to the plaintiffs in due course. Even as late as on 20.09.2004, plaintiff No.1 was informed vide letter Ex.PW-1/X that the matter was still under consideration and as soon as any decision was taken, it would be informed accordingly. This suit was admittedly filed on 18.01.2006 i.e. within three years from the accrual of the cause of action which as was observed commences on 20.09.2004. Thus, there was no occasion for the learned single Judge to have held that the limitation already

stood expired on 07.06.1999 and, therefore, could not have been revived even vide letter dated 20.09.2004. In a case of continuous tort, as per Section 22 the cause of action for filing a suit in respect of a continuous tort would arise during which the tort continuous.

55. Now the question which remains to be determined is as to whether the plaintiffs can be held entitled to the future maintenance costs at the rate of Rs.1,089/- per flat per month from the date of filing of this suit together with interest thereon till the date of decree. This question need not detain us any longer in view of the fact that we have already held that the cause of action in favour of the plaintiffs is a continuing one and the defendants have also not disputed the rate of maintenance. That being so, the plaintiffs are, therefore, entitled to the future maintenance costs at the rate of Rs.1,089/- per flat per month from the date of filing of the suit together with interest at the rate of 12% per annum till the date of decree.

56. In view of the aforesaid discussion, we find merit in the appeal filed by the plaintiffs being OSA No.4002 of 2013 and the same is accordingly allowed and the plaintiffs are held entitled:-

i) a decree for Rs.26 lacs alongwith past, pendente lite and future interest @12% per annum from the date of institution of the suit;

ii) the plaintiffs are further held entitled to future maintenance costs at the rate Rs.1,089/- per flat per month from the date of institution of the suit i.e.18.01.2006 together with interest @ 12% per annum.

This, however, shall be subject to the plaintiffs paying court fee on this amount within a period of eight weeks from today. The appeal filed by the defendants being OSA No.2 of 2014 alongwith Cross Objections No.19 of 2014 is ordered to be dismissed. The judgment and decree passed by the learned single Judge is modified to the aforesaid extent. Parties are left to bear their own costs.

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

Mrs. Anu Rana …… Petitioner
Vs.
Central Bank of India & ors. ….. Respondents

CWP No. 2366 of 2014.
Date of decision: 18.6.2015.

Constitution of India, 1950- Article 226- Departmental proceedings were initiated against the petitioner- disciplinary authority asked the petitioner to explain as to why the proposed penalty be not imposed upon her within seven days from the date of receipt of the order- however, an order of compulsory retirement was passed on the same day- held, that purpose of show cause notice is to enable the delinquent to show as to how the report submitted by the Inquiry Officer is factually incorrect - when the order imposing the penalty and to show cause are passed on the same day, show cause notice is an empty formality to show that principle of natural justice had been complied with - order of compulsory retirement could have been passed after adhering to the principle of natural justice and fair play- authority passing an order must act with an open mind while issuing show cause notice-order of compulsory retirement set aside, however, respondent left at liberty to pass a fresh order after complying with the principle of natural justice. (Para- 4 to 16)

Case referred:
S. L. Kapoor vs. Jagmohan, AIR 1981 SC 136

For the petitioner : Mr. D.K. Bhatti and Mr. Nimish Gupta, Advocates.
For the respondents : Mr. A.K. Sood, Advocate, for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

By medium of this petition, the petitioner has prayed for the following reliefs:

(A) Issue a writ, order or direction especially in the nature of Certiorari for quashing the charge-sheet dated 28.8.2012 (Annexure P-7) and the Enquiry report dated 27.4.2013 (Annexure P-8) thereby quashing the order dated 15.7.2013 (Annexure P-11) whereby an order of punishment was passed pre-maturely even without receiving the reply to the show cause notice and order dated 6.8.2013 (Annexure P-14) awarding the punishment of compulsory retirement and order 17.1.2014 (Annexure P-16) issued by respondent No. 2 whereby the said respondent while confirming the punishment imposed by the Disciplinary Authority has dismissed the appeal filed by the petitioner in a summary and cursory manner by ignoring the facts, documentary and legal submissions made therein;

(B) Direct the respondents to reconsider the orders dated 15.7.2013, 6.8.2013 and 17.1.14 Annexures P-11, P-14 and P-16 respectively and absolve the petitioner of the illegal and wrong charges leveled by the respondents against the petitioner with mala-fide intentions besides the same is arbitrary and disproportionate to the alleged misconduct;

(C) Direct respondent authorities to maintain status quo ante with regard to the services of the petitioner as it exists prior to the issuance of the suspension order dated 2nd March, 2012 during the pendency of the present petition in the interest of justice and fair play;

(D) In alternative the respondent may be directed to consider the case of the petitioner at par with Smt. Reksha Devi who is similarly situated and has punished with much lesser punishment as per the provisions of clause 6 (e) & (f) of MoU dated 19.4.2002.

2. It is not in dispute that the petitioner was proceeded against departmentally. Vide show cause notice dated 15.7.2013 the Disciplinary Authority had asked the petitioner to explain as to why the proposed penalty may not be imposed upon her within seven days from the date of receipt of this letter.

3. Surprisingly vide an administrative order of the same day i.e. 15.7.2013, the petitioner was informed that she has been awarded the following consolidated punishment:-

"Be compulsorily retired with superannuation benefits i.e. pension and/ or Provident Fund and Gratuity as would be due otherwise under the rules or regulations prevailing at the relevant time and without

disqualification from future employment as per provisions of clause No. 6(c) of MOU dated 10.4.2002.

The above punishment is inflicted upon Mrs. Anu Rana with immediate effect."

4. In this background, the question which would require consideration, therefore, is as to whether at the time of issuance of show cause notice and passing of impugned order, the requirements of natural justice have been complied with, because non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It is here that the action of the respondents is required to be tested on the touchstone of justice, equity, fair play and in case the decision is not based on justice, equity and fair play, then the decision cannot be allowed to stand.

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

".....In our view, the requirements of natural justice are met only if opportunity to represent is given in view of proposed action. The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based if it is furnished in a casual way or for some other purpose. We do not suggest the opportunity need be a 'double opportunity' that is one opportunity on the factual allegations and another on the proposed penalty. Both may be rolled into one. But the person proceeded against must know that he is being required to meet the allegations which might lead to a certain action being taken against him. If that is made known the requirements are met. ..." (Emphasis added)

".......In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs. We do not agree with the contrary view taken by the Delhi High Court in the judgment under appeal." (Emphasis supplied)

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

"A proper hearing must always include a 'fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view'. Lord Denning has added :

'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.' ...."

(Emphasis supplied)

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

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

8. The very purpose of issuance of a show cause notice is to enable the delinquent to show how the report submitted by the Inquiry Officer is factually/ legally incorrect. It is a serious business and cannot be taken lightly and the respondents owed a duty to act fairly.

9. The record reveals that the show cause notice was issued only to demonstrate that the principles of natural justice were complied with, but as a matter of fact it is proved that the same was a farce and an empty formality because the proposed penalty and the impugned order imposing penalty, are issued on the same very day i.e. 15.7.2013. This renders the show cause notice illusionary and an empty ritual and above all an idle formality.

10. The punishment of compulsory retirement as imposed upon the petitioner is a serious business and could not have been taken lightly. In order to justify the action taken to compulsory retire the petitioner, the authority concerned had to act fairly and in complete adherence to the rules apart from following the basic principles of natural justice and fair play.

11. It is well settled that a disciplinary authority while acting in exercise of its statutory power acts as a quasi judicial authority and must therefore act fairly and must act with an open mind while initiating a show cause proceeding. The show cause proceedings is meant to give a person proceeded against a reasonable opportunity of making his objection against the penalty indicated in the notice.

12. Justice is rooted in confidence and justice is the goal of a quasi- judicial proceeding also. If the functioning of a quasi- judicial authority has to inspire confidence in the mind of those subjected to its jurisdiction, such authority must act with utmost fairness.

13. It is well settled that justice should not only be done but should be seen to be done. This principle was reiterated by the Hon'ble Supreme Court in **S.L.Kapoor's** case (supra), wherein the Hon'ble Supreme Court has held as follows:-

> "*24. The matter has also been treated as an application of the general principle that justice should not only be done but should be seen to be done. Jackson's Natural Justice (1980 Edn.) contains a very interesting discussion of the subject. He says:*
>
> > *"The distinction between justice being done and being seen to be done has been emphasised in many cases........*

The requirement that justice should be seen to be done may be regarded as a general principle which in some cases can be satisfied only by the observance of the rules of natural justice or as itself forming one of those rules. Both explanations of the significance of the maxim are found in Lord Widgery C. J.'s judgement in R. v. Home Secretary, Ex. P. Hosenball, (1977) 1 WLR 766, 772, where after saying that "the principles of natural justice are those fundamental rules, the breach of which will prevent justice from being seen to be done" he went on to describe the maxim as "one of the rules generally accepted in the bundle of the rules making up natural justice."

It is the recognition of the importance of the requirement that justice is seen to be done that justifies the giving of a remedy to a litigant even when it may be claimed that a decision alleged to be vitiated by a breach of natural justice would still have been reached had a fair hearing been given by an impartial tribunal. The maxim is applicable precisely when the Court is concerned not with a case of actual injustice but with the appearance of injustice, or possible injustice. In Altco Ltd. v. Sutherland, (1971) 2 Lloyd's Rep 515 Donaldson J. said that the court, in deciding whether to interfere where an arbitrator had not given a party a full hearing was not concerned with whether a further hearing would produce a different or the same result, It was important that the parties should not only be given justice, but, as reasonable men, know that they had had justice or "to use the time hallowed phrase" that justice should not only be done but be seen to be done. In R. v. Thames Magistrates' Court, ex. p. Polemis, (1974) 1 WLR 1371, the applicant obtained an order of certiorari to quash his conviction by a stipendiary magistrate on the ground that he had not had sufficient time to prepare his defence. The Divisional Court rejected the argument that, in its discretion, it ought to refuse relief because the applicant had no defence to the charge.

> *'It is again absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me that it is no answer to the applicant to say: 'Well, even if the case had been properly conducted, the result would have been the same'. That is mixing up doing justice with seeing that justice is done (per Lord Widgery C. J. at P. 1375)."*

In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference it natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied Justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because Courts do not issue futile writs. We do not agree with the contrary view taken by the Delhi High Court in the judgment under appeal."

14. When the respondents had issued a show cause notice and granted time to file reply to the same, then the respondents could not have turned around on the same day itself and passed the impugned penalty. The respondents were bound to act fairly, justly and reasonably. The right to impose penalty carriage with a duty to act justly.

15. Having observed so and without gong into the other contentions raised in this petition, I am of the considered opinion that impugned order of penalty dated 15.7.2013 (Annexure P-12) cannot be sustained and the same is accordingly quashed and set-aside. The respondents are, however, at liberty to pass fresh order, that too, after issuing a show cause notice and after affording an opportunity of hearing to the petitioner.

16. The petition is disposed of in the aforesaid terms, leaving the parties to bear their own costs.

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

Bansi Lal Thakur. ……Appellant.
Versus
Ram Saran Thakur ……Respondent.

RSA No. 22 of 2015.
Reserved on: May 26, 2015.
Decided on: June 18, 2015.

Specific Relief Act, 1963- Section 5- Plaintiff claimed that he had rented out one shop consisting of two rooms to the defendant- tenancy was terminated by serving a legal notice- correct address was mentioned in the notice and there is presumption that addressee had received the same- mere acceptance of the rent subsequent to the delivery of notice which will not have the effect of extending the tenancy. (Para-9 to 11)

Case referred:
Shanti Prasad Devi and another vrs. Shankar Mahto and others, AIR 2005 SC 2905

For the appellant: Mr. J.R.Poswal, Advocate.
For the respondent: Mr. G.D.Verma, Sr. Advocate, with Mr. B.C.Verma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree dated 8.7.2014 rendered by the learned District Judge, Shimla, H.P., in Civil Appeal No. 3-S/13 of 2014.

2. Key facts, necessary for the adjudication of this second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff, for the convenience sake) has filed a suit for possession against the appellant-defendant (hereinafter referred to as the defendant, for the convenience sake) with the averments that the plaintiff is owner of five storyed building known as Saw Mill Building at village Banuti, Tehsil and Distt. Shimla, H.P., situated over Kh. No. 960/434/638, comprised in Khewat No. 78, Khatauni No. 124, as per jamabandi for the year 2001-02. The defendant approached the plaintiff in the

month of March, 2009 for renting out one shop comprising of two rooms on rent i.e. 4th floor of the building for running medical store known as M/S Rakesh Medicine Centre for a period of one year on a rent of Rs.20,000/- per annum. An agreement was executed on 23.3.2009. The tenancy of the shop premises commenced from 1.4.2009 till 31.3.2010. Legal notice was served upon the defendant dated 6.3.2012 terminating the tenancy rights qua the tenanted shop asking the defendant to vacate and hand over the possession on or before 30.4.2012 and to pay use and occupation charges.

3. The suit was contested by the defendant. According to him, agreement dated 23.3.2009 was extended twice impliedly by plaintiff in favour of the defendant. The plaintiff has accepted the rent w.e.f. 1.4.2010 to 31.3.2011 and thereafter w.e.f. 1.4.2012 to 31.3.2012. The legal notice dated 6.3.2012 was neither delivered nor has ever been received by him. The tenancy was never terminated and has denied that he is liable to pay the use and occupation charges at the rate of Rs. 300/- per day.

4. The plaintiff filed the replication. The issues were framed by the learned trial Court on 30.10.2012. The learned trial Court, decreed the suit on 28.12.2013. The defendant preferred an appeal against the judgment and decree dated 28.12.2013 before the learned District Judge, Shimla, H.P. The learned District Judge, Shimla, dismissed the same on 8.7.2014, hence this regular second appeal.

5. Mr. J.R.Poswal, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that notice Ext. PW-1/B was never served upon the defendant. No separate findings were given by the Courts below on all the issues. The learned courts below have mis-read and misconstrued the oral as well as documentary evidence on record. The provisions of Section 106 and 107 of the Transfer of Property Act, have not been correctly appreciated by the learned courts below. On the other hand, Mr. G.D.Verma, learned Sr. Advocate, has supported the judgments and decrees passed by both the Courts below.

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

7. The plaintiff has appeared as PW-1. According to him, he had given one shop comprising of two rooms in the fourth floor of the building on rent at the rate of Rs.20,000/- per annum to the defendant. The defendant had agreed to vacate the shop by 31.3.2010. The agreement was never renewed. The defendant has paid the use and occupation charges to him upto 31.3.2012. He had given notice dated 6.3.2012 through registered AD Ext. PW-1/B to the defendant vide postal receipt Ext. PW-1/C. The same was duly received and acknowledged vide Ext. PW-1/D. The shop was not vacated despite the notice. The defendant was liable to pay arrears of rent. He has proved rough plan of the premises vide Ext. PW-1/E.

8. The defendant has appeared as DW-1. He has admitted that he has taken shop on rent from the plaintiff vide agreement Mark X on yearly rent of Rs.20,000/-. He has made all the payments for the year 2010-11 and 2011-12 through cheque. He has not received any legal notice for the vacation of the shop. He has denied his signatures on acknowledgement Ext. PW-1/D. He has admitted that he runs a shop in the name and style of Rakesh Medical Shop in the disputed premises.

9. The copy of jamabandi is Ext. PW-1/A. According to this jamabandi, the shop is situated on Kh.No.960/434/638. The suit premises were given on rent to the defendant on 1.4.2009. The plaintiff has served a notice upon the defendant vide Ext. PW-1/B. The postal receipt is Ext. PW-1/C. The address in the notice was of the store/agency

run by the defendant situated at The Mall Road, Shimla. Thus, there is no merit in the contention of Mr. J.R.Poswal, Advocate that the address mentioned in the notice Ext. PW-1/B as well as postal receipt Ext. PW-1/C and acknowledgement Ext. PW-1/D is wrong. The only requirement of the law is that the address mentioned in the notice should be correct so that the addressee could receive the same. Moreover, the presumption under Section 3 (C) of the Postal Act is that if the correct address is mentioned upon the envelope/post card, the addressee has received the same. There is also presumption under the General Clauses Act, 1897. The defendant has admitted that he is running medical store/agency on the Mall Road. Mr. J.R.Poswal, Advocate has vehemently argued that the plaintiff has received the rent after 31.3.2010. The plaintiff has served defendant with notice Ext. PW-1/B on 6.3.2012. The plaintiff has not received any rent after 6.3.2012.

10. Their lordships of the Hon'ble Supreme Court in the case of ***Shanti Prasad Devi and another vrs. Shankar Mahto and others,*** reported in ***AIR 2005 SC 2905*** have held that mere acceptance of rent for the subsequent months in which the lessee continued to occupy the leased premises cannot be said to be conduct signifying assent to the continuance of the lessee even after expiry of lease period. Their lordships have held as under:

> "17. We fully agree with the High Court and the first appellate court below that on expiry of period of lease, mere acceptance of rent for the subsequent months in which the lessee continued to occupy the lease premises cannot be said to be a conduct signifying 'assent' to the continuance of the lessee even after expiry of lease period. To the legal notice seeking renewal of lease, the lessor gave no reply. The agreement of renewal contained in clause (7) read with clause (9) required fulfillment of two conditions; first the exercise of option of renewal by the lessee before the expiry of original period of lease and second, fixation of terms and conditions for the renewed period of lease by mutual consent and in absence thereof through the mediation of local Mukhia or Panchas of the village. The aforesaid renewal clauses (7) & (9) in the agreement of lease clearly fell within the expression 'agreement to the contrary' used in Section 116 of the Transfer of Property Act Under the aforesaid clauses option to seek renewal was to be exercised before expiry of the lease and on specified conditions.
>
> 18. The lessor in the present case had neither expressly nor impliedly agreed for renewal. The renewal as provided in the original contract was required to be obtained by following a specified procedure i.e. on mutually agreed terms or in the alternative through the mediation of Mukhias and Panchas. In the instant case, there is a renewal clause in the contract prescribing a particular period and mode of renewal which was 'an agreement to the contrary' within the meaning of Section 116 of the Transfer of Property Act. In the face of specific clauses (7) & (9) for seeking renewal there could be no implied renewal by 'holding over' on mere acceptance of the rent offered by the lessee . In the instant case, option of renewal was exercised not in accordance with the terms of renewal clause that is before the expiry of lease. It was exercised after expiry of lease and the lessee continued to remain in use and occupation of the leased premises. The rent offered was accepted by the lessor for the period the lessee overstayed on the leased premises. The lessee, in the above circumstances, could not claim that he was 'holding over' as a lessee within the meaning of Section 116 of the Transfer of Property Act.

> 22. As the leased premises were in use for running a petrol pump, we grant the appellant a reasonable period of two months from the date of this order to deliver possession of the leased premises after removing her installations and other movables."

11. In the instant case, the defendant is continuing in possession after notice Ext. PW-1/B without the consent of the landlord. This possession cannot be termed to be possession of tenant with the consent of the landlord. The learned Courts below have correctly appreciated the provisions of Section 106 and 107 of the Transfer of Property Act. Once the tenancy of the defendant has been terminated, thereafter he has no right to remain in the premises. The issues were inter-linked and thus they have been decided together. The Courts below have correctly appreciated the oral as well as documentary evidence on record. The substantial questions of law are answered accordingly.

12. Consequently, there is no merit in this regular second appeal, the same is dismissed. No costs.

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

CWP Nos. 1776, 1923 & 2101 of 2015.
Reserved on: 5.6.2015.
Decided on: 18.6.2015.

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1. CWP No. 1776 of 2015.
Dr. Vivek Kumar Garg and ors.
Vrs.
State of H.P. & ors.
2. CWP No. 1923 of 2015.
Kirti Rana and ors.
Vrs.
State of H.P. & ors.
3. CWP No. 2101 of 2015.
Dr. Narendeep Ashutosh.
Vrs.
State of H.P. & ors.

Constitution of India, 1950- Article 226- All India Post Graduate Medical Entrance Examination (AIPGMEE) was conducted from 1.12.2014 to 6.12.2014- admission process was started on the basis of entrance examination - initially it was provided that allotment of the seats will be made in the specified ratio- however, subsequently roster was issued on the basis of method of appointment- petitioner contended that allotment has to be made in accordance with original condition- held, that while filling up the seats for post graduate qualification, the only criterion should be merit – State has created sub groups on the basis of method of appointment – all the medical officers discharge the same duties - once they are permitted to sit in one examination, they are to be treated as the same- the classification within the classification is not permissible and it was also not permissible to change the condition after the publication of the prospectus. (Para-14 to 27)

Cases referred:

AIIMS Students' Union vrs. AIIMS and others, (2002) 1 SCC 428

State of M.P. and others vrs. Gopal D. Tirthani and others, (2003) 7 SCC 83
Asha vrs. Pt. B.D.Sharma University of Health Sciences and others, (2012) 7 SCC 389
Nikhil Himthani vrs. State of Uttarakhand and others, (2013) 10 SCC 237
Vishal Goyal and others vrs. State of Karnataka and others, (2014) 11 SCC 456,
Kulmeet Kaur Mahal and others vrs. State of Punjab and others, (2014) 13 SCC 756
Union of India and others vrs. Atul Shukla etc., AIR 2015 SC 1777

For the petitioner(s):	Mr. R.K.Gautam, Sr. Advocate, with Mr. Gaurav Gautam Advocate, for petitioner(s) in CWP Nos. 1776 & 2101 of 2015. Mr. Ajay Mohan Goel, Advocate, for the petitioners in CWP No. 1923 of 2015 & for respondents No. 6 t0 9 in CWP No. 1776 of 2015.
For the respondents:	Mr. P.M.Negi, Dy. AG and Mr. Ramesh Thakur, Asstt. AG for respondent-State in all the petitions. Respondents No. 5 to 7 in CWP No. 2101 of 2015 proceeded ex parte.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since common questions of law and facts are involved in these petitions, the same were taken up together for hearing and are being disposed of by a common judgment. However, in order to maintain clarity, the facts of CWP No. 1776 of 2015 have been taken into consideration.

CWP No. 1776 of 2015

2. The All India Post Graduate Medical Entrance Examination (AIPGMEE) for session 2015-18 was conducted from 1.12.2014 to 6.12.2014. The result of the All India Post Graduate Medical Entrance Examination was declared on 15.1.2015. The Department of Medical Education and Research, Himachal Pradesh, in accordance with the result, issued Prospectus for Medical Post Graduate Courses (MD/MS) in IGMC, Shimla and Dr. RPGMC, Kangra at Tanda. The last date for submission of application form was 20.3.2015. The date of first round of counselling at Auditorium Complex, IGMC, Shimla was at 11:00 AM sharp on 27.3.2015. The last date of joining the allotted course/College was 6.4.2015. The date of 2nd round of counselling at Auditorium Complex, IGMC, Shimla was at 11:00 AM sharp on 27.4.2015. The last date of joining for candidates admitted in 2nd round of counselling was 8.5.2015. The 3rd round of counselling at Auditorium Complex, IGMC, Shimla was at 2:30 PM on 22.6.2015. The last date of joining for candidates admitted in 3rd round of counselling was 22.6.2015. The commencement of academic session was w.e.f. 30.6.2015. The last date up to which students can be admitted against vacancies arising due to any reason from the waiting list was notified as 10.7.2015.

3. The eligibility and distribution of seats have been provided under para 3 of the Prospectus. Para 3.1 (A), deals with HPHS (In-service GDO) Group, which reads as under:

> **"ELIGIBILITY & DISTRIBUTION OF SEATS**
>
> **3.1 (A) HPHS(In-service GDO) Group.**
>
> **(i)** 66.6% of the State Quota Seats will be filled up by in-service Medical Officers. The in-service group will consist of two sub-groups i.e. one sub-group consisting of regularly appointed Medical officer and second sub-group

consisting of Contractual and Rogi Kalyan Samiti appointees. The distribution of seats between regular and those appointed on contract basis including Rogi Kalyan Samiti appointees will be made in the ratio proportionate to their total number as on 31.10.2014. For the academic session 2015-18, the distribution of seats between above two sub-groups will be in the ratio of 2:1."

4. Para 3.5 (iii) of the Prospectus reads as under:

"(iii) the allotment of seats/specialities between the Regular GDO's and the contractual GDO's (including appointees of RKS) on the basis of the respective in position strength ratio of both the categories as on 31.10.2014 i.e. (2:1) will be made in the following manner:

1. GDO (Regular)
2. GDO (Regular)
3. GDO (Contract)

After 3rd point, it will be repeated again."

5. Para 3.5 (iii) has been substituted by notice dated 16.3.2015, which reads as under:

"(iii) 4 point roster will be applied for allotment of seats/specialities between the GDO(Regular) and the GDO(Contract/RKS) on the basis of the respective in-position strength ratio of both the categories as on 31.10.2014 (i.e. 3:1). The 4 point roster will be applied in the following manner as per previous practice:-

1. GDO(Regular)
2. GDO(Regular)
3. GDO(Contract)
4. GDO(Regular)

After 4th point, it will be repeated again."

6. The 4 point roster was also published in the daily edition of The Tribune, dated 17.3.2015 vide Annexure P-8. The petitioners have challenged the allocation of seats on the basis of roster points based on sub-groups in the in-service HPHS (In-service GDO). In CWP No. 1923 of 2015, the petitioners have also sought quashing of communication dated 16.3.2015. According to them, the counselling be held as per the contents of para 3.5(iii), as originally contained in the prospectus.

CWP No. 2101 of 2015.

7. The All India Post Graduate Dental Entrance Examination (AIPGDEE) was conducted on 24.1.2015. The result was declared on 5.2.2015. The State issued Prospectus. The last date of receipt of application(s) was 20.3.2015. The first date of counselling was 30.3.2015. The last date for joining the allotted course/College was 7.4.2015. The date of 2nd round of counselling at HP Govt. Dental College & Hospital, Shimla at 11:00 AM was 29.4.2015. The last date for joining the allotted course/College was 10.5.2015. The 3rd round of counselling at H.P. Govt. Dental College & Hospital, Shimla at 11:00 AM was on 20.6.2015 and the last date for joining the allotted course/College was 20.6.2015. Para 3 of the Prospectus lays down the eligibility and distribution of seats. Para 3.1(i) reads as under:

"ELIGIBILITY & DISTRIBUTION OF SEATS

3.1 (A) In-service GDO (M.O Dental) Group Seats.

(i) 66.6% of the State Quota Seats will be filled up by in-service (M.O.Dental) Group Candidates. The in-service (M.O. Dental) Group will consist of two sub-groups i.e. one sub-group consisting of regular In-service (M.O. Dental) and second sub-group consisting of Contractual and Rogi Kalyan Samiti appointees. The distribution of seats between regular M.O. Dental and those appointed on contractual basis including Rogi Kalyan Samiti appointees will be made in the ratio proportionate to their total number as on 31.10.2014. For the academic session 2015-18, the distribution of seats between above two sub-groups will be in the ratio of 2:1."

8. The allotment of seats between the regular in-service GDO(MO Dental) and the contractual in-service GDO(MO Dental) on the basis of the respective in-position strength ratio has been laid down in para 3.6 (b) (iii), which reads as under:

"3.6 (b) (iii). The allotment of seats between the regular in-service GDO(MO Dental) and the contractual in-service GDO(MO Dental) on the basis of the respective in-position strength ratio of both the categories as on 31.10.2014 in the following manner:-

1. GDO (Regular)
2. GDO (Regular)
3. GDO (Contract)

After 3rd point, it will be repeated again."

9. The respondents have filed the replies. They have justified the constitution of different sub-groups and framing of the roster points.

10. Mr. R.K.Gautam, Sr. Advocate, with Mr. Gaurav Gautam, Advocate and Mr. Ajay Mohan Goel, Advocate, for the respective petitioners, have strenuously argued that the allocation/distribution of seats as per the sub-groups created under the Prospectus for HPHS (In-service GDO) and In-service GDO(MO Dental), is impermissible and unconstitutional. They further contended that the rules of the game cannot be changed mid-way by prescribing the new roster after the issuance of Prospectus. They lastly contended that the merit should be the sole criterion for MD/MS and MDS Courses. On the other hand, Mr. P.M.Negi, learned Dy. Advocate General has vehemently argued that constituting of sub-groups was in accordance with law and he has also justified the preparation of roster.

11. We have heard learned Advocates and gone through the pleadings carefully.

12. The petitioners have participated in the selection process seeking admission to postgraduate degree (MD/MS/MDS) courses for the academic session 2015-18, as per the prospectus issued by the State Government. According to para 3.1 of the Prospectus issued for degree/MD/MS/MDS, courses, 66.6% of the State quota seats are to be filled up by in-service candidates. The in-service group comprises of two further sub-groups; one sub-group consisting of regularly appointed Medical Officers and the second comprising of Medical Officers appointed on contractual basis, including Rogi Kalyal Samiti appointees. The distribution of seats between the regular and those appointed on contractual basis, including Rogi Kalyal Samiti appointees, is to be made in the ratio proportionate to the total number as on 31.10.2014 for the academic session 2015-18. Initially, as per para 3.5 (iii), the ratio between the regular GDO's and the contractual GDOs, including appointees of RKS was as under:

1. GDO (Regular)

2. GDO (Regular)
3. GDO (Contract)

13. After the 3rd point, the process was to be repeated again. The respondent-State issued communication on 16.3.2015, whereby 4 point roster was to be applied for allotment of seats between GDO regular and GDO contract (including the RKS), on the basis of the respective in-position strength ratio of both the categories as on 31.10.2014. Initially as per para 3.5 (iii), the first two seats were to be allotted to GDO (Regular) and thereafter 3rd to GDO (Contract), but after the notification of 16.3.2015, the first two seats would go to GDO(Regular) and 3rd to GDO (Contract) and thereafter 4th to GDO (Regular).

14. It is settled law that for filling up the MD/MS/MDS seats, the criteria should be merit alone. The respondent-State has created two groups within the HPHS (In-service GDO) group, comprising of regularly appointed Medical Officers and contractual/Rogi Kalyan Samiti appointees. The respondent-State has also created sub-groups in the In-service GDO (MO Dental) Group seats, comprising of two sub-groups; one sub-group comprising of regularly appointed Medical Officers and other comprising of contractual/Rogi Kalyan Samiti appointees. All the Medical officers appointed either on regular basis, contractual or by RKS, discharge the same duties. Once they have been permitted to sit in the examination, they would loose birthmark of their initial recruitment either as Medical Officers appointed on regular basis or contractual or appointed by the RKS. They have to be treated as one class/group. The respondent-State has created the classification within the classification by dividing the HPHS in-service GDOs appointed either on regular basis or on contractual basis or appointed by RKS for the purpose of distribution/allotment of seats. There is no intelligible differentia so as to distinguish one group of Medical officers from the other group. They are all Medical officers and possess essential qualifications to sit in the Post Graduate Courses on the basis of All India Test. The respondent-State has further perpetuated the illegality by introducing new roster as per Annexure P-8 on 16.3.2015, whereby the candidates belonging to GDO (Regular), irrespective of their merit would get the first and second seat. The 3rd seat would go to contractual and the 4th again to regularly appointed GDO. The best available method as per the settled law would have been to fill up the MD/MS/MDS courses, strictly as per the marks obtained by in-service candidates, irrespective of their category.

15. The matter can be considered from yet another angle. The candidate who would be at Sr. No. 3 of the roster may have also secured less marks than the candidate appointed on regular basis but merely on the basis of the point allocated to him, he would be permitted to take MD/MS/MDS, seat.

16. The result of the All India Post Graduate Dental Entrance Examination was declared on 5.2.2015. The result of All India Post Graduate Medical Entrance Examination was declared on 15.1.2015. Thereafter, the Prospectus was issued. The last date of receipt of application form for MD/MS course was 20.3.2015. The same date was prescribed for All India Post Graduate Dental Entrance Examination. The counsellings have taken place. Once the prospectus has been issued and the same has been duly notified, it was not open to the respondents to change the terms and conditions contained in the Prospectus mid-way after the issuance of Prospectus. The candidates have taken the examination as per the terms and conditions issued initially at the time of issuance of prospectus. The respondents are also estopped from changing the conditions.

17. The issue raised in these petitions had also cropped up in CWP No. 2390 of 2014. It was decided on 26.5.2014. The operative portion of the judgment reads as under:

> "12. Thus, it is more than clear from the above that allocation of quota to a particular group or sub group is not akin to reservation envisaged under Articles 15(4) and 16(4) of the Constitution. It being so "inter se merit of the candidates in each quota shall be determined based on the merit performance of the candidates belonging to that quota" : Re **State of M.P. and others vs. Gopal D. Tirthani and others**, supra. "There cannot be any circumstance where rule of merit can be compromised": Re **Asha vs. Pt. B.D. Sharma University of Health Sciences and others,** supra. Above all, a more meritorious candidate ought to and must get a preferential right to choose a particular specialty.
>
> 13. The rival contention that once the petitioners have elected to participate in the process enunciated under the aforesaid prospectus, they cannot approbate and reprobate, does not hold good in view of the binding nature of the dictum of law laid down by the Hon'ble Apex Court in the judgments referred to hereinabove. It is for the same reason that lack of challenge against sub clause 3.5(i) (iii) of clause 3 of the Prospectus in the writ petition is of no consequence in the peculiar facts and circumstances of the present case.
>
> 14. In view of the above, the petition is allowed. Consequently, the counselling held by respondents No. 2 and 3 on 28.3.2014, followed by subsequent counselling, if any, for admission to post graduate MD/MS courses in Indira Gandhi Medical College and Dr. Rajindera Prasad Medical College Kangra at Tanda, vis-à-vis 66.6% quota meant for in service candidates, is quashed with a direction to respondents No. 2 and 3 to hold fresh counselling strictly in order of merit based on the State merit list, Annexure P-11. To be explicit, the candidates belonging to both the sub groups, that is, regular GDOs and contractual GDOs (including appointees of RKS) shown in the merit list shall be called for counselling one by one in order of their merit. To illustrate once candidates at Sr. Nos. 1 to 5 of list Annexure P-11 belonging to the first sub group of regular GDOs are called, the candidate at Sr. No.6, who belongs to the other sub group of contractual GDOs (including appointees of RKS) shall be called. The process shall proceed further so on and so forth. The entire process shall be completed well within the schedule for admission fixed by the Hon'ble Supreme Court in its order dated 14.3.2014, in Writ Petition (Civil) No. 433 of 2013, **Dr. Fraz Naseem & Ors. vs. Union of India & Ors**. and the connected matters."

18. The SLP was preferred against the judgment dated 28.5.2014, rendered in CWP No. 2390 of 2014. The appeal was allowed on 13.10.2014. The Hon'ble Supreme Court has taken into consideration that the provisions contained in the prospectus dated 20.2.2014 and Notification dated 19.5.2009 were not specifically challenged. In the instant case, the petitioners have specifically challenged the *inter se* grouping in HPHS (In-service GDO) and In-service GDO(MO Dental) and the subsequent issuance of roster after the issuance of Prospectus by the respondent-State.

19. Their lordships of the Hon'ble Supreme Court in the case of ***AIIMS Students' Union vrs. AIIMS and others,*** reported in ***(2002) 1 SCC 428,*** have held that a candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, according to this rule of equal chance for equal marks. This proposition has greater importance for the higher levels of education like postgraduate courses. It has been held as follows:

"44. When protective discrimination for promotion of equalisation is pleaded, the burden is on the party who seeks to justify the ex facie deviation from equality. The basic rule is equality of opportunity for every person in the country which is a constitutional guarantee. A candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, according to this rule of equal chance for equal marks. This proposition has greater importance when we reach the higher levels and education like post-graduate courses. Reservation, as an exception, may be justified subject to discharging the burden of proving justification in favour of the class which must be educationally handicapped - the reservation geared up to getting over the handicap. The rationale of reservation in the case of medical students must be removal of regional or class inadequacy or like disadvantage. Even there the quantum of reservation should not be excessive or societally injurious. The higher the level of the speciality the lesser the role of reservation."

20. Their lordships in the case of ***State of M.P. and others vrs. Gopal D. Tirthani and others,*** reported in ***(2003) 7 SCC 83,*** while dealing with the issue of in-service candidates and non-service or general category candidates, have laid down the following test to adjudge reasonable classification:

"[21] To withstand the test of reasonable classification within the meaning of Art. 14 of the Constitution, it is well settled that the classification must satisfy the twin tests; (i) it must be founded on an intelligible differentia which distinguishes persons or things placed in a group from those left out or placed not in the group, and (ii) the differentia must have a rational relation with the object sought to be achieved. It is permissible to use territories or the nature of the objects or occupations or the like as the basis for classification. So long as there is a nexus between the basis of classification and the object sought to be achieved, the classification is valid. We have, in the earlier part of the judgment, noted the relevant statistics as made available to us by the learned Advocate General under instructions from Dr. Ashok Sharma, Director (Medical Services), Madhya Pradesh, present in the Court. The rural health services (if it is an appropriate expression) need to be strengthened. 229 community health centres (CHCs) and 169 first referral units (FRUs) need to be manned by specialists and block medical officers who must be post-graduates. There is nothing wrong in the State Government setting apart a definite percentage of educational seats at post-graduation level consisting of degree and diploma courses exclusively for the in-service candidates. To the extent of the seats so set apart, there is a separate and exclusive source of entry or channel for admission. It is not reservation. In-service candidates, and the candidates not in the service of the State Government, are two classes based on an intelligible differentia. There is a laudable purpose sought to be achieved. In-service candidates, on attaining higher academic achievements, would be available to be posted in rural areas by the State Government. It is not that an in-service candidate would leave the service merely on account of having secured a post-graduate degree or diploma though secured by virtue of being in the service of the State Government. If there is any misapprehension the same is allayed by the State Government obtaining a bond from such candidates as a condition precedent to their taking admission that after completing PG Degree/Diploma Course they would serve the State

> Government for another five years. Additionally a Bank guarantee of rupees three lakhs is required to be submitted along with the bond. There is, thus, clearly a perceptible reasonable nexus between the classification and the object sought to be achieved."

21. Their lordships of the Hon'ble Supreme Court in the case of ***Asha vrs. Pt. B.D.Sharma University of Health Sciences and others,*** reported in ***(2012) 7 SCC 389,*** while dealing with admission to Medical Colleges have held that criteria for selection has to be merit alone and it will be a travesty of the scheme formulated by the Supreme Court and duly notified by the States, if the Rule of Merit is defeated by inefficiency, inaccuracy or improper methods of admission. It has been held as follows:

> "21. At this stage, we may refer to certain judgments of the Court where it has clearly spelt out that the criteria for selection has to be merit alone. In fact, merit, fairness and transparency are the ethos of the process for admission to such courses. It will be travesty of the scheme formulated by this Court and duly notified by the states, if the Rule of Merit is defeated by inefficiency, inaccuracy or improper methods of admission. There cannot be any circumstance where the Rule of merit can be compromised. From the facts of the present case, it is evident that merit has been a casuality. It will be useful to refer to the view consistently taken by this Court that merit alone is the criteria for such admissions and circumvention of merit is not only impermissible but is also abuse of the process of law. Ref. Priya Gupta Vs. State of Chhatisgarh & Anr. [CA @ SLP(C) No. 27089 of 2011, decided on 8th May, 2012], Harshali v. State of Maharashtra and Others [(2005) 13 SCC 464], Pradeep Jain v. UOI [1984 (3) SCC 654], Sharwan Kumar and Others v. Director of Health Services and Another [1993 Supp (1) SCC 632], Preeti Srivastava v. State of MP [(1999) 7 SCC 120], Guru Nanak Dev University v. Saumil Garg and Others [2005 (13) SCC 749], AIIMS Students' Union v. AIIMS and Others [(2002) 1 SCC 428]."

22. Their lordships of the Hon'ble Supreme Court in the case of ***Nikhil Himthani vrs. State of Uttarakhand and others,*** reported in ***(2013) 10 SCC 237,*** have held that equality of opportunity for every person in the country is the constitutional guarantee and therefore merit must be the test for selecting candidates, particularly in the higher levels of education like postgraduate medical courses, such as MD. Excellence cannot be compromised by any other consideration for the purpose of admission to postgraduate medical courses such as MD/MS and the like because that would be detrimental to the interests of the nation. It has been held as follows:

> "[11] The Constitution Bench of this Court has held in Saurabh Chaudri and Ors. v. Union of India and Ors. that giving institutional preference is a matter of State Policy which can be invalidated only in the event of it being violative of Article 14 of the Constitution. Hence, the question that we have to decide in this writ petition is whether clauses 1, 2 and 3 of the Eligibility Criteria in the information bulletin are ultra vires Article 14 of the Constitution of India.
>
> [12] Article 14 of the Constitution guarantees to every person equality before law and equal protection of laws. In Dr. Jagadish Saran and Ors. v. Union of India, 1980 2 SCC 768, Krishna Iyer J, writing the judgment on behalf of the three Judges referring to Article 14 of the Constitution held that equality of opportunity for every person in the country is the constitutional guarantee and therefore merit must be the test for selecting candidates, particularly in

the higher levels of education like post-graduate medical courses, such as MD. In the language of Krishna Iyer, J.:

> "23. Flowing from the same stream of equalism is another limitation. The basic medical needs of a region or the preferential push justified for a handicapped group cannot prevail in the same measure all the highest scales of speciality where the best skill or talent, must be handpicked by selecting according to capability. At the level of Ph.d. M.D., or levels of higher proficiency, where international measure of talent is made, where losing one great scientist or technologist in-the-making is a national loss, the considerations we have expanded upon as important lose their potency. Here equality, measured by matching excellence, has more meaning and cannot be diluted much without grave risk...."

[13] Relying on the aforesaid reasons in Dr. Jagadish Saran and Ors. v. Union of India a three Judge Bench of this Court in Dr. Pradeep Jain's case held that excellence cannot be compromised by any other consideration for the purpose of admission to post-graduate medical courses such as MD/MS and the like because that would be detrimental to the interests of the nation and therefore reservation based on residential requirement in the State will affect the right to equality of opportunity under Article 14 of the Constitution but:

> "22. ......a certain percentage of seats may in the present circumstances be reserved on the basis of institutional preference in the sense that a student who has passed MBBS course from a medical college or university, may be given preference for admission to the post-graduate course in the same medical college or university......."

This view expressed in Dr. Pradeep Jain's case has been reiterated by another three Judge Bench of this Court in Magan Mehrotra and Ors. v. Union of India and Ors. after a reconsideration and independent examination."

23. Their lordships of the Hon'ble Supreme Court in the case of ***Vishal Goyal and others vrs. State of Karnataka and others,*** reported in ***(2014) 11 SCC 456,*** have held that at post graduate level even partial reservation based on residence requirement is impermissible. It has been held as follows:

"10. We have considered the submissions of learned counsel for the parties and we find that the basis of the judgment of this Court in Dr. Pradeep Jain's case (supra) is Article 14 of the Constitution which guarantees to every person equality before the law and equal protection of the laws. As explained by this court in paragraphs 12 and 13 10 Page 11 of the judgment in Nikhil Himthani v. State of Uttarakhand & Others (supra):

> "12. Article 14 of the Constitution guarantees to every person equality before law and equal protection of laws. In Jagadish Saran v. Union of India (1980) 2 SCC 768, Krishna Iyer, J., writing the judgment on behalf of the three Judges referring to Article 14 of the Constitution held that equality of opportunity for every person in the country is the constitutional guarantee and therefore merit must be the test for selecting candidates, particularly in the higher levels of

education like postgraduate medical courses, such as MD. In the language of Krishna Iyer, J. (SCC pp.778-79, para 23)

"23. Flowing from the same stream of equalism is another limitation. The basic medical needs of a region or the preferential push justified for a handicapped group cannot prevail in the same measure all the highest scales of specialty where the best skill or talent, must be handpicked by selecting according to capability. At the level of PhD, MD, or levels of higher proficiency, where international measure of talent is made, where losing one great scientist or technologist in-the-making is a national loss, the considerations we have expanded upon a important lose their potency. Here, equality, measured by matching excellence, has more meaning and cannot be diluted much without grave risk."

13. Relying on the aforesaid reasons in Jagadish Saran v. Union of India, a three- 11 Page 12 Judge Bench of this Court in Pradeep Jain case held excellence cannot be compromised by any other consideration for the purpose of admission to postgraduate medical courses such as MD/MS and the like because that would be detrimental to the interests of the nation and therefore reservation based on residential requirement in the State will affect the right to equality of opportunity under Article 14 of the Constitution…….."

In Magan Mehrotra v. Union of India (supra) and Saurabh Chaudri v. Union of India (supra) also, this Court has approved the aforesaid view in Dr. Pradeep Jain's Case that excellence cannot be compromised by any other consideration for the purpose of admission to postgraduate medical courses such as MD/MS and the like because that would be detrimental to the interests of the nation and will affect the right to equality of opportunity under Article 14 of the Constitution.

11. Mr. Mariarputham is right that in Saurabh Chaudri v. Union of India (supra), this Court has held that institutional preference can be given by a State, but in the aforesaid decision of Saurabh Chaudri, it has also been held that decision of the State to give institutional preference can be invalidated by the Court in the event it is shown that the decision of the State is ultra vires the right to equality under Article 14 of the Constitution. When we examine sub-clause (a) of clause 2.1 of the two Information Bulletins, we find that the expression "A candidate of Karnataka Origin" who only is eligible to appear for Entrance Test has been so defined as to exclude a candidate who has studied MBBS or BDS in an institution in the State of Karnataka but who does not satisfy the other requirements of sub-clause (a) of clause 2.1 of the Information Bulletin for PGET-2014. Thus, the institutional preference sought to be given by sub-clause (a) of clause 2.1 of the Information Bulletin for PGET-2014 is clearly contrary to the judgment of this Court in Dr. Pradeep Jain's case (supra).

12. To quote from paragraph 22 of the judgment in Dr. Pradeep Jain's case:

"…… a certain percentage of seats may in the present circumstances, be reserved on the basis of institutional preference in the sense that a student who has passed MBBS course from a medical college or university, may be given preference for admission to the postgraduate course in the same medical college or university….."

13. Sub-clause (a) of clause 2.1 of the two Information Bulletins does not actually give institutional preference to students who have passed MBBS or BDS from Colleges or Universities in the State of Karnataka, but makes some of them ineligible to take the Entrance Test for admission to Post Graduate Medical or Dental courses in the State of Karnataka to which the Information Bulletins apply.

14. We now come to the argument of Mr. Mariarputham that the scheme formulated by this Court in Dr. Dinesh Kumar and Others v. Motilal Nehru Medical College, Allahabad and Others (supra) pursuant to the judgment in Dr. Pradeep Jain's case (supra) is confined to medical and dental colleges or institutions run by the Union of India or a State Government or a Municipal or other local authority and does not apply to private medical and dental colleges or institutions. Paragraph (1) of the scheme on which Mr. Mariarputham relied on is extracted hereinbelow:

> "(1) In the first place, the Scheme has necessarily to be confined to medical colleges or institutions run by the Union of India or a State Government or a municipal or other local authority. It cannot apply to private medical colleges or institutions unless they are instrumentality or agency of the State or opt to join the Scheme by making 15 per cent of the total number of seats for the MBBS/BDS course and 25 per cent of the total number of seats for the postgraduate course, available for admission on the basis of All India Entrance Examination. Those medical colleges or institutions which we have already excepted from the operation of the judgment dated June 22, 1984 will continue to remain outside the scope of the Scheme."

This Court has, thus, said in the aforesaid paragraph (1) of the scheme that the scheme cannot apply to private medical and dental colleges or institutions unless they are instrumentalities or agencies of the State or opt to join the scheme. The reason for this is that private medical and dental colleges or institutions not being State or its instrumentalities or its agencies were not subject to the equality clauses in Article 14 of the Constitution, but the moment some seats in the private medical and dental colleges or institutions come to the State quota, which have to be filled up by the State or its instrumentality or its agency which are subject to the equality clauses in Article 14 of the Constitution, the principles laid down by this Court in Dr. Pradeep Jain's case (supra) will have to be followed while granting admissions to the seats allotted to the State Quota in post graduate medical and dental courses even in private colleges.

15. In the result, we allow the writ petitions, declare subclause (a) of clause 2.1 of the two Information Bulletins for post graduate medical and dental courses for PGET-2014 as ultra-vires Article 14 of the Constitution and null and void. The respondent will now publish fresh Information Bulletins and do the admissions to the post graduate medical and dental courses in the Government colleges as well as the State quota of the private colleges in accordance with the law by the end of June, 2014 on the basis of the results of the Entrance Test already held. We also order that the general time schedule for counselling and admissions to post graduate Medical Courses in our order dated 14.03.2014 in Dr. Fraz Naseem & Ors. v. Union of India will not apply to such admissions in the State of Karnataka for the

academic year 2014-2015. Similarly, the general time schedule for counselling and admissions for post graduate dental courses will not apply 16 Page 17 to such admissions in the State of Karnataka. The parties shall bear their own costs."

24. Their lordships of the Hon'ble Supreme Court in the case of ***Kulmeet Kaur Mahal and others vrs. State of Punjab and others,*** reported in ***(2014) 13 SCC 756,*** have held that additional weightage given to in-service candidates in open category defeats rule of merit.

25. Their lordships of the Hon'ble Supreme Court in the case of ***Union of India and others vrs. Atul Shukla etc.,*** reported in ***AIR 2015 SC 1777,*** have held that the classification of employees based on the method of their recruitment has long since been declared impermissible. There can be no differential treatment between an employee directly recruited vis-à-vis another who is promoted. It has been held as follows:

> "17. The Tribunal has rejected both the reasons aforementioned and, in our opinion, rightly so. Classification of employees based on the method of their recruitment has long since been declared impermissible by this Court. There can be no differential treatment between an employee directly recruited vis-a-vis another who is promoted. So long as the two employees are a part of the same cadre, they cannot be treated differently either for purposes of pay and allowances or other conditions of service, including the age of superannuation. Take for instance, a directly recruited District Judge, vis-a-vis a promotee. There is no question of their age of superannuation being different only because one is a direct recruit while the other is a promotee. So also an IAS Officer recruited directly cannot for purposes of age of superannuation be classified differently from others who join the cadre by promotion from the State services. The underlying principle is that so long as the officers are a part of the cadre, their birth marks, based on how they joined the cadre is not relevant. They must be treated equal in all respects salary, other benefits and the age of superannuation included.
>
> 18. In the case at hand, Group Captains constitute one rank and cadre. The distinction between a Group Captain (Select) and Group Captain (Time Scale) is indicative only of the route by which they have risen to that rank. Both are promotees. One reaches the rank earlier because of merit than the other who takes a longer time to do so because he failed to make it in the three chances admissible to them. The select officers may in that sense be on a relative basis more meritorious than time scale officers. But that is bound to happen in every cadre irrespective of whether the cadre comprises only directly recruited officers or only promotees or a mix of both. Inter se merit will always be different, with one officer placed above the other. But just because one is more meritorious than the other would not by itself justify a different treatment much less in the matter of age of superannuation.
>
> 19. It is common ground that Time Scale Officers do not get to the higher rank only because of the length of service. For purposes of time scale promotion also the officers have to maintain the prescribed minimum standard of physical fitness, professional ability, commitment and proficiency. Rise to the next rank by time scale route is, therefore, by no means a matter of course. It is the length of service and the continued usefulness of the officer on the minimal requirements stipulated for such promotion that entitles an officer to rise to higher professional echelons.

> Suffice it to say that while better inter se merit would earn to an officer accelerated promotion to the Group Captain's rank and resultant seniority over Time Scale Officers who take a much longer period to reach that position, but once Time Scale Officers do so they are equal in all respects and cannot be dealt with differently in the matter of service conditions or benefits. All told the submission of the Time Scale Officers that because of their long years of service and experience, they make up in an abundant measure, for a relatively lower merit cannot be lightly brushed aside. That Group Captains (Time Scale) wear the same rank, are paid the same salary and allowances and all other service benefits admissible to Group Captains (Select) supports that assertion for otherwise there is no reason why they should have been equated in matters like pay, allowances and all other benefits including the rank they wear if they were not truly equal. Once it is conceded that the two are equal in all other respects as indeed they are, there is no real or reasonable basis for treating them to be different for purposes of age of retirement.
>
> 24. The principles stated in the above decisions lend considerable support to the view that classification of Group Captains (Select) and Group Captains (Time Scale) in two groups for purposes of prescribing different retirement ages, is offensive to the provisions of Articles 14 and 16 of the Constitution of India. These appeals must, on that basis alone, fail and be dismissed, but, for the sake of a fuller treatment of the subject, we may as well examine whether the classification has any nexus with the object sought to be achieved by the Government decision taken in the wake of the AVS Committee recommendations."

26. The quota of 66.6% prescribed for the in-service candidates *stricto sensu* cannot be termed as reservation. It is only a source/channel for admission to educational institution(s). The in-service candidates and non-service or general category candidates are two separate classes based on intelligible differentia, having a rationale relation with the object sought to be achieved, however, there could not be further micro classification on the basis of source of recruitment qua in-service candidates under 66.6% quota.

27. The goal to be achieved by classification is that only meritorious candidates are admitted in postgraduate courses. The methodology adopted by the respondents by prescribing the roster points would promote only mediocracy and not merit. It is discriminatory, arbitrary and unreasonable. The purpose of prescribing a source from in-service candidates is to ensure that they improve their qualifications to serve people at large more efficiently. Thus, allocation/distribution of seats on the basis of groups/sub-groups under clause 3.1(A)(i) of the Prospectus for HPHS (In-service GDO) Group and In-service GDO(MO Dental) Group seats is unreasonable and unconstitutional. It is reiterated that these groups should have been treated as one group for the purpose of admission to MD/MS/MDS courses.

28. Accordingly, the Writ Petitions are allowed. The allotment of seats/roster points on the basis of sub-groups comprising of regularly appointed Medical Officers, contractual and Rogi Kalyan Samiti appointees and sub groups comprising of regular Medical Officers (Dental) and second group comprising of contractual and Rogi Kalyan Samiti appointees as per clause 3.1(A) (i) of the Prospectus-cum-Application Form for counselling and admission for postgraduate Degree(MD/MS) Courses and clause 3.6(b)(iii) of the Prospectus-cum-Application Form for counselling and admission for postgraduate Degree(MDS) Courses for the academic session 2015-18, respectively, are quashed and set

aside. The admissions made to MD/MS/MDS courses on the basis of the first counselling, second counselling and 3rd counselling under clause 3.1(A)(i) of both the Prospectus under HPHS (In-service GDO) Group and in-service GDO (MO Dental) Group seats are also quashed and set aside. The respondents are directed to re-do the entire selection process by filling up the MD/MS/MDS seats, strictly as per the merit list on the basis of All India Post Graduate Medical Entrance Examination and All India Post Graduate Dental Entrance Examination, within a period of one week from today in order to adhere to the time schedule framed by the Hon'ble Supreme Court of India qua HPHS (In-service GDO) Group and in-service GDO (MO Dental) Group. Pending application(s), if any, shall also stand disposed of.

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

Pradeep Kumar. …Appellant.
Versus
State of H.P. & others. …Respondents.

RSA No. 229 of 2001
Reserved on: 22.5.2015
Decided on: 18.6.2015

Indian Succession Act, 1925- Section 63- Plaintiff claimed to be a successor on the basis of registered will- he claimed that administrator had wrongly resumed the property in favour of State without affording any opportunity of hearing to the plaintiff- defendant claimed that bidder had not raised construction within two years- thus, he had violated the condition of the auction- general notice was published in the weekly gazette requiring all the bidders to complete the construction after getting the plans approved from the respondent- order was passed in exercise of power under H.P. New Mandi Townships (Development and Regulation) Act, 1973- a plot was purchased in the year 1940 and the provisions of the act were not in operation, therefore, plot could not be resumed under provision of the Act. (Para- 15 to 17)

For the Appellant : Mr. Neeraj Gupta, Advocate.
For the Respondents : Mr. Shrawan Dogra, A.G. with Mr. M.A. Khan, Addl. A.G., Mr. Neeraj K.Sharma, Dy. A.G. and Mr. Ramesh Thaur, Asstt. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 7.4.2001 rendered by the Addl. District Judge, Solan in Civil Appeal No. 6-S/13 of 2000.

2. "Key facts" necessary for the adjudication of this appeal are that the appellant-plaintiff (herein after referred to as 'plaintiff' for convenience sake) instituted a suit for declaration with consequential relief of injunction stating therein that the predecessor in interest of Puran Singh son of Wazir Singh had purchased a plot No.5, Block-B, Saproon Mandi, Solan, now depicted as Khasra Nos. 827, 828, 829, 833, 834, 879 and 882 as per Jamabandi for the year 1992-93 Mauja Dahun, Tehsil and District Solan, H.P. Puran Singh remained owner in possession of the land till his death. He died on 1.11.1995. Plaintiff

succeeded to the property as sole successor on the basis of registered will dated 13.10.1992. It was registered before the Sub-Registrar, Patiala. Plaintiff came to know from the record of the Administrator, Saproon Mandi, Solan that the Administrator has resumed the property in favour of State of Himachal Pradesh vide case No. SP No. 8/1980 dated 29.6.1981. Plaintiff was owner in possession of the same and the predecessor-in-interest of the plaintiff was not afforded hearing by the respondents/defendants (hereinafter as the 'defendants' for the convenience sake) at any point of time. Notice under Section 80 of the Code of Civil Procedure dated 8.4.1997 was served upon the defendants.

3. The suit was contested by the defendants. According to them, plot No.5 Block-B was reported to have been purchased by Sh. Puran Singh. Patwari, Saproon Mandi made a report on 28.8.1980 that the bidder has not constructed the house within the prescribed period of 2 years, and thus, he has violated the condition of auction. Since the residential address of Puran Singh was not available, therefore, a general public notice was published in the weekly gazette dated 28.2.1981 requiring all the bidders to complete the construction after getting the plans approved from the defendants. They were granted 30 days period, failing which the plot could be resumed. Thereafter, the plot was resumed by the Administrator (Deputy Commissioner, Solan) and the order was given effect to in the revenue record on 1.12.1981.

4. Replication was filed by the plaintiff. Issues were framed by the Sub Judge on 21.4.1998. Sub Judge decreed the suit on 15.1.2000. Defendants preferred an appeal before the Additional District Judge, Solan. He allowed the same on 7.4.2001. Hence, the present appeal. It was admitted on 27.6.2001 on the following substantial questions of law:

> **1. "Whether the suit by the plaintiff-appellant as laid is within time?**
>
> 2. **Whether the provisions of H.P. New Mandi Townships (Development and Regulation) Act, 1973 are not applicable to the facts of the present case?"**

5. Mr. Neeraj Gupta, learned counsel for the appellant, has vehemently argued that the suit was within limitation from the date of knowledge. He has also contended that provisions of H.P. New Mandi Townships (Development and Regulation) Act, 1973 were not applicable in the present case.

6. Mr. Shrawan Dogra, learned Advocate General has supported the judgment and decree passed by the first appellate court.

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

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

9. It is not in dispute that the predecessor-in-interest of the plaintiff Sh. Puran Singh has purchased the plot in the year 1940 in public auction. Puran Singh has executed "will" Ex.PW-3/A in favour of the plaintiff on 13.10.1992. The land has been resumed vide order dated 31.6.1981. Plaintiff came to know about the resumption of the plot vide order dated 29.6.1981 only on 8.4.1997 when he visited the office of Administrator. Notice under section 80 of the Code of Civil Procedure was served upon the defendants. Possession of the land despite order dated 29.6.1981 was not taken by the defendants. Suit was thus within the period of limitation from the date of knowledge. Plaintiff came to know about the

impugned order on 8.4.1997 and the suit was filed on 18.6.1997. Thus, the first appellate court has come to a wrong conclusion that the suit was barred by limitation.

10. PW-1 Bhagwan Singh, Registration Clerk office of the Sub-Registrar, Patiala has produced the summoned record and as per summoned record, "will" No. 363 was executed on 13.10.1992. Entry of the "will" was recorded at Sr. No. 363 Bahi No.3 and Zild No. 126.

11. PW-2 Om Parkash Garg was Document Writer. Puran Singh came to him for the execution of "will". The "will" was scribed by him at the instance of Puran Singh. Contents of the will were read over to Puran Singh. Puran Singh was in his senses. He after admitting the contents of the "will" to be correct signed the same.

12. According to PW-3 Rachpal Singh, Om Parkash has scribed the "will". Contents of the "will" were read over and explained to the testator. He after admitting the contents of the "will" to be true signed the same. Thereafter, marginal witnesses signed the "will". It was registered before the Sub-Registrar.

13. PW-4 Pardeep Kumar has proved the death certificate Ex.PW-4/A. According to him, Puran Singh has executed the "will" Ex.PW-3/A in his favour in the month of October, 1992. The suit land was resumed by the defendants vide order Ex.PW-4/H. Puran Singh was in possession of the suit land. No summons were issued. He came to know about the order on 8.4.1997. Notice Ex.PW-4/K was issued. He has proved postal receipt Ex.PW-4/L. According to him, revenue entry Ex.PW-4/B was wrong.

14. DW-1 Dhani Singh has deposed that as per record plot No.5 Block-B area 5 biswas was allotted to deceased Puran Singh. Puran Singh did not raise construction within 2 years over the plot for which purpose it was allotted. On 28.8.1980, a report was given by the Halqua Patwari. A notice was given to the allottee. Allottee did not appear despite notice and on 29.6.1981, plot was resumed by the State.

15. It has come on record that a notice was published in the weekly gazette dated 28.2.1981 requiring all the bidders to complete the construction after getting the plans approved within 30 days. order dated 29.6.1981 has been passed by the Administrator in exercising the powers vested in him under H.P. New Mandi Townships (Development and Regulation) Act, 1973. The plot, admittedly, has been purchased by Sh. Puran Singh in the year 1940. Thus, the previsions of the H.P. New Mandi Townships (Development and Regulation) Act, 1973 were not applicable. Order dated 29.6.1981 is without jurisdiction.

16. The question raised in the present Regular Second Appeal is no more *res integra* in view of the principles laid down by Division Bench of this Court in CWP No. 303/1984 decided on 4.4.1984. Operative portion of the judgment dated 4.4.1984 reads as under:

> **"It would thus appear that for the applicability of the Act, subject to other conditions, the sale must have been made:**
>
> **1. Under the provisions of the Act, or**
>
> **2. Under the provisions of the Punjab Act, or**
>
> **3. Under the notification No. 359-D(M)-57/884, dated March 5, 1957 of the Pubjab Government Agriculture Department.**

Unless the sale falls under anyone of the aforesaid categories, the power of resumption or forfeiture under Section 14 of the Act cannot possibly be exercised.

In the instant case, the petitioner claims that the land in dispute was purchased at a public auction by his deceased father in or about 1940. The fact that the land in dispute was sold at a public auction in 1940 by the ex-Patiala State is not in dispute, though the title of the petitioner is disputed. Under the circumstances, it is apparent that the power of resumption of forfeiture cannot be exercised under Section 14 of the Act. The Act does not apply in such cases. Any such exercise of power is wholly without authority and jurisdiction. On this short ground alone, the petition is entitled to succeed."

17. It is reiterated that the suit was filed within limitation from the date of knowledge. The plot could not be resumed under section 14 of the H.P. New Mandi Townships (Development and Regulation) Act, 1973 since the same has been purchased in the year 1940.

18. Both the substantial questions of law are answered accordingly.

19. In view of the analysis and discussion made hereinabove, present appeal is allowed. Judgment and decree dated 7.4.2001 rendered by the Additional District Judge Solan in Civil Appeal No. 6-S/13 of 2000 is set aside and the judgment and decree dated 15.1.2000 rendered by the Sub Judge, Kasauli at Solan in case No. 233/1 of 1997 is restored. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Smt. Anubha Sood and others .....Appellants
Versus
Sh. Krishan Chand and others ....Respondents

FAO (MVA) No. 254 of 2012
Judgment reserved on 29th May, 2015
Date of decision: 19th June, 2015.

Motor Vehicle Act, 1988 - Section 166- Deceased was aged 42 years- multiplier of '14' will be applicable- he was earning Rs. 1,06,483/ as salary- Tribunal had deducted 1/3rd towards deduction and further deducted 1/4th towards his personal expenses- held, that further deductions are not permissible from the salary - only 1/4th amount was to be deducted towards personal expenses- after deducting 1/4th i.e. Rs.26,500/- -loss of dependency would be Rs. 79,500/- and claimant would be entitled for Rs.11,13,000/- as compensation for loss of income. (Para-24 to 26)

Motor Vehicle Act, 1988- Section 166- Income from the agriculture- deceased was managing orchard- claimants will have to engage a person to manage and supervise the orchard- at least Rs. 5,000/- per month would be payable as salary to him- therefore, claimants are entitled to Rs. 5,000x12x14 = Rs. 8,40,000/- as compensation on this account. (Para-27 to 30)

Cases referred:
State of Haryana and another versus Jasbir Kaur and others, AIR 2003 Supreme Court 3696
The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another, AIR 2003 Supreme Court 4172
Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr., 2009 AIR SCW 3717
Nagappa v. Gurudayal Singh & Ors, (2003) 2 SCC 274
Devki Nandan Bangur and Ors. versus State of Haryana and Ors. 1995 ACJ 1288
Syed Basheer Ahmed & Ors. versus Mohd. Jameel & Anr., (2009) 2 SCC 225
National Insurance Co. Ltd. versus Laxmi Narain Dhut, (2007) 3 SCC 700
Punjab State Electricity Board Ltd. versus Zora Singh and Others (2005) 6 SCC 776
A.P. SRTC versus STAT and State of Haryana & Ors. versus Shakuntla Devi, 2008 (13) SCALE 621
Ningamma & another versus United India Insurance Co. Ltd., 2009 AIR SCW 4916
A.P.S.R.T.C. & another versus M. Ramadevi & others, 2008 AIR SCW 1213
Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service, 2013 AIR SCW 5800
New India Assurance Co. Ltd. versus Shanti Bopanna and others 2014 ACJ 219
Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120.
Santosh Devi versus National Insurance Company Ltd. and others (2012) 6 SCC 421
National Insurance Co. Ltd. versus Indira Srivastava and others 2008 ACJ 614
State of Haryana and another versus Jasbir Kaur and others, (2003) 7 SCC 484
V. Subbulakshmi and others versus S. Lakshmi and another (2008) 4 SCC 224
Amrit Bhanu Shali and others versus National Insurance Company Ltd. and others, (2012) 11 SCC 738
Kalpanaraj and others versus Tamil Nadu State Transport Corporation (2015) 2 SCC 764

For the appellants: Mr. Ajay Mohan Goel, Advocate.
For the respondents: Mr. Narender Sharma, Advocate, for respondents No. 1 and 2.
Mr. Jagdish Thakur, Advocate, for respondents No. 3 and 4.
Nemo for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice .

The claimants have thrown challenge to the judgment and award dated 23.3.2012, made by the Motor Accident Claims Tribunal-II, Shimla in M.A.C. No. 04-S/2 of 2011, titled *Smt. Anubha Sood and others versus Sh. Krishan Chand and others,* whereby compensation to the tune of Rs.7,72,000/- with interest @ 9% per annum came to be awarded in favour of the claimants/appellants herein and against the respondents and insurer came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The insurer, driver and owner have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them. The claimants/appellants have questioned the impugned award only on the ground of adequacy of compensation on

the grounds taken in the memo of appeal read with the averments contained in the claim petition and evidence led before the Tribunal.

3. Thus, the only question to be determined in this appeal is whether the compensation awarded is adequate or otherwise?

4. In order to determine whether the amount awarded is just and appropriate, it is necessary to give a brief resume of the relevant facts.

5. The claimants being the victims of a vehicular accident filed claim petition before the Motor Accident Claims Tribunal, for short “the Tribunal”, for the grant of compensation as per the break-ups given in the memo of appeal, on the ground that they have lost source of dependency on account of death of Sh.Rajesh Sood in a road accident, which was caused by respondent No.2 Sh.Satish Kumar, while driving Canter bearing registration No. HR-64-5419, rashly and negligently, owned by Sh.Krishan Chand, respondent No.1. It is averred in the claim petition that on 27.5.2010, Sh.Rajesh Sood was travelling in his Scorpio bearing registration No. HP-06B-0144 towards Solan and when he reached Mansar, aforementioned Canter came from opposite side and hit his vehicle. He received severe injuries and succumbed to the injuries on the spot. FIR was lodged in police station Solan. It is averred that the deceased was a businessman, orchardist and agent of the Life Insurance Corporation and was 42 years of age, at the time of accident. He was drawing salary to the tune of Rs.1,06,483/ from his firm M/s Mehar Chand Mool Raj, Main Bazar Rampur Bushahar, Rs.21,400/- as profit from the said firm, Rs.3,64,440/- per annum, from orchards, Rs.1,40,334/- from house property and Rs.42,000/- per annum as commission, being agent of the LIC of India, the details of which have been given in paras 4 and 6 of the claim petition. He was an income tax payee and in his income tax return for the assessment year 2010-2011, his income is shown Rs.10,77,710/- and has paid Rs.77373/- as tax for the said assessment year. The claimants have lost source of dependency.

6. Respondents contested the averments contained in the claim petition by filing separate replies.

7. Following issues were framed by the Tribunal on 18.2.2011:

(i) *Whether on 27.5.2010, the respondent No.2 drove truck No. HR-64-5419 in a rash and negligent manner resulting into death of Rajesh Sood? OPP*

(ii) If issue No. 1 is proved, to what compensation the petitioners are entitled and from whom? OPP.

(iii) Whether accident occurred due to negligence of Rajesh Sood, if so its effect? OPR-1.

(iv) Whether offending vehicle was being driven in violation of terms and condition of insurance policy? OPR-3.

(v) Whether respondent No. 2 was not holding effective and valid driving license at the time of accident ? OPR-3.

(vi) Relief.

8. The claimants examined as many as seven witnesses, namely, H.C. Kanshi Ram (PW1), Sh. Satya Parkash, (PW2), Mrs. Santosh (PW3), Mrs. Anubha Sood claimant No.1.(PW4), Dr. Rajan Sood (PW5), Ravinder Kumar (PW6) and Prem Singh (PW7) and have also placed on record documents, i.e., copy of RIR, Ext. PW1/A, copy of DL, Ext. PW2/A, copy of RC, Ext. PW2/B, copy of Insurance policy Ext. PW3/A.

9. The Tribunal, after scanning the evidence held that the claimants have proved by oral as well as documentary evidence that driver Satish Kumar had driven the vehicle rashly and negligently on the date of accident due to which deceased sustained injuries and succumbed the injuries on the spot.

10. Neither driver nor owner have questioned the findings returned by the Tribunal, not to speak of findings returned on issue No. 1., so, the findings returned on issue No. 1 are upheld.

11. The findings returned on issues No. 3 to 5 are not in dispute because the onus to prove these issues was on the respondents, i.e., owner and the insurer, have failed to discharge the same and have not questioned the impugned award. Thus, the findings returned on these issues are also upheld.

12. **Issue No.2.** The factum of insurance is not in dispute. At the cost of repetition, the insurer has not questioned the impugned award. Thus, the issue is whether the amount awarded is just and appropriate?

13. The word *"just compensation"* has been used in Section 168 of the Motor Vehicles Act, 1988 (for short "the Act"). In order to award just compensation, the Tribunal has to weigh all the aspects to come to the conclusion as to what is the just compensation.

14. In the case titled as *State of Haryana and another versus Jasbir Kaur and others*, reported in **AIR 2003 Supreme Court 3696,** the Apex Court has discussed the expression 'just'. It is apt to reproduce para 7 of the judgment herein:

> *"7. It has to be kept in view that the Tribunal constituted under the Act as provided in S. 168 is required to make an award determining the amount of compensation which is to be in the real sense "damages" which in turn appears to it to be 'just and reasonable'. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate the compensation must be "just" and it cannot be a bonanza; nor a source of profit; but the same should not be a pittance. The Courts and Tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a wide discretion is vested on the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and*

> *reasonableness, and non-arbitrary. If it is not so it cannot be just. (See Helen C. Rebello v. Maharashtra State Road Transport Corporation (AIR 1998 SC 3191)."*

15. The same view has been taken by the Apex Court in a case titled as ***The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another*,** reported in ***AIR 2003 Supreme Court 4172***.

16. The Apex Court in the case titled as ***Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr.,*** reported in **2009 AIR SCW 3717,** laid down the same principle while discussing, in para 27 of the judgment, the ratio laid down in the judgments rendered in the cases titled as *Nagappa v. Gurudayal Singh & Ors, (2003) 2 SCC 274; Devki Nandan Bangur and Ors. versus State of Haryana and Ors. 1995 ACJ 1288; Syed Basheer Ahmed & Ors. versus Mohd. Jameel & Anr., (2009) 2 SCC 225; National Insurance Co. Ltd. versus Laxmi Narain Dhut, (2007) 3 SCC 700; Punjab State Electricity Board Ltd. versus Zora Singh and Others (2005) 6 SCC 776; A.P. SRTC versus STAT and State of Haryana & Ors. versus Shakuntla Devi, 2008 (13) SCALE 621.*

17. The Apex Court in another case titled as **Ningamma & another versus United India Insurance Co. Ltd.,** reported in **2009 AIR SCW 4916,** held that the Court is duty bound to award just compensation to which the claimants are entitled to. It is profitable to reproduce para 25 of the judgment herein:

> *"25. Undoubtedly, Section 166 of the MVA deals with "Just Compensation" and even if in the pleadings no specific claim was made under section 166 of the MVA, in our considered opinion a party should not be deprived from getting "Just Compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the Court is duty bound and entitled to award "Just Compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. However, whether or not the claimants would be governed with the terms and conditions of the insurance policy and whether or not the provisions of Section 147 of the MVA would be applicable in the present case and also whether or not there was rash and negligent driving on the part of the deceased, are essentially a matter of fact which was required to be considered and answered at least by the High Court."*

18. The Apex Court in the judgments delivered in the cases titled as **A.P.S.R.T.C. & another versus M. Ramadevi & others, reported in 2008 AIR SCW 1213** and **Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service,** reported in **2013 AIR SCW 5800,** discussed what is the just compensation**.** It is apt to reproduce para 9 of the judgment rendered in ***Sanobanu's*** case supra, herein:

> *"9. In view of the aforesaid decision of this Court, we are of the view that the legal representatives of the deceased are entitled to the compensation as mentioned under the various heads in the table as provided above in this judgment even though certain claims were not preferred by them as we are of the view that they are legally and legitimately entitled for*

> *the said claims. Accordingly we award the compensation, more than what was claimed by them as it is the statutory duty of the Tribunal and the appellate court to award just and reasonable compensation to the legal representatives of the deceased to mitigate their hardship and agony as held by this Court in a catena of cases. Therefore, this Court has awarded just and reasonable compensation in favour of the appellants as they filed application claiming compensation under Section 166 of the M.V. Act. Keeping in view the aforesaid relevant facts and legal evidence on record and in the absence of rebuttal evidence adduced by the respondent, we determine just and reasonable compensation by awarding a total sum of Rs. 16,96,000/- with interest @ 7.5% from the date of filing the claim petition till the date payment is made to the appellants."*

19. The same principles of law have been laid down by this Court in case titled ***Jagdish versus Rahul Bus Service and others*** **(FAO No. 524 of 2007)** decided on 15.5.2015.

20. I, while dealing with a case of such a nature as Judge of Jammu and Kashmir High Court in case titled **New India Assurance Co. Ltd.** ***versus*** **Shanti Bopanna and others** reported in ***2014 ACJ 219***, have taken all these things in view and the ratio laid down in this case is squarely applicable to the facts of the present case and accordingly, the amount awarded merits to be enhanced.

21. Thus, in order to arrive at a conclusion whether the Tribunal has awarded just compensation, the Tribunal or the Appellate Court have to examine the pleadings of the parties and proof, i.e, evidence on the file.

22. The claimants have given details of the income and profession of the deceased. The reply of owner, driver and insurer are evasive, thus have not denied the same specifically, as per the mandate of Order 8 of the Code of Civil Procedure, for short "the Code". However, they have stated that the claimants be put to strict proof.

23. The claimants have proved the date of birth of the deceased as 28.7.1968 in terms of certificate Ext. PW4/A and the Tribunal has taken the age of the deceased as 42 years and applied the multiplier of "14". I am of the considered view that the Tribunal has rightly taken the age of the deceased as 42 years and applied the multiplier of "14", which is just and appropriate multiplier applicable, in view of Schedule-II of the Act, read with the ratio laid down in ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***.

24. The Tribunal has erred in assessing the income of the deceased. The claimants have pleaded that the income of the deceased was Rs.10,77,710/- per annum and have placed on record the income tax return Ext. PW4/B, which do disclose that the income from the house property was Rs.1,44,334/-, salary from firm Rs.1,06,483/-, interest on capital from firm Rs.67,015/-, income from Bank/P.O deposits Rs.2,33,816/-, agriculture income Rs.3,64,440/- other deposits Rs.21,429/-, PPF deposit interest

Rs.1,18,764 and total income recorded is Rs.10,77,710/-. The said document is also not denied by the respondents.

25. The apex Court in case titled ***Santosh Devi versus National Insurance Company Ltd. and others*** reported in **(2012) 6 SCC 421** discussed this issue and it is profitable to reproduce para 11, 14 to 18 of the said judgment herein:

> *"11. We have considered the respective arguments. Although, the legal jurisprudence developed in the country in last five decades is somewhat precedent-centric, the judgments which have bearing on socio-economic conditions of the citizens and issues relating to compensation payable to the victims of motor accidents, those who are deprived of their land and similar matters needs to be frequently revisited keeping in view the fast changing societal values, the effect of globalisation on the economy of the nation and their impact on the life of the people.*
>
> *12-13. …. ….. …..*
>
> *14. We find it extremely difficult to fathom any rationale for the observation made in paragraph 24 of the judgment in Sarla Verma's case that where the deceased was self-employed or was on a fixed salary without provision for annual increment, etc., the Courts will usually take only the actual income at the time of death and a departure from this rule should be made only in rare and exceptional cases involving special circumstances. In our view, it will be naïve to say that the wages or total emoluments/income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc., would remain the same throughout his life.*
>
> *15. The rise in the cost of living affects everyone across the board. It does not make any distinction between rich and poor. As a matter of fact, the effect of rise in prices which directly impacts the cost of living is minimal on the rich and maximum on those who are self- employed or who get fixed income/emoluments. They are the worst affected people. Therefore, they put extra efforts to generate additional income necessary for sustaining their families.*
>
> *16. The salaries of those employed under the Central and State Governments and their agencies/instrumentalities have been revised from time to time to provide a cushion against the rising prices and provisions have been made for providing security to the families of the deceased employees. The salaries of those employed in private sectors have also increased manifold. Till about two decades ago, nobody could have imagined that salary of Class IV employee of the Government would be in five figures*

and total emoluments of those in higher echelons of service will cross the figure of rupees one lac.

17. Although, the wages/income of those employed in unorganized sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the Government employees and those employed in private sectors but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching cloths. If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour, like, barber, blacksmith, cobbler, mason etc.

18. Therefore, we do not think that while making the observations in the last three lines of paragraph 24 of Sarla Verma's judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30 per cent increase in his total income over a period of time and if he / she becomes victim of accident then the same formula deserves to be applied for calculating the amount of compensation.

26. The Tribunal has taken the income of the deceased as Rs.1,06,483/-, per annum as salary from Firm Mehar Chand Mool Raj and after deducting 1/3rd towards the deductions and concluded and held that the net salary of the deceased was Rs.70667/- and further deducted 1/4th towards his personal expenses and held that the loss of source of dependency was Rs.53,000/- per annum, which is not correct. The Tribunal has lost sight off the very important fact that the salary of the deceased was Rs.,06,483/- per annum and no deduction was permissible. In one breath the Tribunal has deducted Rs.35,333/- and thereafter has also made further deductions, which is not permissible in law. As per the ratio laid down in ***Sarla Verma's*** and other judgments referred to supra, the net salary for assessing compensation was to be taken as Rs.1,06,483/- and keeping in view the age of the claimants read with the fact that the widow has lost matrimonial home, sons have lost their father, love and affection, deductions of 1/4th was to be made towards personal expenses. Meaning thereby the claimants have lost source of dependency to the tune of Rs.1,06,483/-,rounded as Rs.1,06,000/-minus Rs.26,500/- = Rs.79,500/- per annum. Thus, the claimants are entitled to Rs.79,500/-x14= ***total Rs.11,13,000/-.***

27. The Tribunal has not taken into consideration the agriculture income of the deceased, was having orchards and was managing the same. The claimants have specifically

averred that the deceased was also managing the orchards. The widow, who has lost everything in her life, matrimonial home, love and affection, she is living broken life, can she manage the orchards? Virtually, the claimants have lost source of income from agriculture. They have to engage a person to manage and supervise the orchard. The compensation was to be awarded.

28. The apex Court in case titled ***National Insurance Co. Ltd. versus Indira Srivastava and others*** reported in ***2008 ACJ 614*** has laid down the same principles. It is apt to reproduce paras 8, 9, 17 and 18 of the said judgment herein:

> *"8. The term 'income' has different connotations for different purposes. A court of law, having regard to the change in societal conditions must consider the question not only having regard to pay packet the employee carries home at the end of the month but also other perks which are beneficial to the members of the entire family. Loss caused to the family on a death of a near and dear one can hardly be compensated on monetory terms.*
>
> *9. Section 168 of the Act uses the word 'just compensation' which, in our opinion, should be assigned a broad meaning. We cannot, in determining the issue involved in the matter, lose sight of the fact that the private sector companies in place of introducing a pension scheme takes recourse to payment of contributory Provident Fund, Gratuity and other perks to attract the people who are efficient and hard working. Different offers made to an officer by the employer, same may be either for the benefit of the employee himself or for the benefit of the entire family. If some facilities are being provided whereby the entire family stands to benefit, the same, in our opinion, must be held to be relevant for the purpose of computation of total income on the basis whereof the amount of compensation payable for the death of the kith and kin of the applicants is required to be determined. For the aforementioned purpose, we may notice the elements of pay, paid to the deceased :*
>
> *"BASIC : 63,400.00CONVEYANCEALLOWANCE : 12,000.00RENT CO LEASE : 49,200.00BONUS (35% OF BASIC) : 21,840.00 TOTAL : 1,45,440.00*
>
> *In addition to above, his other entitlements were :*
>
> *Con. to PF 10% Basic Rs. 6,240/- (p.a.) LTA reimbursement Rs. 7,000/- (p.a.)Medical reimbursement Rs. 6,000/- (p.a.)Superannuation 15% of Basic Rs. 9,360/- (p.a.)Gratuity Cont.5.34% of Basic Rs. 3,332/- (p.a.)Medical Policy-self & Family @ Rs.55,000/- (p.a.)Education Scholarship @ Rs.500 Rs.12,000/- (p.a.)Payable to his two children Directly".*
>
> *10 to 16. ....*
>
> *17. The amounts, therefore, which were required to be paid to the deceased by his employer by way of perks, should be included for computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as contradistinguished to the ones which were for his benefit. We may, however, hasten to add that from the said*

amount of income, the statutory amount of tax payable thereupon must be deducted.

18. The term 'income' in P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Ed.) has been defined as under :

"The value of any benefit or perquisite whether convertible into money or not, obtained from a company either by a director or a person who has substantial interest in the company, and any sum paid by such company in respect of any obligation, which but for such payment would have been payable by the director or other person aforesaid, occurring or arising to a person within the State from any profession, trade or calling other than agriculture."

It has also been stated :

'INCOME' signifies 'what comes in' (per Selborne, C., Jones v. Ogle, 42 LJ Ch.336). 'It is as large a word as can be used' to denote a person's receipts '(per Jessel, M.R. Re Huggins, 51 LJ Ch.938.) income is not confined to receipts from business only and means periodical receipts from one's work, lands, investments, etc. AIR 1921 Mad 427 (SB). Ref. 124 IC 511 : 1930 MWN 29 : 31 MLW 438 AIR 1930 Mad 626 : 58 MLJ 337."

29. Applying the test, it can safely be held that the claimants had to engage a labourer or a person, who has to supervise the orchards and have to pay, at least, Rs.5,000/- per month as salary to him. Thus, the claimants are held entitled to compensation under the head loss from agricultural income as Rs.5,000x12= Rs.60,000/- x14 total ***Rs.8,40,000/-.***

30. The apex Court has also discussed the same issue in another case titled ***State of Haryana and another*** **versus** ***Jasbir Kaur and others***, reported in ***(2003) 7 SCC 484.*** It is apt to reproduce para 8 of the said judgment herein:

"8. It is clear on a bare reading of the Tribunal's decision as affirmed by the High Court that no material was placed before the former to prove as to what was the income. As rightly contended by learned counsel for the appellants, there was not even any material adduced to show type of land which the deceased possessed. The matter can be approached from a different angle. The land possessed by the deceased still remains with the claimants as his legal heirs. There is however a possibility that the claimants may be required to engage persons to look after agriculture. Therefore, the normal rule about the deprivation of income is not strictly applicable to cases where agricultural income is the source. Attendant circumstances have to be considered. Furthermore, there was no material before the Tribunal to arrive at the figure of Rs. 4500 per month. No reason has been indicated to arrive at this figure. In the light of what has been discussed above about "just compensation" the income cannot be estimated without any material

> *to justify the estimation. In the normal course, we would have remitted the matter back to the Tribunal for fresh consideration. But considering the fact that one young person lost his life and the matter was pending before the Tribunal and the High Court for some years, we feel it appropriate to take all relevant factors into consideration, and decide the matter. Gauzing the relevant aspects, noted above, the monthly income is fixed at Rs. 3000/- per month, and after deducting Rs. 1,000/- for personal expenses, financial contribution so far as the claimant are concerned is fixed at Rs. 2,000/- per month. Worked out on the basis of multiplier of 18, the compensation is fixed at Rs. 4,32,000/-. The amount of Rs. 2,000/- awarded by the Tribunal for funeral expenses is not interfered with and thus the total compensation comes to Rs. 4,34,000/-. The rate of interest i.e. 9% per annum as fixed by the Tribunal and affirmed by the High Court is appropriate, and does not need any alteration. After adjusting the sum which was deposited pursuant to the order of this Court dated 14.12.2001, the balance amount along with interest shall be deposited within three months from today before the Tribunal. On the deposit being made along with the amount already deposited, a sum of Rs. 3 lakhs shall be kept in the fixed deposit in the name of the claimants and a sum of Rs. 50,000/- shall be kept in fixed deposit in the name of Smt. Baldev Kaur, mother of the deceased. They shall be entitled to draw interest on the deposit, which shall be re-deposited for further terms of five years. In case of urgent need, it shall be open to the claimants to move Tribunal for release of any part of the amount in deposit. The Tribunal shall consider the request for withdrawal and shall direct withdrawal in case of an urgent need and not otherwise of such sum as would meet the need. It shall be specifically indicated to the Bank where the deposits are to be made that no advance or withdrawal of any kind shall be permitted without the order of the Tribunal. It shall be open to the claimants to approach the Tribunal for variance of the order relating to deposit in fixed deposit, if any other scheme would fetch better returns and also would provide regular and permanent income.*

31. The claimants have specifically pleaded that the deceased was an insurance agent and was earning Rs.42,000/- per annum as insurance agent. The said income is also reflected in the income tax return Ext. PW4/B. The said fact has not been disputed by the driver, owner and the insurer. The insured has not questioned the said income tax return and even they have not led any evidence to dislodge the same. The claimants have proved the income tax return.

32. The learned counsel for the insurance company has argued that the income tax return cannot be taken into consideration without proving the same in accordance with law, is not correct. The judgment relied upon by him in case ***V. Subbulakshmi and others versus S. Lakshmi and another*** reported in ***(2008) 4 SCC 224***, is not in his favour but in favour of the claimants. It is apt to reproduce paras 20 to 24 of the said judgment herein:

> *"20. So far as the question in regard to the quantum of compensation awarded in favour of the appellants is concerned, we are of the opinion that the High Court has taken into consideration all the relevant evidences brought on record.*
>
> *21. The accident took place on 7.5.1997. Income tax returns were filed on 23.6.1997.*
>
> *22. The Income Tax Returns (Exp. P-14), therefore, have rightly not been relied upon.*
>
> *23. Ex.P-8 is a deed of lease. It was an unregistered document. Although the document was purported to have been executed on 10.4.1993, the genuineness thereof was open to question. The stamp paper was purchased in the year 1983 but an interpolation was made therein to show that it was purchased in 1993. The purported receipts granted by the tenant were also unstamped.*
>
> *24. In the aforementioned fact situation, the High Court has not relied upon all the aforementioned documents, filed by the appellant. It may be true that there was no basis for the High Court to arrive at the conclusion that the income of the deceased was Rs.4,000/- from agricultural operation and Rs. 3,000/- from his commission business, but no reliable document having been produced to show that the deceased was earning an income of Rs.12,500/- per month, as claimed. The High Court, in our opinion, cannot be held to have, thus, committed any grave error in this behalf. There is no dispute as regards application of the multiplier."*

33. The apex Court in case titled ***Amrit Bhanu Shali and others*** versus ***National Insurance Company Ltd. and others,*** reported in ***(2012) 11 SCC 738*** has laid down the principles how to grant compensation and how to reach the victim of a vehicular accident. It is apt to reproduce para 17 of the said judgment herein:

> *"17. The appellants produced Income Tax Returns of deceased-Ritesh Bhanu Shali for the years 2002 to 2008 which have been marked as Ext.P-10-C. The Income Tax Return for the year 2007-2008 filed on 12.03.2008 at Raipur, four months prior to the accident, shows the income of Rs.99,000/- per annum. The Tribunal has rightly taken into consideration the aforesaid income of Rs.99,000/- for computing the compensation. If the 50% of the income of Rs.99.000/- is deducted towards personal and living expenses' of the deceased the contribution to the family will be 50%, i.e., Rs 49,500/- per annum At the time of the accident, the deceased-*

Ritesh Bhanu Shali was 26 years old, hence on the basis of decision in Sarla Verma (supra) applying the multiplier of 17, the amount will come to Rs 49,500/- x 17 =Rs 8,41,500/- Besides this amount the claimants are entitled to get Rs.50,000/- each towards the affection of the son, i.e., Rs 1,00,000/- and Rs 10,000/- on account of funeral and ritual expenses and Rs 2,500/- on account of loss of sight as awarded by the Tribunal. Therefore, the total amount comes to Rs.9,54.000/- (Rs.8,41,500/- + Rs. 1,00.000/ - + Rs. 10.000/- + Rs.2,500/-) and the claimants are entitled to get the said amount of compensation instead of the amount awarded by the Tribunal and the High Court. They would also be entitled to get interest at the rate of 6% per annum from the date of the filing of the claim petition leaving rest of the conditions mentioned in the award intact."

34. The apex Court has also discussed this issue in ***Kalpanaraj and others versus Tamil Nadu State Transport Corporation*** reported in ***(2015) 2 SCC 764*** and held that there should be a judicial approach, while granting compensation to the victims of a vehicular accident. It is apt to reproduce para 8 of the said judgment herein:

"8. It is pertinent to note that the only available documentary evidence on record of the monthly income of the deceased is the income tax return filed by him with the Income Tax Department. The High Court was correct therefore, to determine the monthly income on the basis of the income tax return. However, the High Court erred in ascertaining the net income of the deceased as the amount to be taken into consideration for calculating compensation, in the light of the principle laid down by this Court in the case of National Insurance Company Ltd. v. Indira Srivastava and Ors, 2008 2 SCC 763. The relevant paragraphs of the case read as under:

"14. The question came for consideration before a learned Single Judge of the Madras High Court in National Insurance Co. Ltd. v. Padmavathy and Ors. wherein it was held:

'7 ..Income tax, Professional tax which are deducted from the salaried person goes to the coffers of the government under specific head and there is no return. Whereas, the General Provident Fund, Special Provident Fund, L.I.C., Contribution are amounts paid specific heads and the contribution is always repayable to an employee at the time of voluntary retirement, death or for any other reason. Such contribution made by the salaried person are deferred payments and they are savings. The Supreme Court as well as various High Courts have held that the compensation payable under the Motor Vehicles Act is statutory and that the deferred payments made to the employee are contractual. Courts have held that there cannot be any deductions in the statutory compensation, if the Legal Representatives are entitled to lump sum payment under the contractual liability. If the contributions made by the employee which are otherwise savings from the salary are deducted from the gross income

and only the net income is taken for computing the dependency compensation, then the Legal Representatives of the victim would lose considerable portion of the income. In view of the settled proposition of law, I am of the view, the Tribunal can make only statutory deductions such as Income tax and professional tax and any other contribution, which is not repayable by the employer, from the salary of the deceased person while determining the monthly income for computing the dependency compensation. Any contribution made by the employee during his life time, form part of the salary and they should be included in the monthly income, while computing the dependency compensation.'

15. Similar view was expressed by a learned Single Judge of Andhra Pradesh High Court in S. Narayanamma and Ors. v. Secretary to Government of India, Ministry of Telecommunications and Ors. holding:

> *12 .In this background, now we will examine the present deductions made by the tribunal from the salary of the deceased in fixing the monthly contribution of the deceased to his family. The tribunal has not even taken proper care while deducting the amounts from the salary of the deceased, at least the very nature of deductions from the salary of the deceased. My view is that the deductions made by the tribunal from the salary such as recovery of housing loan, vehicle loan, festival advance and other deductions, if any, to the benefit of the estate of the deceased cannot be deducted while computing the net monthly earnings of the deceased. These advances or loans are part of his salary. So far as House Rent Allowance is concerned, it is beneficial to the entire family of the deceased during his tenure, but for his untimely death the claimants are deprived of such benefit which they would have enjoyed if the deceased is alive. On the other hand, allowances, like Travelling Allowance, allowance for newspapers/periodicals, telephone, servant, club-fee, car maintenance etc., by virtue of his vocation need not be included in the salary while computing the net earnings of the deceased. The finding of the tribunal that the deceased was getting Rs.1,401/- as net income every month is unsustainable as the deductions made towards vehicle loan and other deductions were also taken into consideration while fixing the monthly income of the deceased. The above finding of the tribunal is contrary to the principle of 'just compensation' enunciated by the Supreme Court in the judgment in Helen's case. The Supreme Court in Concord of India Insurance Co. v. Nirmaladevi and Ors, 1980 ACJ 55 held that determination of quantum must be liberal and not*

niggardly since law values life and limb in a free country 'in generous scales'."

35. Thus, the claimants are entitled under the head loss of income as insurance agent but 1/4th is also to be deducted. Thus, the claimants have lost source of dependency to the tune of Rs.32,000/- per annum, under this head, are entitled to loss under the head income from LIC Rs.32000/- x 14 = total ***Rs.4,48,000/-.***

36. The Tribunal has awarded ***Rs.10,000/-*** each under the heads "Loss of consortium", "Funeral expenses" and loss of ***"love and affection".*** Total to the tune of ***Rs.30,000/-.*** The amount awarded under these heads is too meager in view of the latest judgment delivered by the apex court. However, I deem it proper to maintain the same. But the Tribunal has fallen in an error in not awarding compensation under the head "Loss of Estate". Therefore, I deem it proper to award ***Rs.10,000/-*** under the head ***"loss of estate".***

37. Having said so, the amount awarded by the Tribunal is too meager, is enhanced and accordingly claimants are held entitled to Rs.11,13,000/- + Rs.8,40,000/- + Rs.4,48,000/-Rs.30,000/- + Rs.10,000/= Total to the tune of ***Rs.24,41,000/-*** in all alongwith 9% interest, as awarded by the Tribunal.

38. The insurer is directed to deposit the enhanced amount along with 9% interest from the date of filing of the claim petition till its realization, within six weeks from today in this Registry, and also to deposit the amount awarded by the Tribunal, if not already deposited. On deposit, the entire amount be released to the claimants, strictly, in terms of the conditions contained in the impugned award, through payees' cheque account.

39. Resultantly, the impugned judgment is modified and the amount of compensation is enhanced, as indicated hereinabove.

40. Accordingly, the appeal is disposed of. Send down the record forthwith, after placing a copy of this judgment.

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

Gumti Devi …Appellant.
Versus
Pushpa Devi and others …Respondents.

FAO No. 76 of 2008
Decided on:19.06.2015

Motor Vehicle Act, 1988- Section 149- Claimants had specifically pleaded that driver of the vehicle had given lift to the deceased- owner stated in the reply that deceased was travelling in the vehicle in the capacity of a labourer – driver stated that deceased was travelling in the vehicle as owner of goods- held that in these circumstances, plea of insurance company that the deceased was a gratuitous passenger has to be accepted as correct - owner had committed willful breach of the terms and conditions of the policy and he was rightly saddled with liability. (Para-5 to 9)

For the appellant: Mr. Dibender Ghosh, Advocate.
For the respondents: Mr. Shyam Chauhan, Advocate, for respondents No. 1 to 4.
Mr. B.C. Verma, Advocate, for respondent No. 5.

Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is judgment and award, dated 19.11.2007, made by the Motor Accident Claims Tribunal (III), Shimla (for short "the Tribunal") in MACT No. 74-S/2 of 2005/04, titled as Pushpa Devi and others versus Gumti Devi and others, whereby compensation to the tune of Rs.4,00,000/- with interest @ 7.5 % per annum from the date of the petition till deposition of the amount came to be awarded in favour of the claimants and against the driver and owner-insured (for short "the impugned award").

2. The insurer, claimants and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-owner has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling her with liability.

4. The only question to be determined in this appeal is - whether the Tribunal has rightly held that the deceased was a gratuitous passenger, thus, the owner-insured has committed breach of the terms and conditions of the insurance policy read with the mandate of Sections 147 and 149 of the Motor Vehicles Act, 1988 (for short "MV Act")?

5. The claimants have specifically averred in para 24 of the claim petition that the driver of the offending vehicle had given lift to the deceased.

6. The owner-insured in reply to para 24 has stated that the deceased was travelling in the offending vehicle in the capacity of a labourer, whereas the driver in reply to the said para has stated that the deceased was travelling in the offending vehicle as owner of the goods.

7. It is worthwhile to record herein that the claimants have nowhere averred that the deceased was travelling in the offending vehicle as owner of the goods or had hired the same.

8. Thus, it can be safely said that the owner-insured has committed willful breach of the terms and conditions of the insurance policy.

9. Having said so, the Tribunal has rightly saddled the owner-insured with liability.

10. Viewed thus, the appeal merits to be dismissed and the impugned award is to be upheld. Accordingly, the impugned award is upheld and the appeal is dismissed.

11. At this stage, learned counsel for the claimants-respondents No. 1 to 4 stated at the Bar that the claimants have already received Rs.50,000/- under 'No Fault Liability'. The insurer has satisfied the interim award in view of the principle of 'No Fault Liability'.

12. Learned counsel for the appellant-insured also stated at the Bar that the owner-insured has already deposited Rs.25,000/- before the Registry at the time of filing of the appeal. The owner-insured is directed to deposit the remaining awarded amount (i.e. the

total awarded amount with interest - Rs.50,000/- + Rs.25,000/-) before the Registry within eight weeks.

13. On deposition of the amount, the same be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

14. Send down the record after placing copy of the judgment on the Tribunal's file.

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

National Insurance Company Ltd., ...Appellant

Versus

Shri Satish Kumar & others ...Respondents

FAO No. 337 of 2008
Date of decision: 19.6.2015

Motor Vehicle Act, 1988- Section 149- Driver possessed a valid driving licence to drive the vehicle at the time of accident – insurer was not able to show as to how driver did not have a valid and effective licence at the time of accident- insurer had also failed to prove any breach of the terms and conditions of the policy- therefore, insurer was rightly held liable to pay compensation. (Para-11 to 13)

For the appellant : Mr. Suneet Goel, Advocate.
For the respondents: M/s Anil Jaswal and Vivek Thakur, Advocates, for respondent No. 1.
Nemo for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

By the medium of this appeal, the appellant-insurer has invoked the jurisdiction of this Court as per the mandate of Section 173 of the Motor Vehicles Act, 1988, (for short 'the Act').

2. Challenge in this appeal is to the award, dated 4th March, 2008, made by the Motor Accident Claims Tribunal, Hamirpur, H.P. (hereinafter referred to as "the Tribunal") in MAC Petition No. 82 of 2006, whereby compensation to the tune of Rs.5,93,000/- with interest at the rate of 9% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimant-respondent No. 1 herein and the appellant-insurer came to be saddled with liability (for short, the "impugned award"), on the grounds taken in the memo of appeal.

3. The claimant, insured-owner and driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

4. The appellant-insurer has questioned the impugned award on the grounds that the Tribunal has fallen in error in saddling it with liability and the driver was not having a valid and effective driving licence at the time of accident.

5. The appellant-insurer has not questioned the findings returned by the Tribunal on the other issues.

6. The parties led evidence. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimant has proved that on 24.04.2005, at about 10.15 a.m., at Village Sawahal on Hamirpur-Sujanpur highway, driver, namely, Hari Om had driven the offending vehicle i.e. truck bearing registration No. HP-12-A-5843, rashly and negligently and caused the accident in which claimant Satish Kumar sustained injuries.

7. I have gone through the evidence and the documents on the record.

Issue No. 1.

8. The findings recorded on issue No. 1 are not in dispute. Thus, the findings recorded by the Tribunal on this issue are upheld.

9. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 & 4.

Issue No. 4.

10. The insurer has not led any evidence to prove how the claim petition was bad for non-joinder and mis-joinder of necessary parties. Accordingly, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No. 3.

11. The driver was having a valid and effective driving licence (Ext. RW-1/A) to drive the offending vehicle at the relevant point of time.

12. Neither the learned Counsel for the appellant-insurer has been able to establish or indicate that the driver was not having a valid and effective driving licence at the time of accident nor the insurer has led any evidence to substantiate the said plea. Accordingly, the findings recorded by the Tribunal on issue No. 3 are upheld.

13. The insurer has also not been able to prove that the driver had committed any breach. Accordingly, it is held that the insurer has to satisfy the award.

Issue No. 2.

14. The injured was 43 years of age at the time of accident. He has undergone pain and sufferings, has to undergo the said in future also. The said accident has shattered his physical frame. The Tribunal has rightly made discussions from paras 16 to 21 of the impugned award and rightly came to the conclusion. Having said so, the amount awarded is meager, cannot be said to excessive, in any way.

15. There is no merit in the appeal. Accordingly, the same is dismissed and the impugned award is upheld.

16. The Registry is directed to release the awarded amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees account cheque.

17. Send down the records after placing a copy of the judgment on the file of the claim petition.

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

Neelam Kumari .....Petitioner

Versus

Yogender Singh and others .....Respondents.

CMPMO No. 14 of 2015.
Date of Decision: 19th June, 2015

Code of Civil Procedure, 1908- Order 16 read with Sec.151- Petitioner filed an application for examining the material witnesses on the ground that it was reported in the summons that the witness had died about 16 years ago and it was necessary to examine his son-defendant No. 6 was also to be examined regarding the signatures of the marginal witnesses- held that mere delay in filing the application is not sufficient to dismiss the same- Rules of Procedure are handmaid of justice and the purpose of prescribing procedure is to advance the course of justice – marginal witness had died and his son is alive- brother of the plaintiff and other defendants are material witnesses - case relates to a dispute between the family members and, therefore, was required to be dealt with by exhibiting more compassion and sympathy - application allowed subject to the payment of cost of Rs. 40,000/-. (Para-7 to 27)

Cases referred:

Sangram Singh vs. Election Tribunal, Kotah, AIR 1955, S.C. 425
Blyth v. Blyth (1966 (1) All E.R. 524 (HL)
Balwant Singh Bhagwan Singh and another vs. Firm Raj Singh Baldev Kishen, AIR 1969 Punjab and Haryana 197
State of Gujarat vs. Ramprakash P. Puri, 1970 (2) SCR 875
Sushil Kumar Sen v. State of Bihar (1975) 1 SCC 774
Shreenath and Another vs. Rajesh and others AIR 1998 SC 1827)
R.N. Jadi & Brothers vs. Subhash Chandra), (2007) 9 Scale 202
Sambhaji and others vs. Gangabai and others (2008) 17 SCC 117
Rajendra Prasad Gupta vs. Prakash Chandra Mishra and others, SC 2011 (1) Scale 469
Mahadev Govind Gharge and others vs. The Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, 2011 (6) Scale 1

For the Petitioner : Mr. Bimal Gupta, Advocate.
For the Respondents : Mr. R. S. Gautam, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge ***(****Oral).*

This petition under Article 227 of the Constitution of India is directed against the order passed by the learned trial Court on 31.10.2014 whereby the applications filed by the petitioner under Order XVI read with Section 151 CPC and another application under Section 151 CPC came to be dismissed.

2. This is unfortunate family dispute. In view of the nature of order I propose to pass, the facts in detail, need not be stated.

3. The defendant No.1 had moved two applications. In the application under Section 151 CPC the defendant had sought the permission to lead additional evidence by

way of oral evidence of Rishi Thakur S/o late Sh. Sukhdev Singh. It was alleged that in the summons issued to the marginal witnesses of the Will dated 26.01.1969 which has been challenged by the plaintiff, it had been reported that he had died about 16 years back and, therefore, it was necessary to examine his son Rishi Thakur, who could depose about the signature of his late father.

4. Another application was filed by the petitioner under Order XVI read with Section 151 CPC for allowing the defendant/petitioner to examine defendant No.6 in evidence. It was alleged that defendant No.6 is the real brother of the plaintiff and other defendants and son of defendant No.2, who had not contested the suit nor stepped into the witness box, but now he was available and ready to depose regarding the signatures of the marginal witnesses as also his father who was executant of the Will.

5. The learned trial Court vide common order rejected these applications mainly influenced by the fact that issues in the case had been struck on 17.3.2011 and after recording the evidence the case had been fixed for final arguments since 16.4.2013.

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

7. It cannot be disputed that there has been inordinate delay on the part of the petitioner in filing the aforesaid applications. But can the rights of the petitioner be defeated only on account of there being delay in filing of the applications?

8. The proposition that Rules of Procedure are handmaid of justice and cannot take away the residuary power in Judges to act ex debito justitiae, where otherwise it would be wholly inequitable, is by now well founded.

9. It must be remembered that the Courts are respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so and further taking into consideration the fact that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done.

10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

11. The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

12. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

13. It is useful to quote the oft-quoted passage of Lord Penzance in 1879 (4) AC 504:

> *"Procedure is but the machinery of the law after all the channel and means whereby law is administered and justice reached. It strongly departs from its*

office when in place of facilitating, it is permitted to obstruct and even extinguish legal rights, and is thus made to govern when it ought to subserve."

14. In the matter of ***Sangram Singh*** vs. ***Election Tribunal, Kotah reported in AIR 1955, S.C. 425***, the Hon'ble Apex Court has observed as under:

> *"Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends, not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provide always that justice is done to both sides) less the very means designed for the furtherance of justice be used to frustrate it."*
>
> *"Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course there must be expectations and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso our laws of procedure should be construed, wherever that is reasonably possible in the light of that principle."*

15. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the Court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. (See: ***Blyth v. Blyth (1966 (1) All E.R. 524 (HL***).

16. In ***Balwant Singh Bhagwan Singh and another*** vs***. Firm Raj Singh Baldev Kishen*** reported in ***AIR 1969 Punjab and Haryana 197*** it was held that:

> *"Promptitude and despatch in the dispensation of justice is a desirable thing but not at the cost of justice. All rules of procedure are nothing but handmaids of justice. They cannot be construed in a manner, which would hamper justice. As a general rule, evidence should never be shut out. The fullest opportunity should always be given to the parties to give evidence if the justice of the case requires it. It is immaterial if the original omission to give evidence or to deposit process fee arises from negligence or carelessness."*

17. In the matter of ***State of Gujarat*** vs***. Ramprakash P. Puri,*** reported in ***1970 (2) SCR 875,*** the Hon'ble Apex Court has held that:

> *"Procedure has been described to be a hand-maid and not a mistress of law, intended to subserve and facilitate the cause of justice and not to govern or obstruct it. Like all rules of procedure, this rule demands a construction which would promote this cause."*

18. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justiciae where the tragic sequel otherwise would be wholly inequitable. - Justice is the goal of jurisprudence – processual, as much as substantive. (***See Sushil Kumar Sen v. State of Bihar (1975) 1 SCC 774).***

19. A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. (See ***Shreenath and Another vs. Rajesh and others AIR 1998 SC 1827***).

20. The Hon'ble Supreme Court in ***(2007) 9 Scale 202 (R.N. Jadi & Brothers vs. Subhash Chandra***), considered the procedural law vis-à-vis substantive law and observed as under:

> *"9. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice."*

21. Procedure is only handmaid of Justice:- All the rules of procedure are the handmaids of justice. Any interpretation which eludes substantive justice is not to be followed. Observing that procedure law is not to be a tyrant, but a servant, in ***Sambhaji and others*** vs. ***Gangabai and others (2008) 17 SCC 117,*** the Hon'ble Supreme Court held as under:

> *"6.(14) Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescription is the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."*

22. In ***2011 (1) Scale 469 Rajendra Prasad Gupta*** vs. ***Prakash Chandra Mishra and others,*** the issue before the Hon'ble Supreme Court was as to whether an application will be maintainable before the trial Court to withdraw the application filed earlier for withdrawal of the suit. The trial Court dismissed the application as not maintainable. The High Court held that once the application for withdrawal of the suit is filed the suit stands dismissed as withdrawn even without there being any order on the withdrawal application and as such another application at a later point of time to withdraw the suit was not maintainable. When the matter was taken up in appeal, the Hon'ble Supreme Court disagreed with the views expressed by the High Court. While allowing the appeal, the Hon'ble Supreme Court observed thus:

> *"5. Rules of procedure are handmaids of justice. Section 151 of the Code of Civil Procedure gives inherent powers to the court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted."*

23. The Hon'ble Supreme Court in ***2011 (6) Scale 1 Mahadev Govind Gharge and others*** vs. ***The Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka***, reiterated the legal position regarding procedural law and observed:

> *"28. Thus, it is an undisputed principle of law that the procedural laws are primarily intended to achieve the ends of justice and, normally, not to shut the doors of justice for the parties at the very threshold....."*

24. In view of the aforesaid exposition of law, it can safely be concluded that the learned trial Court erred in dismissing the applications solely on the ground of delay without taking into consideration the humanist rule that procedure should be the handmaid, not the mistress of legal justice and it always vested with the residuary power to act ex debito justitiae where otherwise it would be wholly inequitable. Apart from that, learned trial Court has completely misconstrued the provisions of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act.

25. It has been established on record that the marginal witness Sukhdev Singh had died, however, his son Rishi Thakur was very much alive. Similarly, once the defendant No.6, who is none other than the brother of the plaintiff and other defendants was sought to be examined as a witness, I see no reason how the learned trial Court could have invoked the provisions of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act to refuse such permission.

26. Learned trial Court appears to be oblivious to the fact that here was a case inter se the family members and, therefore, was required to be dealt with by exhibiting more compassion and sympathy and by not stretching the rigors of law to the breaking point.

27. Having said so, I find merit in this petition and the order dated 31.10.2014 passed by learned Civil Judge ((Jr. Division), Court No.2, Paonta Sahib, District Sirmaur, is set-aside. But at the same time, this Court cannot ignore the fact that there has been a considerable delay on the part of the petitioner in moving the aforesaid applications. Accordingly, the present petition is allowed, but subject to costs of Rs.20,000/- in each, i.e. Rs.40,000/-, which needless to say, shall be paid to the opposite party. The parties through their counsel are directed to appear before the learned trial Court on ***23.7.2015***. The Registry is directed to send the record forthwith so as to reach well before the date fixed.

28. Interim order dated 08.01.2015 is vacated. The pending application also stands disposed of.

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

FAO No. 256 of 2010 a/w FAOs No. 257 to 260, 266 to 274, 297, 298, 301, 337 of 2010, 64,152, 153 of 2011, 4009, 4089, 4093 and 4102 of 2013
Reserved on:29.05.2015
Decided on: 19.06.2015

1. FAO No. 256 of 2010

Oriental Insurance Company …Appellant.
Versus
Smt. Indiro & others …Respondents.

2. FAO No. 257 of 2010

Oriental Insurance Company …Appellant.
Versus
Smt. Kanta & others …Respondents.

3. FAO No. 258 of 2010

Oriental Insurance Company …Appellant.
Versus
Smt. Vidya & others …Respondents.

4. FAO No. 259 of 2010
Oriental Insurance Company …Appellant.
Versus
Smt. Bimla Devi & others …Respondents.

5. FAO No. 260 of 2010
Oriental Insurance Company …Appellant.
Versus
Shri Ashok Kumar & others …Respondents.

6. FAO No. 266 of 2010
Oriental Insurance Company …Appellant.
Versus
Smt. Maya & others …Respondents.

7. FAO No. 267 of 2010
Oriental Insurance Company …Appellant.
Versus
Smt. Sumitra Devi & others …Respondents.

8. FAO No. 268 of 2010
Oriental Insurance Company …Appellant.
Versus
Smt. Kamlesh & others …Respondents.

9. FAO No. 269 of 2010
Oriental Insurance Company …Appellant.
Versus
Smt. Lambo & others …Respondents.

10. FAO No. 270 of 2010
Oriental Insurance Company …Appellant.
Versus
Smt. Lambo & others …Respondents.

11. FAO No. 271 of 2010
Oriental Insurance Company …Appellant.
Versus
Smt. Kanta & others …Respondents.

12. FAO No. 272 of 2010
Oriental Insurance Company …Appellant.
Versus
Smt. Veena Devi & others …Respondents.

13. FAO No. 273 of 2010
Oriental Insurance Company …Appellant.
Versus
Shri Ashok Kumar & others …Respondents.

14. FAO No. 274 of 2010
Oriental Insurance Company …Appellant.
Versus
Shri Ramesh Kumar & others …Respondents.

15. FAO No. 297 of 2010
Oriental Insurance Company ...Appellant.
Versus
Uttam Kumar & others ...Respondents.
16. FAO No. 298 of 2010
Oriental Insurance Company ...Appellant.
Versus
Smt. Leela Devi & others ...Respondents.
17. FAO No. 301 of 2010
Oriental Insurance Company ...Appellant.
Versus
Des Raj & others ...Respondents.
18. FAO No. 337 of 2010
Oriental Insurance Company ...Appellant.
Versus
Darshna Devi & others ...Respondents.
19. FAO No. 64 of 2011
Oriental Insurance Company ...Appellant.
Versus
Shri Lekh Raj & others ...Respondents.
20. FAO No. 152 of 2011
Oriental Insurance Company ...Appellant.
Versus
Smt. Naseem Begum & others ...Respondents.
21. FAO No. 153 of 2011
Oriental Insurance Company ...Appellant.
Versus
Smt. Naseem Begum & others ...Respondents.
22. FAO No. 4009 of 2013
Oriental Insurance Company Limited ...Appellant.
Versus
Smt. Man Dei & others ...Respondents.
23. FAO No. 4089 of 2013
The Oriental Insurance Company Limited ...Appellant.
Versus
Shri Uttam & others ...Respondents.
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24. FAO No. 4093 of 2013
The Oriental Insurance Company Limited ...Appellant.
Versus
Shri Des Raj & others ...Respondents.
25. FAO No. 4102 of 2013
The Oriental Insurance Company Limited ...Appellant.
Versus
Smt. Sumitra & others ...Respondents.

Motor Vehicle Act, 1988- Section 149- 24 persons died and 40 persons were injured in a motor vehicle accident- 25 claim petitions were filed- seating capacity of vehicle was 42+2-

Insurer has to satisfy the award to the extent of risk cover- if the claim petitions are more than the risk covered, then it is for the insured to satisfy the same. (Para-12 to 15)

Motor Vehicle Act, 1988- Section 171- Interest was awarded by MACT @ 12% P.A. in all the petitions except 7 in which interest was awarded @ 7.5 % p.a.- held, that interest has to be awarded as per the prevailing rate- interest awarded @ 9% p.a. in all the claim petitions. (Para-16 to 24)

Cases referred:

United India Insurance Company Limited versus K.M. Poonam & others, 2011 ACJ 917
National Insurance Company Limited versus Anjana Shyam & others, 2007 AIR SCW 5237
Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 Supreme Court Cases 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 Supreme Court Cases 434
State of Haryana and another versus Jasbir Kaur and others, AIR 2003 Supreme Court 3696
Ningamma & another versus United India Insurance Co. Ltd., 2009 AIR SCW 4916

FAO No. 257 of 2010

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents: Mr. Vikas Rathore, Advocate, for respondents No. 1 to 4.
Mr. Hamender Chandel, Advocate, for respondent No. 5.
Nemo for respondent No. 6.

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FAO No. 256 of 2010

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents: Mr. Rajiv Rai, Advocate, for respondents No. 1 to 4.
Mr. Hamender Chandel, Advocate, for respondent No. 5.
Nemo for respondent No. 6.

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FAO No. 258 of 2010

For the appellant: Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents: Mr. Avinash Jaryal, Advocate, for respondents No. 1 to 4.
Mr. Hamender Chandel, Advocate, for respondent No. 5.
Nemo for respondent No. 6.

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FAO No. 259 of 2010

For the appellant:	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents:	Mr. Vijay Chaudhary, Advocate, for respondents No. 1 to 5. Mr. Hamender Chandel, Advocate, for respondent No. 6. Nemo for respondent No. 7.

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FAO No. 260 of 2010

For the appellant:	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents:	Mr. Vikas Rathore, Advocate, for respondents No. 1 & 2. Mr. Hamender Chandel, Advocate, for respondent No. 3. Nemo for respondent No. 4.

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FAO No. 266 of 2010

For the appellant:	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents:	Mr. Avinash Jaryal, Advocate, for respondents No. 1, and 4 to 7. Mr. Hamender Chandel, Advocate, for respondent No. 2. Nemo for respondent No. 3.

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FAO No. 267 of 2010

For the appellant:	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents:	Mr. Avinash Jaryal, Advocate, for respondents No. 1 to 5. Mr. Hamender Chandel, Advocate, for respondent No. 6. Nemo for respondent No. 7.

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FAO No. 268 of 2010

For the appellant:	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents:	Mr. Avinash Jaryal, Advocate, for respondents No. 1 to 4. Mr. Hamender Chandel, Advocate, for respondent No. 5. Nemo for respondent No. 6.

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FAOs No. 269 & 270 of 2010

For the appellant(s):	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents:	Mr. Vikas Rathore, Advocate, for respondents No. 1 to 5. Mr. Hamender Chandel, Advocate, for respondent No. 6. Nemo for respondent No. 7.

FAO No. 271 of 2010

For the appellant:	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents:	Mr. Vikas Rathore, Advocate, for respondents No. 1 to 4. Mr. Hamender Chandel, Advocate, for respondent No. 5. Nemo for respondent No. 6.

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FAO No. 272 of 2010

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

For the respondents: Mr. Vikas Rathore, Advocate, for respondents No. 1 to 3.
Mr. Hamender Chandel, Advocate, for respondent No. 4.
Nemo for respondent No. 5.

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FAO No. 273 of 2010

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

For the respondents: Mr. Vikas Rathore, Advocate, for respondents No. 1 & 2.
Mr. Hamender Chandel, Advocate, for respondent No. 3.
Nemo for respondent No. 4.

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FAO No. 274 of 2010

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

For the respondents: Mr. Kulbhushan Khajuria, Advocate, for respondents No. 1 to 3.
Mr. Hamender Chandel, Advocate, for respondent No. 4.
Nemo for respondent No. 5.

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FAO No. 297 of 2010

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

For the respondents: Mr. Nimish Gupta, Advocate, for respondents No. 1 to 3.
Mr. Hamender Chandel, Advocate, for respondent No. 4.
Nemo for respondent No. 5.

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FAO No. 298 of 2010

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

For the respondents: Mr. Avinash Jaryal, Advocate, for respondents No. 1 to 4.
Mr. Hamender Chandel, Advocate, for respondent No. 5.
Nemo for respondent No. 6.

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FAO No. 301 of 2010

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

For the respondents: Mr. Nimish Gupta, Advocate, for respondents No. 1 to 5.
Mr. Hamender Chandel, Advocate, for respondent No. 6.
Nemo for respondent No. 7.

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FAO No. 337 of 2010

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

For the respondents: Mr. Vijay K. Verma, Advocate, for respondents No. 1 to 3.

Mr. Hamender Chandel, Advocate, for respondent No. 4.
Nemo for respondent No. 5.

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FAO No. 64 of 2011

For the appellant:	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents:	Nemo for respondents No. 1 to 4. Mr. Hamender Chandel, Advocate, for respondent No. 5.

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FAOs No. 152 & 153 of 2011

For the appellant(s):	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents:	Nemo for respondents No. 1 and 3. Mr. Hamender Chandel, Advocate, for respondent No. 2.

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FAO No. 4009 of 2013

For the appellant:	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents:	Mr. Vijay K. Verma, Advocate, for respondents No. 1 to 3. Mr. Hamender Chandel, Advocate, for respondent No. 4. Nemo for respondent No. 5.

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FAOs No. 4089, 4093 & 4102 of 2013

For the appellant(s):	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents:	Mr. Parveen Chauhan, Advocate, for respondent No. 1. Mr. Hamender Chandel, Advocate, for respondent No. 2. Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This judgment shall govern all the twenty five appeals because these are outcome of one motor vehicular accident.

2. These appeals are outcome of the awards made by the Motor Accident Claims Tribunals (for short "the Tribunals") in various claim petitions, which were filed by the claimants being victims of the vehicular accident for grant of compensation, as per the break-ups given in the respective claim petitions (for short "the impugned awards").

3. The claimants have averred in the claim petitions that the driver, namely Shri Satish Kumar, has driven the offending vehicle, i.e. passenger bus, bearing registration No. HP-48-3321, rashly and negligently on 14.08.2009, at place Kundi at about 2.15 - 2.30 P.M. and caused the accident in which 24 persons sustained injuries and succumbed to the injuries and 40 persons sustained injuries.

4. Out of the said passengers, victims/claimants have filed only 25 claim petitions and compensation came to be awarded in favour of the claimants, details of which are given in the respective impugned awards.

5. The claimants, the owner-insured and the driver have not questioned any of the impugned awards on any count, thus, all the impugned awards have attained finality so far the same relate to them.

6. The insurer has questioned the impugned awards on the ground that the owner-insured and the driver have committed breach for the reason that the offending vehicle was being driven in violation of the route permit and the insurance policy read with the mandate of Sections 147 to 149 of the Motor Vehicles Act, 1988, (for short "the MV Act").

7. Thus, the following points are to be determined in these appeals:

> (i) Whether the driver of the offending vehicle was not having a valid and effective driving licence at the relevant point of time?
>
> (ii) Whether the owner-insured has committed breach as more than prescribed/permitted passengers were travelling as passengers in the offending vehicle at the time of the accident?

8. The insurer has failed to prove the issue relating to the driving licence of the driver of the offending vehicle. All the Tribunals, while making the impugned awards, have held that the driver of the offending vehicle was having a valid and effective driving licence at the time of the accident.

9. I have perused the records and am of the considered view that there is sufficient evidence on the file to hold that the driver of the offending vehicle was having a valid and effective driving licence to drive the offending vehicle at the relevant point of time. Thus, the insurer has failed to discharge the onus.

10. It is worthwhile to mention herein that the learned counsel for the insurer has not questioned the findings returned by the Tribunals relating to the driving licence of the driver. Accordingly, the findings returned by the Tribunals on this issue are upheld.

11. It was for the insurer to plead and prove that the owner-insured has committed any willful breach, has failed to do so. No doubt, more than prescribed passengers were travelling in the offending vehicle at the time of the accident, but only twenty five persons have laid the claim petitions. The seating capacity of the offending vehicle was '42 + 2' and the factum of the insurance is not in dispute. Thus, the risk of 42 passengers is covered.

12. It is beaten law of land that the insurer has to satisfy the award to the extent of the risk covered and if the claim petitions are more than the risk covered, then it is for the insured-owner to satisfy the same.

13. My this view is fortified by the judgment of the Apex Court in the case titled as **United India Insurance Company Limited versus K.M. Poonam & others,** reported in **2011 ACJ 917.** It is apt to reproduce para 24 of the judgment herein:

> *"24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons*

only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle."

14. It is also apt to reproduce para 15 of the judgment of the Apex Court in the case titled as **National Insurance Company Limited versus Anjana Shyam & others,** reported in **2007 AIR SCW 5237,** herein:

"15. In spite of the relevant provisions of the statute, insurance still remains a contract between the owner and the insurer and the parties are governed by the terms of their contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner, and meet the claims of third parties subject to the exceptions provided in Section 149(2) of the Act. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. The High Court has considered only the aspect whether by overloading the vehicle, the owner had put the vehicle to a use not allowed by the permit under which the vehicle is used. This aspect is different from the aspect of determining the extent of the liability of the insurance company in respect of the passengers of a stage carriage insured in terms of Section 147(1)(b)(ii) of the Act. We are of the view that the insurance company can be made liable only in respect of the number of passengers for whom insurance can be taken under the Act and for whom insurance has been taken as a fact and not in respect of the other passengers involved in the accident in a case of overloading."

15. This Court in batches of appeals, **FAO No. 257 of 2006,** titled as **National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others,** being the lead case, decided on 10.04.2015, and **FAO No. 224 of 2008,** titled as **Hem Ram & another versus Krishan Chand & another,** being the lead case, decided on 29.05.2015, has laid down the same principle, which is not disputed by the learned counsel for the insurer.

16. Learned counsel for the insurer argued that the amount awarded in all the claim petitions, on the face of it, is excessive and came to be passed in violation of the Second Schedule appended with the MV Act read with the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120,** and also not in tune with the insurance policy/agreement and the pleadings of the parties.

17. Perusal of the impugned awards does disclose that interest has been awarded @ 12% per annum in all the claim petitions except seven claim petitions, which are subject matter of FAOs No. 64, 152, 153 of 2011, 4009, 4089, 4093 and 4102 of 2013, in which interest has been awarded @ 7.5% per annum, which is not in tune with Section 171 of the MV Act, which provides that the interest is to be paid as per the prevailing rates.

18. The Apex Court in the case titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in **(2002) 6 Supreme Court Cases 281,** reduced the rate of interest on compensation to 9% from 12% awarded by the High Court. It is apt to reproduce relevant portion of para 39 of the judgment herein:

> *"39. ....*
>
> *Thereafter, the observations made in the case of Kaushnuma Begum, v. New India Assurance Co. Ltd., (2001) 2 SCC 9 : 2001 SCC (Cri) 268, have been quoted. After so much of discussion on the point of rate of interest and after mentioning the decisions relied upon by both the side or their part, it could not be said that rate of interest was not in dispute before the Court. As indicated earlier the observation is not indicated to have been made in reference to any statement of the Counsel for the party nor it come out that the respective parties may not have advanced arguments for maintaining the rate of interest as awarded and the other party for reducing the rate of interest. In the light of the position indicated above, we do not think it will be possible to shut out the Insurance Company from urging before us that lesser rate of interest should have been awarded in place of 12% as awarded by the High Court. Before us also, learned Counsel for the Insurance Company has referred the decision of this Court reported in A. Robert v. United Insurance Co. Ltd., (1999) 2 SCC 463 : 1982 SCC (Cri) 478, to indicate that interest at the rate of 6% was awarded in that case. Another case cited awarding 6% interest is M. S. Grewal v. Deep Chand Sood, (2001) 8 SCC 151 : 2001 SCC (Cri) 1426 : (2001) 2 ACC 540, particularly para 34 SCC para 39) has been referred. Jefford & Anr. v. Gee, (1970) 1 All ER 1202 : (1970) 2 QB 130 : (1970) 2 WLR 702 (CA), has also been*

referred to indicate that the amount awarded is on account of loss of future earning whereas the interest is payable on being kept out of the money it is therefore submitted that the interest may not be payable on the loss of future earning. Another decision which has been referred to is R. D. Hattangadi v. Pest Control (India) (P) Ltd., (1995) 1 SCC 551 : 1995 SCC (Cri) 250, more particularly para 18 of the judgment where it has been held that no interest is awardable on the amount of future expenditure. It is further observed: (SCC p. 559, para 18)

> *"It need not be pointed out that interest is to be paid over the amount which has become payable on the date of award and not which is to be paid for expenditures to be incurred in future."*

But it not indicated by the learned Counsel for the appellant-Insurance Company as to which is that amount out of the amount awarded which is on account of future expenditure yet to be incurred by the claimants. The interest is to be awarded on the amount which is payable on the date of the award. It is also to be noted that in some cases interest at the rate of 6% was awarded. This case however does not help the appellant Insurance Company. The next case which has been cited is Kaushnuma Begum v. New India Assurance Co. Ltd., (2001) 2 SCC 9 : 2001 SCC (Cri) 268. In this case, interest at the rate of 9% was awarded. The reason indicated in para 24 of the judgment, we quote hereunder : (SCC p. 16)

> *"24. Now, we have to fix up the rate of interest. Section 171 of the M. V. Act empowers the Tribunal to direct that 'in addition to the amount of compensation simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as may be specified in this behalf'. Earlier, 12% was found to be the reasonable rate of simple interest. With a change in economy and the policy of Reserve Bank of India the interest rate has been lowered. The nationalized banks are now granting interest at the rate of 9% on fixed deposit for one year. We, therefore, direct that the compensation amount fixed hereinbefore shall bear interest at the rate of 9% per annum from the date of the claim made by the appellants."*

In our view the reason indicated in the case of Kaushnuma Begum (supra) is a valid reason and it may be noticed that the rate of interest is already on the decline. We therefore, reduce the rate of interest to 9% in place of 12% as awarded by the High Court.

(Emphasis added)"

19. The Apex Court in another case titled as **Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892,** held that the Courts should take into consideration the changing socio-economic conditions. It is apt to reproduce para 11 of the judgment herein:

> *"11. We have considered the respective arguments. Although, the legal jurisprudence developed in the country in last five decades is somewhat precedent-centric, the judgments which have bearing on socio-economic conditions of the citizens and issues relating to compensation payable to the victims of motor accidents, those who are deprived of their land and similar matters needs to be frequently revisited keeping in view the fast changing societal values, the effect of globalisation on the economy of the nation and their impact on the life of the people."*

20. The Apex Court in a case titled as **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 Supreme Court Cases 738,** awarded interest @ 6% per annum. It is apt to reproduce para 17 of the judgment herein:

> *"17. The appellants produced Income Tax Returns of deceased-Ritesh Bhanu Shali for the years 2002 to 2008 which have been marked as Ext. P-10-C. The Income Tax Return for the year 2007-2008 filed on 12-03-2008 at Raipur, four months prior to the accident, shows the income of Rs. 99,000/- per annum. The Tribunal has rightly taken into consideration the aforesaid income of Rs. 99,000/- for computing the compensation. If the 50% of the income of Rs. 99,000/- is deducted towards personal and living expenses of the deceased the contribution to the family will be 50%, i.e., Rs.49,500/- per annum. At the time of the accident, the deceased-Ritesh Bhanu Shali was 26 years old, hence on the basis of decision in Sarla Verma applying the multiplier of 17, the amount will come to Rs. 49,500/- x 17 = Rs. 8,41,500/-. Besides this amount the claimants are entitled to get Rs. 50,000/- each towards the affection of the son, i.e., Rs. 1,00,000/- and Rs. 10,000/- on account of funeral and ritual expenses and Rs. 2,500/- on account of loss of sight as awarded by the Tribunal. Therefore, the total amount comes to Rs. 9,54,000/- (Rs. 8,41,500/- + Rs. 1,00,000/- + Rs. 10,000/- + Rs. 2,500/-) and the claimants are entitled to get the said amount of compensation instead of the amount awarded by the Tribunal and the High Court. They would also be entitled to get interest at the rate of 6% per annum from the date of the filing of the claim petition leaving rest of the conditions mentioned in the award intact."*

21. The Apex Court in the case titled as **Smt. Savita versus Binder Singh & others,** reported in **2014 AIR SCW 2053,** modified the order made by the Tribunal and

enhanced the rate of interest to 8% from 6% as awarded by the Tribunal. It is apt to reproduce paras 3.2 and 10 of the judgment herein:

> *"3.2 In the claim petition, the appellant-claimant asked for compensation of 20,20,000/0 along with interest at the rate of 12% per annum fromt he respondents/opposite parties. The parties filed their pleadings before the Tribunal and the following issues were framed:*
>
> *...................*
>
> *10. The order of the High Court and Tribunal is modified. We direct that the claimant/appellant is entitled to a sum of Rs. 6,55,400/- plus interest @ 8 per cent per annum from the date of filing of the claim petition till the date of payment as compensation. Accordingly, we direct that the enhanced amount should be paid to the appellant after deducting the amount already paid, within a period of four weeks from date. For the reasons stated hereinabove, the appeal is partly allowed."*

22. The Apex Court in the case titled as **Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982,** held that the High Court was justified in reducing the rate of interest to 9% per annum from 12% per annum, as awarded by the Tribunal. It is apt to reproduce relevant portion of para 16 of the judgment herein:

> *"16. Further, the High Court has awarded the compensation with interest @ 9% per annum. We concur with this holding of the High Court in the light of the decision of this Court in Municipal Corporation of Delhi, Delhi v. Uphaar Tragedy Victims Association & Ors, (2011) 14 SCC 481 : AIR 2012 SC 100 : 2011 AIR SCW 6418. Accordingly, we award an interest @ 9% per annum on the compensation to be awarded to the appellants- claimants. ...."*

23. The Apex Court in latest judgments in the cases titled as **Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 Supreme Court Cases 433,** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 Supreme Court Cases 434,** awarded interest @ 9% per annum. It is apt to reproduce para 2 of the judgment in **Amresh Kumari's case (supra)** herein:

> *"2. We have heard the learned counsel for the parties. The question whether interest on the amount of compensation determined to be payable to the claimant is to be awarded from the date of the award or from the date of the filing of the claim petition came up for consideration before this court in Mohinder Kaur v. Hira Nand Sindhi, (2015) 4 SCC 434, to which one of us (D.K. Jain, J.) was a party, it was held that the claimant was entitled to interest from the date of filing of the claim petition. Following the said decision, we hold that the appellant would be entitled to simple interest @ 9 per cent, as awarded by the learned Single Judge, from the date of filing of the claim petition i.e. 11-8-1986."*

24. Having said so, I am of the considered view that the interest awarded in all the claim petitions is not in tune with the ratio laid down by the Apex Court read with the mandate of Section 171 of the MV act. Thus, I deem it proper to award interest at the prevailing rate. Accordingly, it is held that the interest @ 9% per annum is granted in all the claim petitions.

25. The next question is - whether the amount awarded is excessive and whether the insurer can question the same?

26. The law developed on the issue is that the insurer cannot question the adequacy of compensation, but, at the same time, the Court has to examine as to what is just compensation and where it appears, on the face of it, to be a booty and borne in disguise, the Court has to interfere.

27. The mandate of Section 168 (1) of the MV Act is to 'determine the amount of compensation which appears to it to be just'.

28. The word "just' has been defined in the **Webster's Encyclopedic Unabridged Dictionary of the English Language, Deluxe Edition,** at page No. 1040, herein:

> "**just,** adj. **1.** guided by truth, reason, justice, and fairness: *We hope to be just in our understanding of such difficult situation.* **2.** done or made according to principle; equitable; proper: *a just reply.* **3.** based on right; rightful; lawful; *a just claim.* **4.** in keeping with truth or fact; true; correct: *a just analysis.* **5.** given or awarded rightly; deserved, as a sentence, punishment, or reward: *a just penalty.* **6.** in accordance with standards or requirements; proper or right: *just proportions.* **7. (**esp. in Biblical use) righteous. **8.** actual, real, or genuine. -*adv.* **9.** within a brief preceding time; but a moment before: *The sun just came out.* **10.** exactly or precisely: *This is just what I mean.* **11.** by a narrow margin: barely: *The arrow just missed the mark.* **12.** only or merely: *he was just a clerk until he became ambitious.* **13.** actually; really; positively: *The weather is just glorious."*

29. In the **Oxford Advanced Learner's Dictionary,** the word "just" has been defined at page No. 702, as under:

> *"**just. -** adv. **1.** exactly, **2.** at the same moment as, **3.** as good,nice, easily, etc., **4.** after, beefore, under, etc. sth, **5.** used to say that you/sb did sth very recently, **6.** at this/that moment, **7.** about/going to do sth, **8.** simply, **9.** (informal) really; completely, **10.** to do sth only, **11.** used in orders to get sb's attention, give permission etc., **12.** used to make a polite request, excuse etc., **13.** could/might/may - used to show a slight possibility that sth is true to will happen, **14.** used to agree with sb..........*
>
> *adj. **1.** that most people consider to be morally fair and reasonable, **2.** people who are just **3.** appropriate in a particular situation."*

30. In the case titled as **State of Haryana and another versus Jasbir Kaur and others,** reported in **AIR 2003 Supreme Court 3696,** the Apex Court has discussed the expression 'just'. It is apt to reproduce para 7 of the judgment herein:

> *"7. It has to be kept in view that the Tribunal constituted under the Act as provided in S. 168 is required to make an award determining the amount of compensation which is to be in the real sense "damages" which in turn appears to it to be 'just and reasonable'. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate the compensation must be "just" and it cannot be a bonanza; nor a source of profit; but the same should not be a pittance. The Courts and Tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a wide discretion is vested on the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot be just. (See Helen C. Rebello v. Maharashtra State Road Transport Corporation (AIR 1998 SC 3191)."*

31. The Apex Court in another case titled as **Ningamma & another versus United India Insurance Co. Ltd.,** reported in **2009 AIR SCW 4916,** held that the Court is duty bound to award just compensation to which the claimants are entitled to. It is profitable to reproduce para 25 of the judgment herein:

> *"25. Undoubtedly, Section 166 of the MVA deals with "Just Compensation" and even if in the pleadings no specific claim was made under section 166 of the MVA, in our considered opinion a party should not be deprived from getting "Just Compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the Court is duty bound and entitled to award "Just Compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. However, whether or not the claimants would be governed with the terms and conditions of the insurance policy and whether*

or not the provisions of Section 147 of the MVA would be applicable in the present case and also whether or not there was rash and negligent driving on the part of the deceased, are essentially a matter of fact which was required to be considered and answered at least by the High Court."

32. The Apex Court in a latest judgment in the case titled as **Smt. Savita versus Bindar Singh & others,** reported in **2014 AIR SCW 2053,** has laid down the same proposition of law and held that the Tribunal as well as the Appellate Court can ignore the claim made by the claimant in the application for compensation. It is apt to reproduce para 6 of the judgment herein:

"6. After considering the decisions of this Court in Santosh Devi as well as Rajesh v. Rajbir Singh (supra), we are of the opinion that it is the duty of the Court to fix a just compensation. At the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation."

33. Applying the test, one comes to an inescapable conclusion that the Tribunals have virtually fallen in an error in applying the multiplier in most of the claim petitions. Thus, I deem it proper to reduce the multiplier applied in most of the claim petitions as follows:

<u>1. FAO No. 256 of 2010:</u>

34. The Tribunal, after taking the income of the deceased to be Rs.10,000/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.80,004/- per annum, and applying the multiplier of '13', held the claimants entitled to compensation to the tune of Rs.10,40,052/- under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.11,20,052/- .

35. Admittedly, the age of the deceased was 46 years. The age of the widow was 40 years and two of the children was 17 years and 14 years, at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '11' is applicable. Thus, the claimants are held entitled to Rs.80,004/- x 11 = Rs.,80,044/- under the head 'loss of income'. The

claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

36. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.8,80,044/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.9,10,044/-.

2. FAO No. 257 of 2010

37. The Tribunal, after taking the income of the deceased to be Rs.10,000/- per month, after deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.80,004/- per annum, and applying the multiplier of '16', held the claimants entitled to compensation to the tune of Rs.12,80,064/- under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.13,60,064/- .

38. Admittedly, the age of the deceased was 40 years. The claimants are the widow and the sons and daughters of the deceased. The age of the widow was also 40 years at the relevant point of time. Applying the ratio of the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '14' is applicable. Thus, the claimants are held entitled to Rs.80,004/- x 14 = Rs.11,20,056/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

39. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.11,20,056/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.11,50,056/-.

3. FAO No. 258 of 2010:

40. The Tribunal, after taking the income of the deceased to be Rs.9,591/- per month, after deducting one third towards his personal expenses, assessed loss of dependency to the claimant to the tune of Rs.76,728/- per annum, and applying the multiplier of '11', held the claimants entitled to compensation to the tune of Rs. 8,44,0888/- under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.30,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.9,14,088/- .

41. Admittedly, the age of the deceased was 55 years. The age of the widow was 45 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimant and the judgments in **Sarla Verma and Reshma Kumari's cases (supra),** multiplier of '9' is applicable. Thus, the claimant is held entitled to Rs.76,728/- x 9 = Rs.6,90,552/- under the head 'loss of income'. The claimant is also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

42. Viewed thus, the claimant is held entitled to compensation to the tune of Rs.6,90,552/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.7,20,552/-.

4. FAO No. 259 of 2010:

43. The Tribunal, after taking the income of the deceased to be Rs.22,417/- per month, after deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.1,79,340/- per annum, and applying the multiplier of '15', held the claimants entitled to compensation to the tune of Rs.26,90,100/-

under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.27,70,700/- .

44. Admittedly, the age of the deceased was 45 years at the time of the accident. The claimants are the widow, sons, daughter and mother of the deceased. Keeping in view the age of the deceased read with the judgments in **Sarla Verma and Reshma Kumari's cases (supra),** multiplier of '13' is applicable. Thus, the claimants are held entitled to Rs.1,79,340/- x 13 = Rs.23,31,420/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

45. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.23,31,420/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.23,61,420/-.

5. FAO No. 260 of 2010:

46. The Tribunal, after taking the future income of the deceased to be Rs.10,000/- per month, assessed the loss to the parents to the tune of Rs.24,000/- per annum, and applying the multiplier of '18', held the claimants entitled to compensation to the tune of Rs.4,32,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.20,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.4,62,000/- .

47. Admittedly, the age of the deceased was 2 years. The claimants are the parents of the deceased and the age of the father of the deceased was 31 years, when he appeared in the witness box. Keeping in view the age of the deceased read with the age of the claimants and the law laid down by the Apex Court in **Sarla Verma** and **Reshma Kumari's cases (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.24,000/- x 15 = Rs.3,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

48. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- + Rs.10,000/- + Rs.10,000/- = Rs.,80,000/-.

6. FAO No. 266 of 2010:

49. The Tribunal, after taking the income of the deceased to be Rs.5,000/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.39,820/- per annum, and applying the multiplier of '5', held the claimants entitled to compensation to the tune of Rs.1,99,100/- under the head 'loss of income'. The Tribunal has also awarded Rs.20,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.2,39,100/- .

50. Admittedly, the age of the deceased was 62 years. The multiplier of '5' applied by the Tribunal is just and appropriate in view of the age of the deceased read with the law laid down by the Apex Court in **Sarla Verma** and **Reshma Kumari's cases (supra),** needs no interference. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

51. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.1,99,100/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.2,29,100/-.

7. FAO No. 267 of 2010:

52. The Tribunal, after taking the income of the deceased to be Rs. 7,000/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.56,000/- per annum, and applying the multiplier of '15', held the claimants entitled to compensation to the tune of Rs.8,40,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.9,20,000/- .

53. Admittedly, the age of the deceased was 41 years. The claimants are the widow, daughters and sons of the deceased. The age of the widow was 36 years and three children were minor at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '13' is applicable. Thus, the claimants are held entitled to Rs. 56,000/- x 13 = Rs.7,28,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

54. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.7,28,000/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.7,58,000/-.

8. FAO No. 268 of 2010:

55. The Tribunal, after taking the income of the deceased to be Rs.5,000/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.40,000/- per annum, and applying the multiplier of '15', held the claimants entitled to compensation to the tune of Rs.6,40,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.7,20,000/- .

56. Admittedly, the age of the deceased was 37 years. The claimants are the widow, minor son and the parents of the deceased. The age of the widow was 37 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '14' is applicable. Thus, the claimants are held entitled to Rs.40,000/- x 14 = Rs.5,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

57. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.5,60,000/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.5,90,000/-.

9. FAO No. 269 of 2010:

58. The Tribunal, after taking the future income of the deceased to be Rs.10,000/- per month, assessed the loss to the parents to the tune of Rs.24,000/- per annum, and applying the multiplier of '15', held the claimants entitled to compensation to

the tune of Rs.3,60,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.20,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.3,90,000/- .

59. Admittedly, the age of the deceased was 2 years. The claimants are the mother, brothers and sisters of the deceased. The age of the mother was 45 years, when she appeared in the witness box. The multiplier of '15' applied by the Tribunal is just and appropriate in view of the age of the deceased read with the law laid down by the Apex Court in **Sarla Verma** and **Reshma Kumari's cases (supra),** needs no interference. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

60. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,80,000/-.

10. FAO No. 270 of 2010:

61. The Tribunal, after taking the income of the deceased to be Rs.26,375/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.2,11,008/- per annum, and applying the multiplier of '11', held the claimants entitled to compensation to the tune of Rs.23,21,088/- under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection', Rs.5,000/- under the head 'expenses on medicines' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.24,06,088/- .

62. Admittedly, the age of the deceased was 54 years. The claimants are the widow, sons and daughter of the deceased. The age of the widow was 45 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '9' is applicable. Thus, the claimants are held entitled to Rs.2,11,008/- x 9 = Rs.18,99,072/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

63. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.18,99,072/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.19,29,072/-.

11. FAO No. 271 of 2010:

64. The Tribunal, after taking the future income of the deceased to be Rs.10,000/- per month, assessed loss of dependency to the parents to the tune of Rs.36,000/- per annum, and applying the multiplier of '16', held the claimants entitled to compensation to the tune of Rs.5,76,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.20,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.6,06,000/- .

65. Admittedly, the age of the deceased was 14 years. The claimants are the mother, brother and sisters of the deceased. The age of the mother was 40 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.36,000/- x 15 = Rs.5,40,000/- under

the head 'loss of income'. The claimants are also awarded Rs.0,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

66. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.5,40,000/- + Rs.10,000/- + Rs.10,000/- = Rs.5,60,000/-.

12. FAO No. 272 of 2010:

67. The Tribunal, after taking the future income of the deceased to be Rs.10,000/- per month, assessed loss of dependency to the parents to the tune of Rs.24,000/- per annum, and applying the multiplier of '17', held the claimants entitled to compensation to the tune of Rs.4,08,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.20,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.4,38,000/-.

68. Admittedly, the age of the deceased was 6 years. The claimants are the parents and minor sister of the deceased. The age of the father was 35 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.24,000/- x 15 = Rs.3,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

69. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,80,000/-.

13. FAO No. 273 of 2010:

70. The Tribunal, after taking the future income of the deceased to be Rs.10,000/- per month, assessed loss of dependency to the parents to the tune of Rs.24,000/- per annum, and applying the multiplier of '18', held the claimants entitled to compensation to the tune of Rs.4,32,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.20,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.4,62,000/-.

71. Admittedly, the age of the deceased was 5 years. The claimants are the parents of the deceased. The age of the father of the deceased was 31 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.24,000/- x 15 = Rs.3,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

72. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,80,000/-.

14. FAO No. 274 of 2010:

73. The Tribunal, after taking the future income of the deceased to be Rs.10,000/- per month, assessed loss of dependency to the parents to the tune of Rs.24,000/- per annum, and applying the multiplier of '17', held the claimants entitled to compensation to the tune of Rs.4,08,000/- under the head 'loss of income'. The Tribunal

has also awarded Rs.20,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.4,38,000/-.

74. Admittedly, the age of the deceased was 9 years. The claimants are the parents of the deceased. The age of the father of the deceased was 33 years and that of mother was 30 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.24,000/- x 15 = Rs.3,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

75. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- + Rs.10,000/- + Rs.0,000/- = Rs.3,80,000/-.

15. FAO No. 297 of 2010:

76. The Tribunal, after taking the future income of the deceased to be Rs.10,000/- per month, assessed loss of dependency to the parents to the tune of Rs.24,000/- per annum, and applying the multiplier of '18', held the claimants entitled to compensation to the tune of Rs.4,32,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.20,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.4,62,000/-.

77. Admittedly, the age of the deceased was 6 years. The claimants are the parents and minor sister of the deceased. The age of the father of the deceased was 30 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.24,000/- x 15 = Rs.3,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

78. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,80,000/-.

16. FAO No. 298 of 2010:

79. The Tribunal, after taking the income of the deceased to be Rs.15,000/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.1,20,000/- per annum, and applying the multiplier of '15', held the claimants entitled to compensation to the tune of Rs.18,00,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.18,80,000/- .

80. Admittedly, the age of the deceased was 42 years. The claimants are the widow, son, daughter and mother of the deceased. The age of the widow was 40 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a

larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '13' is applicable. Thus, the claimants are held entitled to Rs.1,20,000/- x 13 = Rs.15,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

81. Viewed thus, the claimants are held entitled to compensation to the tune ofRs.15,60,000/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.15,90,000/-.

17. FAO No. 301 of 2010:

82. The Tribunal, after taking the income of the deceased to be Rs.5,000/- per month and deducting one third towards her personal expenses, assessed loss of dependency to the claimants to the tune of Rs.40,000/- per annum, and applying the multiplier of '17', held the claimants entitled to compensation to the tune of Rs.6,80,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.50,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.7,40,000/- .

83. Admittedly, the age of the deceased was 31 years. The claimants are the husband, minor sons and daughters of the deceased. The age of the husband of the deceased was 36 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.40,000/- x 15 = Rs.6,00,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.0,000/- under the head 'loss of estate'.

84. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.6,00,000/- + Rs.0,000/- + Rs.10,000/- = Rs.6,20,000/-.

18. FAO No. 337 of 2010:

85. The Tribunal, after taking the income of the deceased to be Rs.5,551/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.44,400/- per annum, and applying the multiplier of '17', held the claimants entitled to compensation to the tune of Rs.7,54,800/- under the head 'loss of income'. The Tribunal has also awarded Rs.40,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection' and Rs.15,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.8,49,800/- .

86. Admittedly, the age of the deceased was 32 years. The claimants are the widow, minor son and mother of the deceased. The age of the widow was 22 years and that of the son was one year at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.44,400/- x 15 = Rs.6,66,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.0,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

87. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.6,66,000/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.6,96,000/-.

19. FAO No. 64 of 2011:

88. The Tribunal, after taking the income of the deceased to be Rs.2,500/- per month and deducting one third towards her personal expenses, assessed loss of dependency to the claimants to the tune of Rs.20,000/- per annum, and applying the multiplier of '17', held the claimants entitled to compensation to the tune of Rs.3,40,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.50,000/- under the head 'loss of love & affection/consortium' and Rs.10,000/- under the head 'funeral expenses', thus, awarded total compensation to the tune of Rs.4,00,000/- .

89. Admittedly, the age of the deceased was 29 years. The claimants are the husband and minor son and daughter of the deceased. The age of the husband of the deceased was 31 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '16' is applicable. Thus, the claimants are held entitled to Rs.20,000/- x 16 =Rs.3,20,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

90. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,20,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,40,000/-.

20. FAO No. 152 of 2011:

91. The Tribunal, after taking the future income of the deceased to be Rs.3,600/- per month, which were the minimum wages payable in the State of Himachal Pradesh at the time of passing the award, after deducting 50% towards his personal expenses, assessed loss of dependency to the mother to the tune of Rs.21,600/- per annum, and applying the multiplier of '15', while keeping in mind the age of the mother as 40 years, held the claimant entitled to compensation to the tune of Rs.3,24,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.25,000/- under the head 'loss of love & affection' and Rs.15,000/- under the head 'funeral expenses and other conventional charges', thus, awarded total compensation to the tune of Rs.3,64,000/-.

92. Admittedly, the age of the deceased was 14 years. The claimant is the mother of the deceased and her age was 40 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimant and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' applied by the Tribunal is just and appropriate, needs no interference. The claimant is awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

93. Viewed thus, the claimant is held entitled to compensation to the tune of Rs.3,24,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,44,000/-.

21. FAO No. 153 of 2011:

94. The Tribunal, after taking the future income of the deceased to be Rs.3,600/- per month, which were the minimum wages payable in the State of Himachal Pradesh at the time of passing the award, after deducting 50% towards her personal expenses, assessed loss of dependency to the mother to the tune of Rs.21,600/- per annum, and applying the multiplier of '15', while keeping in mind the age of the mother as 40 years, held the claimant entitled to compensation to the tune of Rs.3,24,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.25,000/- under the head 'loss of love & affection' and Rs.15,000/- under the head 'funeral expenses and other conventional charges', thus, awarded total compensation to the tune of Rs.3,64,000/-.

95. Admittedly, the age of the deceased was 11 years. The claimant is the mother of the deceased and her age was 40 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimant and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' applied by the Tribunal is just and appropriate, needs no interference. The claimant is awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

96. Viewed thus, the claimant is held entitled to compensation to the tune of Rs.3,24,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,44,000/-.

22. FAO No. 4009 of 2013

97. The Tribunal, after taking the income of the deceased to be Rs.5,000/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.40,000/- per annum, and applying the multiplier of '11', held the claimants entitled to compensation to the tune of Rs. 4,40,000/- under the head 'loss of income'. The Tribunal has also awarded, Rs.5,000/- under the head 'loss of estate', Rs.5,000/- under the head 'funeral charges', Rs.5,000/- under the head 'transportation of the dead body', Rs.0,000/- under the head 'loss of consortium', and Rs.50,000/- under the head 'loss of love & affection', thus, awarded total compensation to the tune of Rs.5,15,000/- .

98. Admittedly, the age of the deceased was 52 years at the time of the accident. The claimants are the widow and minor daughters of the deceased. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '9' is applicable. Thus, the claimants are held entitled to Rs.40,000/- x 9 = Rs.3,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

99. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,90,000/-.

23. FAO No. 4089 of 2013:

100. The Tribunal, after taking the income of the claimant-injured to be Rs.,000/- per month and applying the multiplier of '16', held the claimant-injured entitled to compensation to the tune of Rs.88,000/- under the head 'loss of future income', while taking into consideration the 5% permanent disability suffered by the injured. The Tribunal has also awarded Rs.2,000/- under the head 'loss of earning for the period the claimant-injured remained admitted', Rs.5,000/- under the head 'medical expenditure', Rs.4,000/- under the head 'attendant charges, Rs.4,000/- under the head 'special diet', Rs.15,000/- under the head 'pain and sufferings' and Rs.25,000/- under the head 'loss of amenities of life', thus, awarded total compensation to the tune of Rs.1,43,000/- .

101. It is apt to record herein that the Tribunal has wrongly calculated the loss of future income as Rs.88,000/- as it should be Rs.48,000/- for the reason that the monthly income of the claimant-injured has been taken as Rs.5,000/- per month. The claimant-injured has suffered 5% permanent disability. Meaning thereby, he has suffered the loss of future income to the extent of 5% of Rs.5,000/- per month, which comes to 250/- per month, i.e. Rs.3,000/- per annum.

102. Admittedly, the age of the claimant-injured was 31 years at the time of the accident. The claimant-injured has suffered 5% permanent disability, thus, has suffered loss of future income to the tune of 5% of Rs.5,000/- per month, i.e. Rs.250/- per month (Rs.3,000/- per annum). Keeping in view the age of the claimant-injured and the extent of permanent disability suffered by him read with the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimant-injured is held entitled to Rs.3,000/- x 15 = Rs.45,000/- under the head 'loss of future income'. The compensation awarded under the other heads is just and appropriate, needs no interference.

103. Viewed thus, the claimant-injured is held entitled to compensation to the tune of Rs.45,000/- + Rs.2,000/- + Rs.5,000/- + Rs.4,000/- + Rs.4,000/- + Rs.15,000/- + Rs.25,000/- = Rs.1,00,000/-.

24. FAO No. 4093 of 2013:

104. The Tribunal, after taking the income of the claimant-injured to be Rs.5,000/- per month and applying the multiplier of '15', held the claimant-injured entitled to compensation to the tune of Rs.2,25,000/- under the head 'loss of future income', while taking into consideration the 25% permanent disability suffered by the claimant-injured. The Tribunal has also awarded Rs.5,000/- under the head 'loss of earning for the period the claimant-injured remained admitted', Rs.50,000/- under the head 'medicines & transportation', Rs.5,000/- under the head 'attendant charges, Rs.5,000/- under the head 'special diet', Rs.25,000/- under the head 'pain and sufferings' and Rs.1,00,000/- under the head 'loss of amenities of life', thus, awarded total compensation to the tune of Rs.4,15,000/- .

105. Admittedly, the age of the claimant-injured was 38 years at the time of the accident. The claimant-injured has suffered 25% permanent disability, thus, has suffered loss of future income to the tune of 25% of Rs.5,000/- per month, i.e. Rs.1250/- per month (Rs.15,000/- per annum). Keeping in view the age of the claimant-injured and the extent of permanent disability suffered by him read with the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '14' is applicable. Thus, the claimant-injured is held entitled to Rs.15,000/- x 14 = Rs.2,10,000/- under the head 'loss of future income'. The compensation awarded under the other heads is just and appropriate, needs no interference.

106. Viewed thus, the claimant-injured is held entitled to compensation to the tune of Rs.2,10,000/- + Rs.5,000/- + Rs.50,000/- + Rs.5,000/- + Rs.5,000/- + Rs.25,000/- + Rs.1,00,000/- = Rs.4,00,000/-.

25. FAO No. 4102 of 2013:

107. The Tribunal, after taking the income of the claimant-injured to be Rs.3,000/- per month and applying the multiplier of '15', held the claimant-injured entitled to compensation to the tune of Rs.2,43,000/- under the head 'loss of future income', while taking into consideration the 45% permanent disability suffered by the claimant-injured. The Tribunal has also awarded Rs.3,000/- under the head 'loss of earning for the period the claimant-injured remained admitted', Rs.10,000/- under the head 'medicines', Rs.5,000/- under the head 'attendant charges, Rs.5,000/- under the head 'special diet', Rs.1,00,000/- under the head 'pain and sufferings' and Rs.1,00,000/- under the head 'loss of amenities of life', thus, awarded total compensation to the tune of Rs. 4,66,000/- .

108. Admittedly, the age of the claimant-injured was 40 years at the time of the accident. The claimant-injured has suffered 45% permanent disability, thus, has

suffered loss of future income to the tune of 45% of Rs.3,000/- per month, i.e. Rs.1350/- per month (Rs.16,200/- per annum). Keeping in view the age of the claimant-injured and the extent of permanent disability suffered by him read with the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '14' is applicable. Thus, the claimant-injured is held entitled to Rs.16,200/- x 14 = Rs.2,26,800/- under the head 'loss of future income'. The compensation awarded under the other heads is just and appropriate, needs no interference.

109. Viewed thus, the claimant-injured is held entitled to compensation to the tune of Rs.2,26,800/- + Rs.3,000/- + Rs.10,000/- + Rs.5,000/- + Rs.5,000/- + Rs.1,00,000/- + Rs.1,00,000/- = Rs.4,49,800/-.

110. Having glance of the above discussions, all the appeals are disposed of and the impugned awards are modified, as indicated hereinabove.

111. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the respective impugned awards after proper identification. Excess amount, if any, be released in favour of the insurer through payee's account cheque.

112. Send down the record after placing copy of the judgment on each of the Tribunal's files.

****

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

Oriental Insurance Company Ltd. …Appellant

Versus

Ambi Chand and others. …Respondents.

FAO No.351 of 2008.

Decided on: 19.06.2015.

Motor Vehicle Act, 1988- Section 166- MACT had deducted 1/3rd of amount towards the personal expenses- deceased was bachelor, therefore, 50% of the amount was to be deducted towards personal expenses- income of the deceased was Rs.4,000/- p.m.- loss of dependency would be Rs.2,000/- p.m.- deceased was 22 years of age at the time of accident- multiplier of '15' has to be applied and the compensation of Rs. 3,60,000/- (Rs.2,000/- x 12 x 15) has to be awarded towards loss of dependency. (Para-4 to 9)

Cases referred:

Sarla Verma (Smt.) and ors. vs. Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120
Munna Lal Jain and another vs. Vipin Kumar Sharma and others, JT 2015(5) SC 1

For the Appellant: Mr.Ashwani K. Sharma, Advocate.
For the Respondents: Mr.Lalit Sehgal, Advocate, for respondents No.1 to 4.
Mr.G.R. Palsara, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

The appellant/insurer has invoked the jurisdiction of this Court in terms of Section 173 of the Motor Vehicles Act, (for short, the Act), challenging the award, dated 7th

March, 2008, passed by Motor Accident Claims Tribunal-II, Mandi, (for short, the Tribunal), in Claim Petition No.51/2006, titled Ambi Chand and others vs. Kamla Devi and others, whereby compensation to the tune of Rs.5,23,000/-, with interest at the rate of 7.5% per annum, from the date of filing of the Claim Petition till realization, was awarded in favour of the claimants, and the insurer/appellant was saddled with the liability, (for short, the impugned award).

2. The claimants, the owner/insured and the driver have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

3. Only the insurer has questioned the impugned award on two grounds - firstly, that the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident and secondly, that the amount awarded is excessive.

4. Mr.Ashwani K. Sharma, learned counsel for the appellant/insurer, vehemently argued that the Tribunal has fallen in error in deducting 1/3rd amount, from the total income of the deceased, as his personal expenses. He submitted that the deceased, namely, Duni Chand was a bachelor and 50% ought to have been deducted from his income towards his personal expenses.

5. The argument advanced by the learned counsel for the appellant is correct and the Tribunal has fallen in error in deducting 1/3rd amount from the total income of the deceased, towards his personal expenses. The Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** has also held that in such cases, while determining compensation under the head 'loss of source of dependency', 50% has to be deducted towards personal expenses of the deceased.

6. The claimants have pleaded in the Claim Petition that the deceased, at the time of his death, was earning Rs.4,000/- per month by working as a salesman. It was also pleaded that the deceased was also earning Rs.11,000/- from agricultural sources. However, the claimants have not been able to prove the agricultural income of the deceased.

7. The Tribunal, after scanning the evidence, rightly came to the conclusion that the monthly income of the deceased was Rs.4,000/-. Thus, applying the ratio laid down by the Apex Court in Sarla Verma's case (supra), it can safely be held that the claimants have lost source of dependency to the tune of Rs.2,000/- per month.

8. Keeping in view the fact that the deceased was 22 years of age at the time of accident, read with the latest decision of the Apex Court in **Munna Lal Jain and another vs. Vipin Kumar Sharma and others, JT 2015(5) SC 1,** multiplier of 15 is to be applied, which has been rightly applied by the Tribunal.

9. In view of the above discussion, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- (Rs.2,000/- x 12 x 15), with interest as awarded by the Tribunal.

10. Coming to other argument of the learned counsel for the appellant, apparently, the driver of the offending vehicle was having a valid and effective driving licence at the time of accident. In order to seek exoneration, it was for the insurer to prove that the owner had committed willful breach, in which it has miserably failed. The Tribunal has rightly made discussion while determining issues No.4 and 5 and has rightly saddled the

insurer with the liability. Accordingly, the argument advanced by the learned counsel for the appellant is repelled, being devoid of any force.

11. Having glance of the above discussion, the appeal is partly allowed and the impugned award is modified, as indicated above. The amount be released in favour of the claimants strictly in terms of the impugned award and the excess amount, if any, deposited by the insurer, be released in its favour through payee's account cheque.

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

Ramesh Kumar and another …Appellants.
Versus
Himachal Pradesh Road Transport Corporation and another …Respondents.

FAO No. 81 of 2008
a/w CO No. 484 of 2008
Decided on: 19.06.2015

Motor Vehicle Act, 1988- Section 166- Claimants had specifically pleaded that deceased was a house wife and was earning Rs. 5,000 to 7,000/- p.m. by agriculturist and horticulturist vocations- they further pleaded that they have to engage a servant for looking after the affairs of the house and orchard by paying Rs. 3,000/- p.m. - it can be held by guess work that income of the deceased was not less than Rs. 4,5000/- p.m.- 1/3rd of the amount is to be deducted towards personal expenses - loss of dependency would be Rs. 3,000/- p.m. and applying multiplier of '8', claimants will be entitled to Rs. 3,000x12x8=2,88,000/- as compensation for loss of dependency. (Para-12 to 14)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellants: Mr. G.S. Rathore, Advocate.
For the respondents: Mr. N.K. Thakur, Senior Advocate, with Mr. Rohit Bharoll, Advocate for cross-objector/respondent No. 1.
Nemo for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This appeal is directed against the judgment and order, dated 03.10.2007, made by the Motor Accident Claims Tribunal, Shimla (for short "the Tribunal") in MACC No. 1-S/2 of 2005, titled as Ramesh Kumar and another versus Himachal Pradesh Road Transport Corporation and another, whereby compensation to the tune of Rs.1,83,600/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimants (for short "the impugned award").

2. The owner-insured and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The claimants and the insurer have questioned the impugned award on the ground of adequacy of compensation.

4. Thus, the only issue to be determined in this appeal is - whether the amount awarded is adequate?

5. In order to determine this issue, it is necessary to give a resume of the case, the womb of which has given birth to the appeal in hand.

6. It is averred in the claim petition that deceased-Kankhu Devi was 55 years of age when she became the victim of a vehicular accident, which was caused by the driver, namely Shri Amar Singh Negi, while driving bus bearing registration No. HP-25-0767, owned by HRTC, rashly and negligently, on 14.11.2004 near place Narkanda.

7. The respondents in the claim petition resisted the claim petition on the grounds taken in the respective memo of objections.

8. Following issues came to be framed by the Tribunal on 19.06.2006:

> *"1) Whether Smt. Kankhu Devi on 14.11.2004, while travelling on bus No. HP-25-0767 suffered injuries to which she succumbed when the bus met with an accident due to rash and negligent driving by respondent No. 2, as alleged? OPP*
>
> *2) If issue No. 1 is proved, whether the petitioners are entitled for compensation, if so, to what amount and from whom? OPP*
>
> *3) Whether the petition is not maintainable? OPR*
>
> *4) Relief."*

9. Parties led evidence.

10. The Tribunal, after scanning the evidence, oral as well as documentary, decided the claim petition in favour of the claimants and against the respondents.

11. Issues No. 1 and 3 are not in dispute. Thus, the findings returned by the Tribunal on issues No. 1 and 3 are upheld.

12. Issue No. 2 is in dispute so far it relates to adequacy of compensation. The claimants have specifically averred in the claim petition that the deceased was a house wife and was earning Rs.5,000/- - Rs.7,000/- per month by agricultural and horticultural vocations. Further averred that the claimants have to engage a servant for looking after the affairs of the house and the orchard by paying Rs.3,000/- per month to him.

13. Admittedly, the deceased was a house wife, was growing vegetables, was maintaining the household chores and looking after the orchard. The claimants are the sons of the deceased. They have lost the love and affection of their mother and money cannot be a substitute for the loss of love of a mother. It has taken away their entire comforts.

14. The claimants have specifically pleaded that they had to pay Rs.3,000/- per month to the servant for managing their house and orchard. Thus, by guess work, it can be safely said that the deceased would have been earning not less than Rs.4,500/- per month. One third is to be deducted towards her personal expenses in view of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120**. Thus, it is held that the monthly contribution of the deceased towards her family was Rs.3,000/- per month. The Tribunal has rightly applied the multiplier of '8' in view of the judgments (supra).

15. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,000/- x 12 x 8 = Rs.2,88,000/-. The compensation awarded by the Tribunal under the other heads is upheld.

16. Having said so, the claimants are held entitled to total compensation to the tune of Rs.2,88,000/- + Rs.15,000/- + Rs.15,000/- = Rs.3,18,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization.

17. The respondents are directed to deposit the enhanced amount of compensation before the Registry within eight weeks. On deposition, the same be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

18. Having glance of the above discussions, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

Cross Objections No. 484 of 2008

19. In view of the disposal of the appeal, the cross objections are also disposed of accordingly.

20. Send down the record after placing copy of the judgment on the Tribunal's file.

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

FAO No.366 of 2008 with FAO No.367 of 2008.
Decided on: 19.06.2015.

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1. FAO No.366 of 2008:

Rattan Singh and others ...Appellants

VERSUS

Dodi Devi and others ...Respondents.

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2. FAO No.367 of 2008:

Rattan Singh and others ...Appellants

VERSUS

Vijay Kumar and others ...Respondents.

Motor Vehicle Act, 1988- Section 147- Tractor was insured with trolley and additional premium was paid- tractor of the trolley was being used for agriculture purposes- therefore, insurer was wrongly discharged by MACT. (Para-11 to 13)

FAO No.366 of 2008:

For the Appellants: Mr.G.R. Palsara, Advocate.
For the Respondents: Mr.R.L. Chaudhary, Advocate, for respondent No.1.
Mr.Lalit K. Sharma, Advocate, for respondent No.2.
Nemo for respondent No.3.

FAO No.367 of 2008:

For the Appellants: Mr.G.R. Palsara, Advocate.
For the Respondents: Mr.Sandeep Chauhan, Advocate, for respondents No.1 and 2.
Mr.Lalit Sharma, Advocate, for respondent No.3.
Nemo for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Both these appeals are the outcome of common award, dated 28th February, 2008, passed by the Motor Accident Claims Tribunal-II, Mandi, (for short, the Tribunal), in Claim Petitions No.16 of 1999, titled Dodi Devi vs. Govind Ram and others, filed by the mother of deceased Rattan Lal, and Claim Petition No.2 of 1999, titled Vijay Kumar and another vs. Deceased Govind Ram through LRs and others, filed by the minor son and daughter of deceased Rattan Lal, whereby compensation to the tune of Rs.2,31,000/-, with interest at the rate of 7.5%, from the date of filing of the Claim Petition till realization, was awarded in favour of the claimants, and the owner-appellant was saddled with the liability, (for short, the impugned award).

2. Feeling aggrieved, the owner/insured has challenged impugned award by the medium of the instant appeals.

3. The short question involved in these appeals is – Whether the Tribunal has rightly directed the owner/insured to satisfy the impugned award, by exonerating the insurer from the liability. The answer is in the negative for the following reasons.

4. The Claimants have specifically averred in the Claim Petitions that on 8th December, 1998, the deceased Rattan Lal was traveling in a tractor bearing No.HP-33-3431, which was owned by Govind Ram. The Tractor, attached with trolley, met with an accident and Rattan Lal sustained injuries and succumbed to the same, constraining the claimants to file the Claim Petitions claiming compensation to the tune of Rs.10.00 lacs. Both the Claim Petitions were consolidated and tried together by the Tribunal.

5. The owner, the driver and the insurer resisted the Claim Petitions by filing replies.

6. On the pleadings of the parties, the following issues were framed by the Tribunal in Claim Petition No.16 of 1999:

> *"1.Whether deceased Rattan Lal son of the petitioner died in accident which took place on 8-12-1998 at 10.00 P.M. near Chakkar on Mandi-Nerchowki road was riding in tractor bearing No.HP-33-3431 belonging to respondent No.1 and driven by rash and negligent manner? OPA*
>
> *2. If issue No.1 is proved in affirmative whether the petitioner is entitled to compensation and to what extent and from whom? OPA*

3. Whether the respondent No.3 is not liable to pay compensation as the vehicle was driven by unauthorized person without any effective and valid licence? OPR-3

4. Relief."

7. In Claim Petition No.2 of 1999, the following issues were settled by the Tribunal:

"1.Whether deceased Rattan Lal father of the petitioners died in accident which took place on 8-12-1998 at 10 P.M. near Chakkar on Mandi-Nerchowki road was riding in tractor bearing No.HP-33-3431 belonging to respondent No.1 and driven by rash and negligent manner? OPA

2. If issue No.1 is proved in affirmative, whether the petitioners are entitled to compensation and to what extent and from whom? OPA

3. Whether the respondent No.3 is not liable to pay compensation as the vehicle was driven by unauthorized person without any effective and valid licence? OPR-3

4. Relief."

8. Parties led their evidence. The Tribunal, after scanning the entire evidence, held that the Claimants have proved issues No.1 and 2. It was also held that the insurer has failed to prove issue No.3. However, while determining as to who is to be saddled with the liability, the Tribunal saddled the insured with the liability.

9. The findings recorded under issue No.1 are not in dispute, therefore, the same are accordingly upheld.

10. Before issue No.2 is taken up, I deem it proper to deal with issue No.3. The onus to prove this issue was on the insurer, which the insurer has not discharged. Admittedly, the driver of the offending tractor was having a valid and effective driving licence at the time of accident. Accordingly, this issue is decided against the insurer.

11. Coming to issue No.2, the adequacy of compensation is not in dispute. However, the findings recorded by the Tribunal are under challenge to the extent that the owner/insured has been wrongly saddled with the liability. During the course of hearing, it was urged by the learned counsel for the appellant/owner that the insurance policy Ext.RW-2/A was comprehensive one and therefore, the Tribunal has wrongly interpreted the insurance policy Ext.RW-2/A and has wrongly exonerated the insurer.

12. A perusal of the insurance policy Ext.RW-2/A does disclose that the Tractor was insured with trolley and additional premium was paid. It is admitted case that the tractor with trolley was being used for agricultural purpose. It has been admitted by the driver of the offending tractor that the deceased was performing the job of a labourer. Mr.Lalit K. Sharma, learned counsel for the insurer, was not in a position to defend the impugned award on this count.

13. Having said so, the Tribunal has fallen in error in discharging the insurer and directing the owner to satisfy the impugned award. Accordingly, the impugned award is modified by providing that the insurer has to satisfy the impugned award. The insurer is directed to deposit the award amount within 8 weeks from today in the Registry of this Court and on deposit, the Registry is directed to release the same in favour of the claimants strictly in terms of the impugned award.

14. The amount, if any, deposited by the insured/appellant be released in his favour through payees' account cheque. A copy of this judgment be placed on the record of the connected appeal.

15. Both the appeals stand disposed of accordingly.

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

Sucha Singh …Appellant

Versus

Ritesh Kumar & another …Respondents

FAO No. 399 of 2008
Date of decision: 19.6.2015

Motor Vehicle Act, 1988- Section 149- Accident had taken place on 12.7.2004- license expired in the month of February, 2002 and it was renewed w.e.f. 24.11.2004-driver did not have a valid driving license w.e.f. 1.2.2002 till 24.11.2004 – owner had committed willful breach of the terms and conditions of the policy by employing a driver having no valid driving license- therefore, insured was rightly held liable to pay compensation. (Para-5 to 9)

For the appellant : Mr. Sanjay Dutt Vasudeva, Advocate.
For the respondents: Mr. Ajay Sharma, Advocate, for respondent No. 1.
Mr. Jagdish Thakur, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 24th March, 2008, made by the Motor Accident Claims Tribunal-II, Kangra at Dharamshala (hereinafter referred to as "the Tribunal") in MAC Petition No. 59-N/2004, whereby compensation to the tune of Rs.1,50,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimant-respondent No. 1 herein and the insured/owner- -cum-driver came to be saddled with liability (for short, the "impugned award"), on the grounds taken in the memo of appeal.

2. The claimant and insurer have not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to them.

3. The insured/owner-cum-driver has questioned the impugned award on the ground that the Tribunal has fallen in an error in directing him to satisfy the awarded amount and discharging the insurer from liability on the grounds taken in the memo of appeal.

4. Thus, the only question to be determined in this appeal is - whether the Tribunal has rightly directed the insured/owner-cum-driver to satisfy the impugned award.

5. Learned Counsel for the appellant/insured- owner-cum-driver has argued that the accident had taken place on 12th July, 2004 and the appellant had submitted his driving licence in the month of February, 2002 before the Licensing Authority, Jawali, for its renewal, which was renewed on 24th November, 2004. The appellant/insured-owner-cum-

driver was under legal obligation to submit his driving licence for its renewal as per the provisions of the Motor Vehicles Act, 1988 and the rules framed thereunder, within 30 days of its expiry. But the Licencing Authority has not renewed the Driving License, thus the insurer has to satisfy the impugned award. The argument is misconceived for the following reasons.

6. Admittedly, the driving license was renewed w.e.f. 24th November, 2004 upto 24th November, 2007, which is also recorded in the photocopy of the driving licence Ext. RW-1/B. In the given circumstances, one comes to an inescapable conclusion that the driver was not having a valid and effective driving licence w.e.f. 1st April, 2002 upto 24th November, 2004. Thus, the driver was not having an effective and valid driving licence on the relevant date i.e. the date of the accident.

7. Learned Counsel for the appellant argued that the owner-cum-driver was in breach. The argument is forceful for the simple reason that the driver of the offending vehicle was not having valid and effective driving licence at the relevant point of time. Thus, the owner was in breach.

8. This Court has already dealt with this issue in a batch of two FAOs, the lead case of which was **FAO No. 308 of 2008**, titled as **Partap Chand and another versus Harinder Kumar and another**, decided on 5th June, 2015. It is apt to reproduce paras 6, 7 & 8 of the aforesaid judgment herein:

> *"6. Coming to the appeal filed by the owner/insured, admittedly, the driver of the offending vehicle though was having a driving licence at the time of accident, which occurred on 12th August, 2004, but that had lost its life on 13th June, 2004 and the same came to be renewed only w.e.f. 24th August, 2004.*
>
> *7. The Apex Court in **Ram Babu Tiwari vs. United India Insurance Co.Ltd. & Ors, 2008 AIR SCW 6512,** has held that the licence was not valid in case it was not renewed on the date of its expiry and renewed from a subsequent date. It is apt to reproduce paragraphs 13 and 19 of the said decision hereunder:*
>
> > *"13. The question as to whether the owner of a vehicle had taken care to inform himself as to whether the driver entrusted to drive the vehicle was having a licence or not is essentially a question of fact. However, in this case, it stands admitted that as on the date of accident, namely, on 27.1.1996, the driver did not hold any licence. Furthermore, it is beyond dispute that he had a licence only for one year and for about 3 years thereafter, he failed and neglected to renew his licence. His licence was renewed only on and from 7.2.1996.*
> >
> > *……….. …………… …………… …………*
> >
> > *19. The principle laid down in Kusum Rai (supra) has been reiterated in Ishwar Chandra & Ors. v. Oriental Insurance Co. Ltd. & Ors. [(2007) 10 SCC 650], referring to sub-section (1) of Section 15 of the Act, this Court stated the law, thus :*
> >
> > > *"9. From a bare perusal of the said provision, it would appear that the licence is renewed in terms of the said Act and the rules framed thereunder. The proviso appended to Section 15 (1) of the Act in no uncertain terms states that whereas the original licence granted despite expiry remains*

valid for a period of 30 days from the date of expiry, if any application for renewal thereof is filed thereafter, the same would be renewed from the date of its renewal. The accident took place 28-4-1995. As on the said date, the renewal application had not been filed, the driver did not have a valid licence on the date when the vehicle met with the accident."

8. *Therefore, the driver of the offending vehicle cannot be said to be having a valid and effective driving licence at the relevant point of time and, therefore, the Tribunal has rightly held that the owner had committed breach. In the given circumstances, it can safely be held that the owner has committed the breach for the simple reason that the driver of the offending vehicle was not having any licence, what to speak of valid and effective driving licence, at the relevant point of time. Accordingly, the point raised by the owner-insured is turned down."*

9. Having said so, there is no merit in the appeal. Accordingly, the appeal is dismissed and the impugned award is upheld.

10. The Registry is directed to release the awarded amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees account cheque.

11. Send down the records after placing a copy of the judgment on the file of the claim petition.

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

Smt. Tara Devi & others .....Appellants
Versus
HRTC and others .....Respondents.

FAO (MVA) No. 396 of 2008.
Date of decision: 19.06.2015.

Motor Vehicle Act, 1988- Section 166- Deceased was drawing salary of Rs. 7,103/- p.m.- 1/4th of the amount was to be deducted towards personal expenses- thus, loss of dependency is Rs. 5,300/- p.m.- multiplier has to be applied considering the age of the deceased - applying multiplier of '13', claimants are entitled to Rs. 5300x12 =Rs.63,600 x 13 = 8,26,800/-. (Para-11 to 16)

Cases referred:

Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120.
Munna Lal Jain and another versus Vipin Kumar Sharma and others JT 2015 (5) SC 1

For the appellants: Ms. Devyani Sharma, Advocate.
For the respondents: Mr. N.K. Thakur, Sr. Advocate with Mr. Ramesh Sharma, Advocate, for respondents No. 1 and 2.
Mr. Malay Kaushal, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice,(*Oral).*

At the very outset, the learned counsel for the appellant stated at the Bar that respondent No. 3 Bhagat Ram has died. She prayed that name of respondent No. 3 may be ordered to be deleted from the array of the respondents since his legal representatives are already on record. Her statement is taken on record. The name of respondent No. 3 is ordered to be deleted from the array of the respondents on the oral request of the learned counsel for the appellant.

2. Subject matter of this appeal is the judgment and award dated 24.3.2008, passed by the Motor Accident Claims Tribunal, II Solan, H.P. in MAC Petition No. 1-S/2 of 2007, whereby compensation to the tune of Rs.6,44,000/- alongwith 9% interest per annum came to be awarded in favour of the claimants and against the respondents and the insurer was saddled with the liability, for short "the impugned award".

3. The claimants have disputed the adequacy of compensation, on the grounds taken in the memo of appeal.

4. The insurer, owner and driver have not questioned the impugned award on any ground, thus it has attained finality, so far as it relates to them.

5. The claimants filed claim petition before the Tribunal in terms of Section 166 of the Motor Vehicles Act, for short the Act, for the grant of compensation as per the break-ups given in the claim petition on account of death of deceased Ved Prakash in an accident which took place on 1.10.2006 at Chungari Mour on Kasauli-Parwanoo road, caused by respondent No. 2 Mohan Lal, who was driving HRTC Bus bearing Registration No. HP-12-A-4068 rashly and negligently.

6. Respondents have resisted the averments contained in the claim petition and following issues came to be framed.

(i) Whether the accident in which the death of Ved Prakash took place was the result of rash and negligent driving of the Bus No. HP-12-4068 by respondent No.2? ……OPP

(ii) If issue No. 1 proved in affirmative, whether the petitioners are entitled for the compensation, if so, to what extent? ……OPR

(iii) Whether the petition is not maintainable? …OPR

(iv) Whether the petition is bad for non-joinder of necessary party? …….. OPR

(v) Relief.

7. Claimants have examined as many as five witnesses, including Smt. Tara Devi widow of the deceased, who herself stepped into the witness box as PW4.

8. Respondents have not examined any witness.

9. The Tribunal, after scanning, thrashing and marshaling the evidence, held that the claimants are entitled to compensation to the tune of Rs.6,44,000/- with interest at the rate of 9% per annum from the date of filing the petition till its realization.

10. The insurer, owner and driver have not questioned the findings returned by the Tribunal on issues No. 1, 3 and 4, thus the findings returned on these issues are upheld.

11. Now coming to issue No. 2. Admittedly, the deceased was a government employee, has drawn his last salary as Rs.7103/- vide Ext. PW4/A. The claimants are widow, two daughters and one minor son and 1/4th was to be deducted from the income of the deceased, in view of the ratio laid down in ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***.

12. The Tribunal has fallen in an error in deducting 1/3rd. Thus, it is held that the claimants have lost source of dependency to the tune of Rs.5300/- per month.

13. The Tribunal has also fallen in an error in applying the multiplier of "11" in view of the Schedule appended to the Act, read with ***Munna Lal Jain and another versus Vipin Kumar Sharma and others*** reported in ***JT 2015 (5) SC 1***. It is apt to reproduce paras 12 and 14 of the said judgment herein:

> *"12. The remaining question is only on multiplier. The High Court following Santosh Devi (supra), has taken 13 as the multiplier. Whether the multiplier should depend on the age of the dependants or that of the deceased, has been hanging fire for sometime; but that has been given a quietus by another three-Judge Bench decision in Reshma Kumari (supra). It was held that the multiplier is to be used with reference to the age of the deceased. One reason appears to be that there is certainty with regard to the age of the deceased but as far as that of dependants is concerned, there will always be room for dispute as to whether the age of the eldest or youngest or even the average, etc., is to be taken. To quote:*
>
> > *"36. In Sarla Verma, this Court has endeavoured to simplify the otherwise complex exercise of assessment of loss of dependency and determination of compensation in a claim made under Section 166. It has been rightly stated in Sarla Verma that the claimants in case of death claim for the purposes of compensation must establish (a) age of the deceased; (b) income of the deceased; and (c) the number of dependants. To arrive at the loss of dependency, the Tribunal must consider (i) additions/deductions to be made for arriving at the income; (ii) the deductions to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. We do not think it is necessary for us to revisit the law on the point as we are in full agreement with the view in Sarla Verma."*
>
> *13. xxxxxxx xxxxxxxx xxxxxxxxxx*

> *14. The multiplier, in the case of the age of the deceased between 26 to 30 years is 17. There is no dispute or grievance on fixation of monthly income as Rs.12,000.00 by the High Court."*

14. In view of the Schedule appended to the Act read with the judgment supra, the multiplier of "13" was to be applied. Accordingly, the multiplier of "13" is applicable and is applied.

15. The claimants have also pleaded that the deceased was earning some income from the agricultural sources but has failed to prove the same. The Tribunal has rightly refused to grant the said prayer.

16. Viewed thus, the claimants are entitled to Rs.5300 x 12 = Rs.63,600 x 13 = 8,26,800/- with Rs.10,000/- as funeral expenses, Rs.20,000/- for loss of happiness of married life and Rs.20,000/- for love and affection. Accordingly, the amount awarded is enhanced to Rs.8,26,800/-+Rs.50,000= Rs.8,76,800/- with 9% interest, as awarded by the Tribunal.

17. The insurer is directed to deposit the entire amount in the Registry within eight weeks from today. On deposit, the same be released in favour of the claimants, through payees' cheque account, strictly, in terms of the conditions contained in the impugned award.

18. Resultantly, the impugned award is modified as indicated hereinabove and the appeal is disposed of accordingly.

19. Send down the record forthwith, after placing a copy of this judgment.

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

Cr. Appeal No. 10/2010
with Cr. Appeal No. 326/2010
Reserved on: 17.6.2015
Decided on: 19.6.2015

1. **Cr. Appeal No. 10/2010**
Tarsem Lal …… Appellant
Versus
State of Himachal Pradesh ……..Respondent

2. **Cr. Appeal No. 326/2010**
State of Himachal Pradesh …… Appellant
Versus
Rajesh Kumar ……..Respondent

N.D.P.S. Act, 1985- Section 50- Accused was found in possession of 5.6 k.g of charas- consent memo did not mention that accused had a legal right to be searched before a Magistrate or a Gazetted Officer- consent memo further inquired from the accused whether the accused wanted to be searched before Magistrate or a Gazetted Officer or police officer- only two options namely to be searched before Magistrate or a Gazetted Officer can be given as per law - consent was collective and should have been given individually – option was given prior to the search of the vehicle and no option to be searched was given prior to the

search of the person- held, that requirements of Section 50 of the Act were not complied with. (Para- 25 to 27)

Cases referred:
State of Delhi v. Ram Avtar (2011) 12 SCC 207
State of Rajasthan v. Parmanand (2014) 5 SCC 345

For the appellant(s)	:	Mr. Chandranarayana Singh, legal aid counsel, in Cr. Appeal No. 10/2010 and Mr. M.A. Khan, Additional Advocate General, in Cr. Appeal No. 326/2010.
For the respondent(s)	:	Mr. M.A. Khan, Additional Advocate General in Cr. Appeal No. 10/2010 and Mr. Daleep Khachi, vice counsel, in Cr. Appeal No. 326/2010.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

Since both the appeals have arisen out of the same judgment, both the appeals were taken up together and are being disposed of this common judgment.

2. Cr. Appeal No. 10/2010 has been instituted against Judgment dated 31.12.2009 by the learned Special Judge, Fast Track Court, Chamba, District Chamba, in Sessions Trial No. 17/2009, whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985, was convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of ` 1.00 Lakh, in default of payment of fine, to further undergo rigorous imprisonment for six months. Cr. Appeal No. 326/2010 has been filed by the State against the same judgment, whereby respondent-accused Rajesh Kumar was acquitted.

3. Case of the prosecution, in a nutshell, is that police party headed by Yudhbir Singh set up a Naka at Toll Tax barrier near police post Banikhet. At about 3.00 am, a car bearing No. PB-02-AU-6363 came from Banikhet Bus stand side. Car was stopped by the police party. Accused Rajesh Kumar was driving the car. Tarsem Lal was lying on the backseat of the car. He had covered himself with a blanket. He was asked to remove the blanket. A bag of blue colour was found kept on his lap. He was asked to come out of vehicle. He was hesitant to come out of vehicle. Police became suspicious that the accused might be carrying some narcotic substance. ASI Yudhbir Singh informed the accused person of their legal right to be searched before a Magistrate or a Gazetted Officer. Accused consented to be searched by the Police. Memo was prepared to this effect. The bag was checked and it contained Charas which weighed 5.6 kg. Two samples of 25 gms each were separated which were put in an empty cigarette packets and sealed with seal impression 'K'. Balance Charas was also put in different parcel and sealed with seal impression of 'K'. Vehicle was also taken into possession. Rukka was sent to the police station, on the basis of which FIR No. 23/2009 was recorded. Case property was produced before the SHO Hakam Singh. He resealed the same with seal 'H' and deposited with MHC. Special Report was also sent to the Superintendent of Police, Chamba. Challan was put up in the Court after completing all codal formalities.

4. Prosecution examined as many as sixteen witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. They denied the

allegations. Accused-Tarsem Lal was convicted and sentenced by the learned trial Court as noticed above. Hence, Cr. Appeal No. 10/2010. Accused-Rajesh Kumar was acquitted by the learned trial Court. Hence, Cr. Appeal No. 326/2010 by the State.

5. Mr. Chandranarayana Singh, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused.

6. Mr. M.A. Khan, Additional Advocate General appearing on behalf of the State, has vehemently argued that the prosecution has proved its case against the accused.

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

8. PW-1 Suneel Kumar testified that he was serving at the Army Cantonment Barrier. He was on duty alongwith Tilak Raj at the Barrier. Police laid Naka a little ahead of the Cantonment Barrier towards Banikhet. A car bearing registration number of Punjab came from Chamba side. It was stopped. There were three persons in the car. There was a bag in the car. Third person managed to run away from the car. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that there were only two persons occupying the car, one was driver and another occupant was on the backseat. He did not see person lying in backseat covered with blanket. He did not know that recovered bag was on the lap of the Tarsem. However bag was recovered from the backseat. He admitted that police gave option to both the accused to be searched by a Magistrate or a Gazetted Officer as it was their right. Accused consented to be searched by the police party. He admitted his signatures on Ext. PW-1/A. He also admited that Tilak Raj and Roop Lal put their signatures on Ext. PW-1/A and Ext. PW-1/B as witnesses. He also admitted that recovered bag was searched in the presence of witnesses and accused. It contained Charas in the shape of sticks. It was weighed. Charas weighed 5.6 kg. He denied that two samples of 25 gms each were separated from the Charas and put in cigarette packets and parceled and sealed in his presence. He also denied that seals were fixed on the parcels in his presence. He also denied that sample seal was taken in his presence. Volunteered that his signatures were taken later on, on sample mark A-1 by the police. He admitted his signatures on site plan mark A-2. He also admitted his signatures on Ext. PW-1/B as well as on Ext. P1, P2, P3 and P4. He denied the suggestion that parcel was sealed in his presence. He denied that seal after use was given to him. He admitted that he had appended his signatures on Ext. PW-1/A, PW-1/B, PW-1/C and PW-1/D after going through their contents. He was also cross-examined by the learned advocate appearing on behalf of the accused. In his cross-examination by the learned counsel for the accused, he admitted that police chowki was situated at a distance of 10 yards from the Barrier. He admitted that accused were taken to Police Chowki. He also admitted that Boru was taken to Police Chowki. He remained on duty at Barrier. He was called about 10 minutes after taking accused to the police chowki and his signatures were obtained. When he was called to police post, by that time, parcels had already been prepared and other papers had also been filled in by that time. His signatures were obtained thereafter. He came back to the Barrier. He denied the suggestion that police told him that they had recovered Bhang and he should put his signatures. Volunteered that police first recovered Bhang and took him to police Chowki and asked him to put his signatures. Police did not give any option to the accused in his presence whether they wanted to be searched by a Magistrate or a Gazetted Officer or by the police party.

9. PW-2 Roop Singh deposed that on 1.2.2009 he was associated with the police party headed by ASI Yudhbir Singh. He was present at Cantonment Barrier Banikhet and Tilak Raj and Suneel Kumar were also present on duty at Cantonment Barrier. Police

checked the vehicle. Two persons were occupying the vehicle. Persons occupying the car were directed to come out of the vehicle. ASI Yudhbir Singh gave option to the accused by uttering the words, "*that he was suspecting that you were possessing contraband and your vehicle was required to be searched and whether you wanted to give your search before the Magistrate, or to the gazetted officer of police or to the police party present on the spot."* Accused consented to be searched by the police party. Consent memo Ext. PW-1/A was prepared. Thereafter, Yudhbir Singh gave his personal search. Bag was found to be in lap of the accused Tarsem, which was searched in the presence of witnesses which contained Boru of white colour which was tied with string. Boru was searched and found to contain Charas in the shape of sticks. It weighed 5.6 kg. Out of recovered Charas, two samples of 25 grams each were drawn and put in cigarette packets and sealed with seal 'K'. Balance Charas alongwith Boru and bag was parceled and sealed with same seal 'K'. NCB form was filled in. Seal, after use, was handed over to Suneel Kumar. Seizure memo was prepared. Case property was produced while recording statement of PW-2. He also admitted in his cross-examination that police Chowki was about 10 meters from the cantonment barrier. He admitted that Rukka was sent before commencing the proceedings. He also admitted that the road remains busy throughout day and night. He also admitted that there was no provision of light in the rain shelter. Volunteered that there was provision of light outside rain shelter. He was not in a position to narrate the exact time which was spent by the Tilak Raj and Suneel Kumar alongwith the police party when the proceedings were carried out. He could not tell even by guess work whether they remained present for 10, 20 or 30 minutes alongwith the police party. He did not even by guess work at what time rukka was sent to the police station.

10. PW-3 Sanjay Kumar also deposed the manner in which accused were nabbed. Search, seizure and sealing process was completed at the spot. Rukka was given to him after preparing seizure memo and after filling NCB form.

11. PW-4 Om Parkash is a formal witness.

12. PW-5 Shekhar deposed that on 2.2.2009, MHC Ashok Kumar handed over to him one sample parcel duly sealed with seals alongwith sample seals, NCB form vide RC No. 14/2009 for being taken to FSL Junga. He delivered the parcel on 3.2.2009 and obtained receipt on the RC and returned the RC to MHC on his return.

13. PW-6 Ashok Kumar deposed that he was posted as IO in Police Station Dalhausie since 2006. He was officiating as MHC on 2.2.2009. He handed over one parcel alongwith NCB forms, docket, copy of FIR and seizure memo to Shekhar Kumar for being taken to FSL Junga for examination vide RC No. 14/2009.

14. PW-7 Bhajan Singh deposed that on 1.2.2009, Hakam Singh deposited with him three parcels sealed with three seals of 'K' and three seals of 'H' each alongwith NCB form, sample seals for being kept in Malkhana. Entries were made in the Malkhana Register. He kept the case property in the Malkhana vide entry at Sr. No. 76/09. He proved copy of Malkhana register Ext.PW-7/A. He admitted in his cross-examination that there was no reference of deposit of NCB form in the Malkhana Register. Volunteered that he did not record in the Malkhana Register as it was not a case property.

15. PW-8 Pritam Chand and PW-9 Sanjeev Bhatiya are formal witnesses.

16. PW-10 Manmohan Singh deposed that he handed over his car at about 3-4 pm on 31.1.2009.

17. PW-11 Hakam Singh deposed that he recorded FIR Ext. PW-11/A after receiving Rukka. ASI Yudhbir Singh handed over to him two sample parcels containing 25 grams Charas each and one big parcel containing 5.6 kgs Charas. Again stated that 5.50 kgs. They were sealed with seal 'K' and NCB form for resealing purpose. He resealed all the parcels with seal 'H' and handed over case property to MHC Dalhausie to be kept in Malkhana.

18. PW-12 Mazid Mohammad also deposed the manner in which accused was nabbed and codal formalities of seizure and sampling were completed at the spot. In his cross-examination, he has admitted that option to be searched by a Magistrate or a Gazetted Officer was given prior to conducting search of vehicle.

19. PW-13 Anuj Kumar also deposed the manner in which accused was nabbed and codal formalities of seizure and sampling were completed at the spot. In his cross-examination, he has admitted that in his presence, IO has given option to the accused to be searched by a Magistrate or a Gazetted Officer or police persons at the spot.

20. PW-14 Raj Kumar is a formal witness.

21. PW-15 Rajesh Kumar deposed that ASI Yudhbir Singh handed over to Hakam Singh a big parcel said to have contained 5.6 kg Charas, sealed with three seals of 'K', two sample parcels said to have contained 25 grams Charas each sealed with three seals of 'K' and NCB form for resealing purpose. Hakam Singh resealed all the parcels with three seals of 'H' and prepared resealing memo Ext. PW-11/B to that effect.

22. PW-16 Yudhbir Singh has also deposed the manner in which accused was apprehended and codal formalities of seizure and sampling were completed at the spot. Accused were given option when the police was suspicious that they possessed narcotic substance, that whether they wanted to be searched by a Magistrate or a Gazetted Officer or by the police party on the spot. Accused consented to be searched by the police party. He handed over case property to Hakam Singh after completing all the codal formalities. In his cross-examination, he has admitted that in the site plan, Ext. PW-16/B, rain shelter has not been shown. He also admitted that Suneel and Tilak Raj did not remained present with him throughout the proceedings. Again stated that they remained present with him during the course of proceedings. Option was given to the accused persons only once that too at the time of search of vehicle and no fresh option was given to the accused at the time of conducting personal search.

23. We have gone through the consent memo Ext. PW-1/A. It does not state that accused had a legal right to be searched before a Magistrate or a Gazetted Officer. There is another illegality in Ext. PW-1/A. Accused have been asked to give their option in writing whether they wanted to be searched before a Magistrate or a Gazetted Officer or police officer. Requirement of law is that the option is to be given by the accused whether he wants to be searched before a Magistrate or a Gazetted Officer. There are only two options. PW-2 HC Roop Singh has also deposed that the accused were told by the IO whether they wanted to give search before a Magistrate or a Gazetted Officer or to the police party present at the spot. PW-13 Anuj Kumar has stated that IO gave option to the accused to be searched by a Magistrate or a Gazetted Officer or police persons at the spot. PW-16 Yudhbir Singh IO has also deposed that accused were asked to give their personal search before a Magistrate or a Gazetted Officer or the police present at the spot. Moreover, accused have been collectively asked to give their option to be searched by a Magistrate or a Gazetted Officer. Consent is required to be obtained individually.

24. PW-12 Mazid Mohammad has also stated that option to be searched by a Magistrate or a Gazetted Officer was given prior to search of vehicle and option was given only once that too before conducting search of the vehicle. Similarly, PW-16 IO Yudhbir Singh has also admitted that no fresh option was given to the accused at the time of conducting their personal search. Case of the prosecution is that there were only two occupants in the car, however, PW-1 Suneel Kumar has categorically stated in his examination-in-chief that there were three occupants and third one ran away from the spot. Proceedings, as per prosecution case, were carried out in the rain shelter. Site plan is Ext. PW-16/A PW-16 Yudhbir Singh has admitted in his cross-examination that rain shelter has not been shown in the site plan. There was no light also as per statement of PW-2 Roop Singh. PW-2 did not remember how long Tilak Raj and Suneel Kumar remained on the spot. He could not tell even by rough estimate whether they remained at the spot for 10, 20 or 30 minutes. Similarly, PW-16 Yudhbir Singh initially stated in his cross-examination that Suneel and Tilak Raj did not remain present with him throughout the proceedings. Later on stated that they were present with him during the course of entire proceedings. Police party spent 6-7 hours for carrying out the proceedings. Surprisingly, PW-2 also says that Rukka was sent before commencement of the proceedings. Rukka was to be sent after completing all the formalities at the spot, on the basis of which FIR was registered.

25. Case property has been produced while recording statement of PW-2. Who has produced the case property in the Court is not stated. We have gone through the extract of Malkhana Register Ext. PW-7/A. There is no entry when FSL report was received back. There is no entry when the case property was dispatched from the Malkhana, in the Malkhana Register, for the purpose of production of the same before the Court. There is no entry when the case property was returned in the Malkhana. There is no DDR at the time of producing the case property before the Court and its re-deposit in the Malkhana. Thus, it casts doubt whether the case property is the same which was seized from the accused, sent to FSL for examination and produced before the Court or it was case property of some other case. There is no reference whether NCB form was deposited alongwith case property in the Malkhana. In the cases under NDPS Act, question how and where samples were stored and when they have been dispatched or received in Malkhana, is a matter of great importance.

26. Their Lordships of the Hon'ble Supreme Court in **State of Delhi v. Ram Avtar** reported in (2011) 12 SCC 207 have held that merely asking accused whether he wished to be searched by a Magistrate or a Gazetted Officer without informing that he enjoys a right in this behalf, is no compliance of Section 50 of the Narcotic Drugs & Psychotropic Substances Act. Their Lordships have held as under:

> " 9. One of the earliest and significant judgments of this Court, on the issue before us is the case of State of Punjab v. Balbir Singh, [(1994) 3 SCC 299] where the Court considered an important question i.e., whether failure by the empowered or authorized officer to comply with the conditions laid down in Section 50 of the Act while conducting the search, affects the prosecution case. In para 16 of the said judgment, after referring to the words "if the person to be searched so desires", the Court came to the conclusion that a valuable right has been given to the person, to be searched in the presence of the Gazetted Officer or Magistrate if he so desires. Such a search would impart much more authenticity and creditworthiness to the proceedings, while equally providing an important safeguard to the accused. It was also held that to afford this opportunity to the person to be searched, such person must be fully aware of his right under Section 50 of the Act and that can be achieved only by the authorized officer explicitly informing him of the same. The statutory language is clear, and the provisions implicitly make it

obligatory on the authorized officer to inform the person to be searched of this right. Recording its conclusion in para 25 of the judgment, the Court clearly held that non-compliance with Section 50 of the Act, which is mandatory, would affect the prosecution case and vitiate the trial. It also noticed that after being so informed, whether such person opted for exercising his right or not would be a question of fact, which obviously is to be determined on the facts of each case.

10. This view was followed by another Bench of this Court in the case of Ali Mustaffa Abdul Rahman Moosa v. State of Kerala, [(1994) 6 SCC 569], wherein the Court stated that the searching officer was obliged to inform the person to be searched of his rights. Further, the contraband seized in an illegal manner could hardly be relied on, to the advantage of the prosecution. Unlawful possession of the contraband is the sine qua non for conviction under the NDPS Act, and that factor has to be established beyond any reasonable doubt. The Court further indicated that articles recovered may be used for other purposes, but cannot be made a ground for a valid conviction under this Act.

11. In the case of Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat, [(1995) 3 SCC 510], the Court followed the principles stated in Balbir Singh's case (supra) and also clarified that the prosecution must prove that the accused was not only made aware of his right but also that the accused did not choose to be searched before a Gazetted Officer or a Magistrate.

12. Then the matter was examined by a Constitution Bench of this Court, in the case of State of Punjab v. Baldev Singh [(1999) 6 SCC 172], where the Court, after detailed discussion on various cases, including the cases referred by us above, recorded its conclusion in para 57 of the judgment . The relevant portions of this conclusion are as under:

> "57. On the basis of the reasoning and discussion above, the following conclusions arise:
>
> (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.
>
> XXX XXX XXX (4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of

> justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.
>
> XXX XXX XXX (6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law."

13. Still in the case of Ahmed v. State of Gujarat, [(2000) 7 SCC 477), a Bench of this Court followed the above cases including Baldev Singh's case (supra) and held that even where search is made by empowered officer who may be a Gazetted Officer, it remains obligatory for the prosecution to inform the person to be searched about his right to be taken to the nearest Gazetted Officer or Magistrate before search. In this case, the Court also noticed at sub-para (e) at page 482 of the judgment that the provisions of Section 50 of the Act, which afford minimum safeguard to the accused, provide that when a search is about to be made of a person under Section 41 or Section 42 or Section 43 of the Act, and if the person so requires, then the said person has to be taken to the nearest Gazetted Officer of any department mentioned in Section 42 of the Act or to the nearest Magistrate.

14. In the case of K. Mohanan v. State of Kerala, [(2010) 10 SCC 222] another Bench of this Court while following Baldev Singh's case (supra) stated in unambiguous terms that merely asking the accused whether he wished to be searched before a Gazetted Officer or a Magistrate, without informing him that he enjoyed a right under law in this behalf, would not satisfy the requirements of Section 50 of the Act.

15. We may also notice here that some precedents hold that though a right of the person to be searched existed under Section 50 of the Act, these provisions are capable of substantial compliance and compliance in absolute terms is not a requirement under law. Reference in this regard can be made to Joseph Fernandez v. State of Goa, [(2000) 1 SCC 707], Prabha Shankar Dubey v. State of Madhya Pradesh, [(2004) 2 SCC 56], Krishna Kanwar v. State of Rajasthan, [(2004) 2 SCC 608, Manohar Lal v. State of Rajasthan, [(1996) 11 SCC 391], Karnail Singh v. State of Haryana, [(2009) 8 SCC 539].

16. In the case of Prabha Shankar Dubey (supra), this Court while referring to Baldev Singh's case (supra) took the view that Section 50 of the Act in reality provides additional safeguards which are not elsewhere provided by the statute. As the stress is on the adoption of reasonable, fair and just procedure, no specific words are necessary to be used to convey the existence of this right. The notice served, in that case, upon the person to be searched was as follows:

> `By way of this notice you are informed that we have received information that you are illegally carrying opium with you, therefore, we are required to search your scooter and you for this purpose. You

would like to give me search or you would like to be searched by any gazetted officer or by a Magistrate?'

Keeping the afore-referred language in mind, the Court applied the principle of substantial compliance, and held that the plea of non- compliance with the requirements of Section 50 of the Act was without merit on the facts of that case.

17. The Court held as under:

"12. The use of the expression "substantial compliance" was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in Baldev Singh case. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations.

13. Above being the position, we find no substance in the plea that there was non-compliance with the requirements of Section 50 of the Act."

18. Similarly, in Manohar Lal's case (supra) the option provided to the accused, not to go to a Magistrate if so desired, was considered to imply requirement of mere substantial compliance; and that strict compliance was not necessary.

19. In the case of Union of India v. Satrohan, [(2008) 8 SCC 313] though the Court was not directly concerned with the interpretation of the provisions of Section 50 of the Act, the Court held that Section 42(2) of the Act was mandatory. It also held that search under Section 41(1) of the Act would not attract compliance to the provisions of Section 50 of the Act. To that extent this judgment was taking a view different from that taken by the equi-Bench in Ahmed's case (supra). This question to some extent has been dealt with by the Constitution Bench in the case of Vijaysinh Chandubha Jadeja v. State of Gujarat [(2011) 1 SCC 609] (hereinafter referred to as `Vijaysinh Chandubha Jadeja'). As this question does not arise for consideration before us in the present case, we do not consider it necessary to deliberate on this aspect in any further detail.

20. In the case of Vijaysinh Chandubha Jadeja v. State of Gujarat, [(2007) 1 SCC 433], a three Judge Bench of this Court had taken the view that the accused must be informed of his right to be searched in presence of a Magistrate and/or a Gazetted Officer, but in light of some of the judgments we have mentioned above, a reference to the larger bench was made, resulting. Accordingly, a Constitution Bench was constituted and in the case of Vijaysinh Chandubha Jadeja (supra) of this Court, referring to the language of Section 50 of the Act, and after discussing the above-mentioned judgments of this Court, took the view that there was a right given to the person to be searched, which he may exercise at his option. The Bench further held that substantial compliance is not applicable to Section 50 of the Act as its requirements were imperative. The Court, however, refrained from specifically deciding whether the provisions were directory or mandatory.

21. It will be useful to refer the relevant parts of the Constitution Bench in Vijaysinh Chandubha Jadeja (supra). In para 23, the Court said

> `In the above background, we shall now advert to the controversy at hand. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in Baldev Singh case'.

After further referring to the conclusions arrived at by the Constitution Bench in Baldev Singh's case (supra) (which have been referred by us in para 9 of this judgment) and reiterating the same the Constitution Bench in Vijaysinh Chandubha Jadeja (supra) this case concluded as under:

> "31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez and Prabha Shankar Dubey is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh case. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

22. An analysis of the above judgments clearly show that the scope of the provisions of Section 50 of the Act are no more res integra and stand concluded by the above judgments particularly the Constitution Bench judgments of this Court in the cases of Baldev Singh (supra) and Vijaysinh Chandubha Jadeja (supra).

23. In the present case, we are concerned with the provisions of Section 50 of the Act as it was, prior to amendments made by Amending Act 9 of 2001 w.e.f. 2.10.2001. In terms of the provisions, in force at the relevant time, the petitioner had a right to be informed of the choice available to him; making him aware of the existence of such a right was an obligation on the part of the searching officer. This duty cast upon the officer is imperative and failure to provide such an option, in accordance with the provisions of the Act, would render the recovery of the contraband or illicit substance illegal. Satisfaction of the requirements in terms of Section 50 of the Act is sine qua non prior to prosecution for possession of an unlawful narcotic substance.

24. In fact, the Constitution Bench in the case of Vijaysinh Chandubha Jadeja (supra), in para 25, has even taken a view that after the amendment to Section 50 of the Act and the insertion of sub-section 5, the mandate of Section 50(2) of the Act has not been nullified, and the obligation upon the searching officer to inform the person searched of his rights still remains. In other words, offering the option to take the person to be searched before a Gazetted Officer or a Magistrate as contemplated under the provisions of this Act, should be unambiguous and definite and should inform the suspect of his statutory safeguards.

25. Having stated the principles of law applicable to such cases, now we revert back to the facts of the case at hand. There is no dispute that the concerned officer had prior intimation, that the accused was carrying smack, and the same could be recovered if a raid was conducted. It is also undisputed that the police party consisting of ASI - Dasrath Singh, Head Constable- Narsingh, Constable - Manoj Kumar and lady constable-Nirmla had gone in a Government vehicle to conduct the raid. The vehicle was parked and the accused, who was coming on a scooter, had been stopped.

He was informed of and a notice in writing was given to him of, the suspicions of the police, that he was carrying smack. They wanted to search him and, therefore, informed him of the option available to him in terms of Section 50 of the Act. The option was given to the accused and has been proved as Ex. PW-6/A, which is in vernacular. The High Court in the judgment under appeal has referred to it and we would prefer to reproduce the same, which reads as under :

> "Musami Ram Avtar urf Rama S/o late Sh. Mangat Ram R/o 71/144, Prem Nagar, Choti Subzi Mandi, Janakpuri, Delhi, apko is notice ke tehat suchit kiya jata hai ki hamare pas itla hai ki apko kabje me smack hai aur apki talashi amal mein laye jati hai. Agar ap chahen to apki talashi ke liye kisi Gazetted officer ya Magistrate ka probandh kiya ja sakta hai."

26. The High Court while relying upon the judgment of this Court in the case of Baldev Singh (supra) and rejecting the theory of substantial compliance, which had been suggested in the case of Joseph Fernandez (supra), found that the intimation did not satisfy the provisions of Section 50 of the Act. The Court reasoned that the expression `duly' used in Section 50 of the Act connotes not `substantial' but `exact and definite compliance'. Vide Ex.PW-6/A, the appellant was informed that a Gazetted Officer or a Magistrate could be arranged for taking his search, if he so required. This intimation could not be treated as communicating to the appellant that he had a right under law, to be searched before the said authorities. As the recovery itself was illegal, the conviction and sentence has to be set aside.

27. It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance thereto should be strictly construed. As already held by the Constitution Bench in the case of Vijaysinh Chandubha Jadeja (supra), the theory of `substantial compliance' would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance thereof must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The officer had prior information of the raid; thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non-compliance of the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial."

27. Their Lordships of the Hon'ble Supreme Court in **State of Rajasthan v. Parmanand** reported in (2014) 5 SCC 345, have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their lordships have also held that Section 50 does not provide for third option. Their lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. Their lordships have held as under:

"15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.

16. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No.2 – Surajmal is stated to have signed for himself and for respondent No.1 – Parmanand. Respondent No.1 Parmanand did not sign.

19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.

20. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed."

Cr. Appeal No. 326/2010

28. Prosecution has failed to prove that contraband was recovered from the conscious and exclusive possession of the accused-respondent. He was merely a driver. Accordingly the present appeal fails and is accordingly dismissed. Bail bonds of the accused-respondent namely Rajesh Kumar are discharged.

Cr. Appeal No. 10/2010

29. Cr. Appeal No. 10/2010 is allowed. Judgment of conviction dated 31.12.2009 by the learned Special Judge, Fast Track Court, Chamba, District Chamba, in Sessions Trial No. 17/2009, whereby appellant-accused Tarsem Lal has been convicted and sentenced, is set aside. Accused-Tarsem Lal is acquitted of the offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985. He be released forthwith, if not required by the police in any other case. Fine amount, if any deposited by the accused, be also refunded to him. Registry is directed to prepare the release warrant of the accused-Tarsem Lal and send the same immediately to the concerned Superintendent of Jail. Pending applications, in both the appeals, if any, are disposed of.

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

United India Insurance Company …Appellant.
Versus
Sh. Lalli alias Laloo and another …Respondents.

FAO No. 255 of 2008
Decided on: 19.06.2015

Motor Vehicle Act, 1988- Section 149- Owner specifically stated that he had engaged the driver after examining his driving licence and after knowing that he was driver of tractor in the same village- held, that owner had performed his duty which he was supposed to do- insurance policy covered 1+1 person which means that risk of driver and passenger was covered- only the claimant had filed the claim, therefore, insurance company is liable to satisfy the award and it was rightly saddled with liability. (Para-9 to 15 and 22)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Lal Chand versus Oriental Insurance Co. Ltd., 2006 AIR SCW 4832
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217,
United India Insurance Company Limited versus K.M. Poonam & others, 2011 ACJ 917
National Insurance Company Limited versus Anjana Shyam & others, 2007 AIR SCW 5237

For the appellant: Mr. P.S. Chandel, Advocate.
For the respondents: Nemo for respondent No. 1.
Mr. Lalit Sehgal, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

A vehicular accident, which was caused by the driver, namely Shri Bir Singh, while driving tractor, bearing registration No. HP-16-0243, rashly and negligently on 30.08.2001 at about 10.45 P.M. near Village Ratoli on Rajgarh-Solan Road, has given birth to the appeal in hand calling in question the award, dated 01.03.2008, made by the Motor Accident Claims Tribunal-II, Sirmaur District at Nahan (for short "the Tribunal") in MAC

Petition No. 40-N/2 of 2005, titled as Shri Lalli alias Laloo versus Nagender Chauhan and another (for short "the impugned award").

2. The claimant, namely Shri Lalli alias Laloo, being the victim of the vehicular accident, filed a claim petition before the Tribunal seeking compensation to the tune of Rs.7,90,000/-, as per the break-ups given in the claim petition.

3. The respondents in the claim petition, i.e. the owner-insured and the insurer appeared and resisted the claim petition on the grounds taken in the respective memo of objections.

4. Following issues came to be framed by the Tribunal on 13.10.2006:

> *"1) Whether the petitioner had sustained injuries on 30.8.2001 at about 10.45 P.M. at place near village Ratoli on Rajgarh Solan road due to the rash and negligent driving of tractor No. HP-16-0243 being driven by Shri Bir Singh (since deceased) as alleged? ..OPP*
>
> *2) If issue No. 1 is proved, to what amount of compensation the petitioner is entitled to and from whom? ..OPP*
>
> *3) Whether the driver of the offending tractor was not possessed of a valid and effective driving licence at the time of accident? ..OPR-2*
>
> *4) Whether the offending tractor was being driven in contravention of terms and conditions of the Insurance Policy at the relevant time? ..OPR-2*
>
> *5) Whether this petition is collusive with respondent No. 1?..OPR-2*
>
> *6) Relief."*

5. Parties led evidence.

6. The Tribunal, after scanning the oral as well as documentary evidence decided the claim petition in favour of the claimant-injured and directed the insurer to satisfy the award.

7. The insurer has questioned the impugned award only on two grounds:

> (i) That the driver of the offending vehicle was not having a valid and effective driving licence; and
>
> (ii) That three persons were travelling in the offending vehicle at the time of the accident, thus, their risk was not covered in terms of the insurance contract.

8. Both the arguments, though attractive, are devoid of any force for the following reasons:

9. Parties have led evidence and the owner-insured, while appearing in the witness box as RW-1, has specifically stated that he had engaged the driver-Bir Singh after examining his driving licence and after knowing the fact that he was also driving the tractor of one Bhagat Ram in the same village.

10. Thus, it can be safely said that the owner-insured has performed his duties, which he was supposed to do in view of the mandate of the insurance contract read with the mandate of Sections 147 to 149 of the Motor Vehicles Act, 1988 (for short "the MV Act").

11. The Apex Court in a case titled as **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** the laid down principles, how the insurer can avoid its liability. It is apt to reproduce relevant portion of para 105 of the judgment herein:

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

12. The Apex Court in a case titled as **Lal Chand versus Oriental Insurance Co. Ltd.,** reported in **2006 AIR SCW 4832,** where the owner-insured had performed his job whatever he was required to do and satisfied himself that the driver was having valid driving licence, held the insurer liable. It is apt to reproduce paras 8, 9 and 11 of the judgment herein:

> *"8. We have perused the pleadings and the orders passed by the Tribunal and also of the High Court and the annexures filed along with the appeal. This Court in the case of United India Insurance Co. Ltd. v. Lehru & ors.,*

reported in 2003 (3) SCC 338, in paragraph 20 has observed that where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). He will, therefore, have to check whether the driver has a driving licence and if the driver produces a driving licence, which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take test of the driver, and if he finds that the driver is competent to drive the vehicle, he will hire the driver.

9. In the instant case, the owner has not only seen and examined the driving licence produced by the driver but also took the test of the driving of the driver and found that the driver was competent to drive the vehicle and thereafter appointed him as driver of the vehicle in question. Thus, the owner has satisfied himself that the driver has a licence and is driving competently, there would be no breach of Section 149(2)(a)(ii) and the Insurance Company would not then be absolved of its liability.

10. ....

11. As observed in the above paragraph, the insurer, namely the Insurance Company, has to prove that the insured, namely the owner of the vehicle, was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant point of time."

13. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver.

However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

14. Having said so, I am of the considered view that the Tribunal has rightly made discussion in paras 31 and 32 of the impugned award.

15. Viewed thus, the owner-insured has not committed any willful breach and the Tribunal has rightly saddled the appellant-insurer with liability to satisfy the award.

16. The next question to be determined is - whether the risk of the claimant-injured was covered in terms of the terms and conditions contained in the insurance contract? The answer is in the affirmative for the following reasons:

17. The factum of insurance is admitted. The risk of '1+1' is covered in terms of the insurance agreement, Ext. R-1. Meaning thereby, the policy covers the risk of the driver and one passenger. Thus, the insurer is to be saddled with liability of one passenger.

18. Only one person, i.e. the claimant-injured has filed claim petition before the Tribunal. Thus, his risk is covered. Had there been any other claim than the risk covered, it was for the owner-insured to satisfy the liability.

19. My this view is fortified by the judgment of the Apex Court in the case titled as **United India Insurance Company Limited versus K.M. Poonam & others,** reported in **2011 ACJ 917.** It is apt to reproduce para 24 of the judgment herein:

"24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the

provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle."

20. It is also apt to reproduce para 15 of the judgment of the Apex Court in the case titled as **National Insurance Company Limited versus Anjana Shyam & others,** reported in **2007 AIR SCW 5237,** herein:

"15. In spite of the relevant provisions of the statute, insurance still remains a contract between the owner and the insurer and the parties are governed by the terms of their contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner, and meet the claims of third parties subject to the exceptions provided in Section 149(2) of the Act. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. The High Court has considered only the aspect whether by overloading the vehicle, the owner had put the vehicle to a use not allowed by the permit under which the vehicle is used. This aspect is different from the aspect of determining the extent of the liability of the insurance company in respect of the passengers of a stage carriage insured in terms of Section 147(1)(b)(ii) of the Act. We are of the view that the insurance company can be made liable only in respect of the number of passengers for whom insurance can be taken under the Act and for whom insurance has been taken as a fact and not in respect of the other passengers involved in the accident in a case of overloading."

21. The Tribunal has granted meager amount of compensation. But, the claimant-injured has not questioned the same, the same is reluctantly upheld.

22. Having said so, the impugned award merits to be upheld and the appeal is to be dismissed. Accordingly, the appeal is dismissed and the impugned award is upheld.

23. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award after proper identification.

24. Send down the record after placing copy of the judgment on the Tribunal's file.

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

FAOs (MVA) No. 301 and 637 of 2008.
Judgment reserved on 5.6.2015.
Date of decision: 19th June,2015.

1. FAO No.301 of 2008.
Smt. Vidya Devi .....Appellant
Versus
Shri Naresh Kumar and another ...Respondents.

2. FAO No.637 of 2008.
Naresh Kumar .....Appellant
Versus
Smt. Vidya Devi and another ...Respondents.

Motor Vehicle Act, 1988- Section 166- Tribunal had assessed the income of the deceased as Rs.3,000/- per month and loss of dependency as Rs.1,000/-- deceased was agriculturist and horticulturist by profession and it can be safely held that he was earning Rs.6,000/- p.m.- loss of dependency has to be taken as 50%- deceased was 21 years old at the time of accident - applying multiplier of '14', claimant will be entitled to Rs. 3000x12x14=Rs.5,04,000/-+ Rs. 1000/-costs=Rs. 5,05,000/-. (Para-16 to 18)

Cases referred:
Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120
Munna Lal Jain and another versus Vipin Kumar Sharma and others JT 2015 (5) SC 1

For the appellant(s): Mr.J.L. Bhardwaj, and Mr. Vikram Thakur, Advocate, vice Mr. M.A. Khan, Advocate, for the appellants in both the appeals.

For the respondent(s): Mr. Vikram Thakur, Advocate, vice Mr. M.A. Khan, Advocate, for respondent No. 1 in FAO No. 301 of 2008 and Mr. J.L. Bhardwaj, Advocate, for respondent No. 1 in FAO No. 637 of 2008.
Mr. Lalit K. Sharma, Advocate, for respondent No. 2 in FAO No. 301 of 2008 and Mr. G.C. Gupta, Sr. Advocate, with Ms. Meera Devi, Advocate, for respondent No. 2 in FAO No. 637 of 2008.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

These two appeals are outcome of a common judgment and award dated 1.3.2008, passed by the Motor Accident Claims Tribunal, Fast Track Court Shimla, H.P. in MAC No.62-S/2 of 2005/2001, whereby compensation to the tune of Rs.2,03,000/-

alongwith 9% interest and cost to the tune of Rs.1000/- came to be awarded in favour of the claimant and the insured was saddled with the liability.

2. Both these appeals are being taken up together for disposal in the given circumstances.

3. The claimant has filed FAO No. 301 of 2008 for enhancement of compensation and the insured has filed FAO No.637 of 2008, for exonerating him from the liability and saddling the insurer with the liability.

4. Claimant Smt. Vidya Devi, being the victim of a vehicular accident filed claim petition before the Tribunal for the grant of compensation on the grounds taken in the memo of claim petition. It is averred in the claim petition that his son, namely, Sh. Vidya Sagar 21 years of age was agriculturist and horticulturist by profession, hired truck No. HP-51-2587 from Kumarsain to Rampur for bringing the karyana articles for his shop, which he was running in his village Khaneti. The said truck is stated to be owned by Shri Naresh Kumar respondent No. 1 and Shri Gopal Singh was driving the said vehicle. The said vehicle met with an accident due to carelessness and negligence of driver Gopal Singh and FIR No. 24/2001 dated 21.3.2001 came to be registered in police station Kumarsain. It is further stated that the whole family is facing starvation as well as remains under deep grief and shock and the claimant has been deprived of the source of income hope/help in the old age and love and affection of her son.

5. Respondents have resisted the averments contained in the claim petition and following issues came to be framed.

(i) *Whether the driver of the truck bearing No. HP-51-2587 was driving the said truck on 21.3.2001 at about 1 AM near Sainj, Tehsil Kumarsain, Distt. Shimla in rash and negligent manner resulting in death of Vidya Sagar, as alleged? OPP.*

(ii) *If issue No. 1 is proved, whether the petitioner is entitled for compensation, if so from whom? OPP*

(iii) *Whether the truck in question was being driven without Route permit, registration certificate etc. at the time of accident, as alleged? OPR-2.*

(iv) *Whether the driver of the said truck was not having valid and effective driving licence at the time of accident, as alleged? OPR-2.*

(v). *Relief.*

6. Claimant examined as many as six witnesses and stepped herself into the witness box as PW1.

7. The respondents have not examined any witness except ASI Sham Lal as (RW-1).

8. The findings returned by the Tribunal on issue No. 1 are not in dispute. The question of quantum as well as who is to be saddled with the liability, is in dispute, in both these appeals.

9. The claimant, by the medium of FAO No. 301 of 2008, has prayed that the amount awarded is too meager thus, has disputed the adequacy of compensation.

10. Owner Naresh Kumar has questioned the impugned award by the medium of FAO No. 637 of 2008 on the ground that the vehicle was insured and the driver was having a valid and effective driving license, thus the insurer was to be saddled with the liability.

11. I have gone through the record and the evidence on the file. The Tribunal has rightly decided issue No. 1 in favour of the claimant and is also not in dispute. Thus, the findings so returned on the said issue are upheld.

12. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 & 4.

13. It is worthwhile to mention herein that the respondents have not pressed both these issues before the Tribunal, thus came to be decided against the respondents. Respondent No. 2, i.e., the insurer had to discharge the onus, failed to do so. Insured has not questioned the findings.

14. It was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving license, in order to seek exoneration, has not led any evidence and has failed to discharge the onus. Thus, it can be safely held that the driver was having a valid and effective driving license.

15. It was for the insurer to plead and prove that the owner has committed any willful breach and the vehicle was being driven in violation of the route permit and the Registration certificate, has not discharged the said onus. Accordingly, both these issues are decided in favour of the claimant and against the owner, driver and insurer.

16. Now adverting to issue No. 2. The Tribunal has fallen in an error in taking the income of the deceased as Rs.3,000/- per month and loss of source of dependency to the tune of Rs.1,000/-. Admittedly, the deceased was 21 years of age at the time of the accident. It is pleaded that he was agriculturist and horticulturist by profession and was earning not less than Rs.12,000/- per month. By a guess work, it can be safely held that he would have been earning Rs.6,000/- per month. He was an unmarried youth and would have contracted marriage. After all, the mother has lost a budding son, helping hand in her old age and source of income, therefore, has lost source of dependency to the tune of 50% of Rs.6000/-, i.e., Rs.3000/- per month, in view of ratio laid down in ***Sarla Verma and others versus Delhi Transport Corporation and another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***.

17. Thus, the claimant has lost source of dependency to the tune of Rs.3000/- per month. The age of the deceased was 21 years at the time of accident, the just and appropriate multiplier to be applied is "14" in view of ***Sarla Verma,*** supra read with ***Munna Lal Jain and another versus Vipin Kumar Sharma and others*** reported in ***JT 2015 (5) SC 1***. It is apt to reproduce paras 12 and 14 of the said judgment herein:

> *"12. The remaining question is only on multiplier. The High Court following Santosh Devi (supra), has taken 13 as the multiplier. Whether the multiplier should depend on the age of the dependants or that of the deceased, has been hanging fire for sometime; but that has been given a quietus by another three-Judge Bench decision in Reshma Kumari (supra). It was held that the multiplier is to be used with reference to the age of the deceased. One reason appears to be that there is certainty with regard to the age of the deceased but as far as that of dependants is concerned, there will always be room for dispute as to whether the age of the eldest or youngest or even the average, etc., is to be taken. To quote:*

"36. In Sarla Verma, this Court has endeavoured to simplify the otherwise complex exercise of assessment of loss of dependency and determination of compensation in a claim made under Section 166. It has been rightly stated in Sarla Verma that the claimants in case of death claim for the purposes of compensation must establish (a) age of the deceased; (b) income of the deceased; and (c) the number of dependants. To arrive at the loss of dependency, the Tribunal must consider (i) additions/deductions to be made for arriving at the income; (ii) the deductions to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. We do not think it is necessary for us to revisit the law on the point as we are in full agreement with the view in Sarla Verma."

13. xxxxxxx xxxxxxxx xxxxxxxxxx

14. The multiplier, in the case of the age of the deceased between 26 to 30 years is 17. There is no dispute or grievance on fixation of monthly income as Rs.12,000.00 by the High Court."

18. Viewed thus, the claimant is entitled to Rs.3000x12x14=Rs.5,04,000/- +Rs.1000/-costs = Rs.5,05,000/-. Accordingly, the amount awarded is enhanced to Rs.5,05,000/- with 9% interest, as awarded by the Tribunal.

19. The question is who is to be saddled with the liability? The Tribunal has fallen in an error in saddling the insured with the liability for the reasons that the vehicle was duly insured. It was for the insurer to satisfy the award. Accordingly, the insurer is saddled with the liability. The insurer is directed to deposit the entire amount within six weeks from today. On deposit, Registry is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account.

20. The statutory amount deposited by the insured be released to the claimant as costs.

21. The impugned award is modified as indicated hereinabove and the appeals are disposed of accordingly.

22. Send down the record forthwith, after placing a copy of this judgment.

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

Abhay Shankar Shukla ……Petitioner.

Versus

SJVN Ltd. & ors. …….Respondents.

CWP No. 2522 of 2015.
Reserved on: 18.6.2015
Decided on: 20.6.2015.

Constitution of India, 1950- Article 226- Petitioner was transferred from Corporate Office Shimla to STPL, Patna- the persons who were working for more period than the petitioner were not transferred- wife of the petitioner had undergone renal (kidney) transplant in the

year 2000- daughter of the petitioner is studying in 10+2 at Shimla- petitioner has worked only for three years at Shimla and has been transferred while the people working for more than 9-10 years have not been transferred- therefore, petition allowed and the transfer order of the petitioner quashed, liberty granted to the respondent to transfer the person on the basis of length of services at a particular place. (Para-4 to 6)

For the petitioner: Mr. Sunil Mohan Goel, Advocate.
For the respondents: Mr. Rajiv Jiwan, Advocate, for respondent No. 1.
Ms. Kiran Thakur, Advocate, for respondents No. 2,3 & 4.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner was appointed as Accounts Officer in the respondent-Corporation. He joined at Corporate Office, Shimla as Dy. General Manager (Finance) in the month of April, 2012. He was transferred from Corporate Office Shimla to STPL, Patna, Bihar vide Office order dated 22.4.2015. The respondent Corporation has framed the transfer policy. The following are the objectives of the transfer policy:

"**OBJECTIVES:**

1.1 Transfer Policy has been formulated with the following objectives:

a). To provide stability of tenure to an employee at the place of posting for a specified period.

b). To bring about transparency and clarity to the employees with respect to their transfers from one project to another or from project to Corporate Office.

c). To encourage specialization in a particular field while also making available wider exposure for the growth of all individuals.

d). To meet the organizational requirements while accommodating the aspirations of the individual."

2. The mode of transfer is laid down at para 4.0 and tenure at 5.0, which read as follows:

"**4.0 MODE OF TRANSFER:**

4.1 Transfer will be effected in the following heads:

a) From Corporate Office to Project/plants and Vice-Versa.

b) Within the same Project/plant.

c) One Project/plant to another project/plant.

d) From Non-family Station to Family Station.

5.0 TENURE:

5.1 The normal tenure of posting will be as under for all stations:

Executives and Supervisors- 3 years.

Workmen- 5 years."

3. The petitioner has brought to the notice of the Court that respondents No. 2, 3 and 4 have worked at the same place for a period of 18.04, 9.11 and 10.7 years, respectively. The explanation given by the respondent-Corporation for retaining the private respondents is that Sh. S.L. Sharma is the senior most officer, who is heading the Finance Department of Corporate Finance Department at Shimla. Sh. Anand Upadhyaya

AGM(Finance) is heading the Finance Department of Rampur Hydro Electric Station. Sh. Sanjay Sood, AGM(Finance) is heading the Compilation Section, being the senior most qualified Chartered Accountant.

4. Mr. Sunil Mohan Goel, submitted at the Bar that the details of the officers who have worked for more than 9-10 years were called. The name of the petitioner was not in the list. However, despite that he has been transferred vide order dated 22.4.2015 to STPL, Bihar.

5. The respondent-Corporation should have transferred the senior most incumbent taking into consideration that the M/S STPL Patna has been formed as a subsidiary company of SJVN Ltd. for construction and generation of 1320 MW thermal power in the State of Bihar. The daughter of the petitioner is studying in 10+2 standard at Shimla. The wife of the petitioner has undergone renal (kidney) transplant in the year 2000. The specialized treatment is not available at Patna. Mr. Rajiv Jiwan, Advocate, submitted that the respondent-Corporation is ready and willing to provide lease property to the petitioner, as per the Circular dated 11.11.2013 at Delhi. However, the fact of the matter is that the petitioner has been discriminated against by the respondent-Corporation, as noticed hereinabove, by sending him to Patna and retaining persons with longer period of service at Shimla.

6. Although the scope of judicial review in transfer matters is very limited, however, in the instant case, the respondent-Corporation has retained the incumbents who have worked for more than 9-10 years at same station. The petitioner has merely worked for 3 years at Shimla and has been transferred to STPL, Patna. The action of the respondent-Corporation of transferring the petitioner is illegal and arbitrary and also violative of Articles 14 and 16 of the Constitution of India.

7. Accordingly, the Writ Petition is allowed. Annexure P-1 dated 22.4.2015, qua the petitioner, is quashed and set aside. However, liberty is reserved to the respondent-Corporation to transfer the incumbents on the basis of length of service at a particular place. Pending application(s), if any, shall also stand disposed of.

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

Ashwani Gupta …Petitioner

Versus

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

CWP No. 7502 of 2014
Judgment reserved on: 15.6.2015
Date of Decision : June 20, 2015

Constitution of India, 1950- Article 226- Petitioner filed a Writ Petition seeking relief that respondent No. 5 be held to be disqualified from holding the office of MLA and he be restrained from acting as MLA- held, that power under Article 226 is in the widest possible terms but this power cannot be used to set aside the election- election can be set aside only by raising an election dispute and only an Election Tribunal can set aside the election under properly filed election petition under Representation of the People Act- writ petition dismissed as not maintainable. (Para-7 to 24)

Cases referred:

K. Venkatachalam vs. A. Swamickan and another (1999) 4 SCC 526.
Kurapati Maria Das vs. Dr. Ambedkar Seva Samajan and others (2009) 7 SCC 387
Gurdeep Singh Dhillon vs. Satpal and others (2006) 10 SCC 616
N.P. Ponnuswami vs. Returning Officer, Namakkal Constituency AIR 1952 SC 64
Durga Shankar Mehta vs. Raghuraj Singh, AIR 1954 SC 520
Hari Vishnu Kamath vs. Syed Ahmad Ishaq, AIR 1955 SC 233
Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others (1978) 1 SCC 405
Krishna Ballabh Prasad Singh vs. Sub Divisional Officer Hilsa-cum- Returning Officer and others (1985) 4 SCC 194
Indrajit Barua and others vs. Election Commission of India and others AIR 1986 SC 103
Jaspal Singh Arora vs. State of Madhya Pradesh (1998) 9 SCC 594
Election Commission of India through Secretary vs. Ashok Kumar and others (2000) 8 SCC 216

For the Petitioner : Mr. Dinesh Bhanot, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. Romesh Verma, Addl. Advocate Generals, Mr. J.K.Verma and Mr. Vikram Thakur, Deputy Advocate Generals, for respondents No. 1 and 4.
Mr. Ashok Sharma, ASGI, for respondent No. 2.
Ms. Nishi Goel, Advocate for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner, who claims himself to be RTI candidate, has filed this petition allegedly as probono publico and has sought following reliefs:

> "(a). The respondent No.5 may kindly be held to be disqualified from holding the office of the member State Legislative Assembly by issuing a writ of quo warranto or any other appropriate writ, order or direction.
>
> (b) Restrained respondent No.5 from functioning as an MLA.

2. This Court on 15.10.2014 issued notices which were confined to the official respondents whereas no notice was issued to the elected candidate, who has been arrayed as respondent No.5. The allegations as set out in the petition are that respondent No.5 at the time of nomination was a Government contractor and had many subsisting contracts and therefore, had incurred disqualification for being elected as a member of the State Legislative Assembly because this fact was suppressed by him while filling up his nomination. It is further alleged that the Returning Officer i.e. respondent No.4 did not follow the provisions contained in Section 9-A and 125-A of the Representation of the People Act, 1951 and illegally permitted respondent No.5 to get elected as a member of State Legislative Assembly.

3. Respondent No.1 in response to the petition filed its reply wherein preliminary objection regarding maintainability of this petition has been raised. It is averred that Article 329 of the Constitution debars any Court of the land to entertain a suit or proceedings calling in question any election to Parliament or State Legislature and the only

mode and manner of challenge to the election of a candidate to either Parliament or State Legislature can only be by way of election petition.

4. The respondents No. 2 to 4 have filed their separate reply wherein these respondents too have relied upon the provisions of Article 329(b) of the Constitution of India and Part-VI of the Representation of the People Act, 1951 to canvass that no election can be called in question except by way of an election petition presented within 45 days from the date of declaration of result of the returned candidate. It has further been averred that the lack of qualification and disqualification at the time of contesting any election is a ground to be raised in an election petition under Section 100 (1) of the Act of 1951 and not by way of present writ petition.

5. Since the respondents have raised preliminary objection regarding very maintainability of this petition, we propose to deal only with this question.

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

7. The petitioner in order to justify the maintainability of the petition has vehemently argued that Article 226 of the Constitution is couched in widest possible terms and there being no express bar to the jurisdiction of this Court, therefore, the present writ is maintainable. In support of his argument, he has relied upon the judgment of the Hon'ble Supreme Court in ***K. Venkatachalam vs. A. Swamickan and another (1999) 4 SCC 526***.

8. While the respondents on the other hand would canvass that in view of the clear cut provisions as contained in Article 329 of the Constitution of India read with the Representation of the People Act, 1951 (for short 'RP Act') and also taking into consideration the disputed questions of fact, the writ petition is not maintainable.

9. In ***K. Venkatachalam's*** case (supra) it was held by the Hon'ble Supreme Court as follows:

> "20. *In all these cases there is a common message that when the poll or re-poll process is on for election to the Parliament or Legislative Assembly, High Court cannot exercise its jurisdiction under 226 of the Constitution and that remedy of the aggrieved parties is under the Act read with Article 329(b) of the Constitution. The Act provides for challenge to an election by filing the election petition under Section 81 on one or more grounds specified in sub-section(l) of Sections 100 and 101 of die Act. There cannot be any dispute that there could be a challenge to the election of the appellant by filing an election petition on the ground improper acceptance of his nomination inasmuch as the appellant was hot an elector on the electoral roll of Lalgudi Assembly Constituency and for that matter also by any non-compliance, with the provisions of the Constitution or of the Act. If an election petition had been filed under Section 81 of the Act High Court would have certainly declared the election of the appellant void. It was, therefore, submitted that respondent could not invoke the jurisdiction of the High Court under Article 226 of the Constitution in view of Article 329(b) of the Constitution read with Sections 81 and 100 of the Act and only an election petition was maintainable to challenge the election of the appellant. That right the respondent certainly had to challenge the election of the appellant. Election petition under Section 81 of the Act had to be filed within forty-five days from the date of election of the returned candidate, that is the appellant in the present case. This was not done.There is no provision under the Act that an election petition could be filed beyond the period of*

limitation prescribed under Section 81 of the Act. That being so the question arises if the respondent is without any remedy particularly when it is established that the appellant did not have the qualification to be elected to the Tamil Nadu Legislative Assembly from Lalgudi Assembly Constituency.

26. The question that arises for consideration is if in such circumstances High Court cannot exercise its jurisdiction under Article 226 of the constitution declaring that the appellant is hot qualified to be member of the Tamil Nadu Legislative Assembly from Lalgudi Assembly Constituency. On the finding recorded by the High Court it is clear that the appellant jn his nomination form impersonated a person known as `Venkatachalam s/o Pethu', taking advantage of the fact that such person bears his first name. Appellant would be even criminally liable as he filed his nomination on affidavit impersonating himself If in such circumstances he is allowed to continue to sit and vote in the Assembly his action would be fraud to the constitution.

27. In view of the judgment of this Court in the case of Election Commission of India v. Saka Varikata Rao, AIR (1953) SC 210 it may be that action under Article 192 could not be taken as the disqualification which the appellant incurred was prior to his election. Various decisions of this Court, which have been referred to by the appellant that jurisdiction of the High Court under Article 226 is barred challenging the election of a returned candidate and which we have noted above, do not appear to apply to the case of the appellant now before us. Article 226 of the Constitution is couched in widest possible term and unless there is clear bar to jurisdiction of the High Court its powers under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In circumstances like the present one bar of Article 329(b) will not come into play when case falls under Articles 191 and 193 and whole of the election process is over. Consider the case where the person elected is not a citizen of India. Would the Court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution?

28. We are, therefore, of the view that the High Court rightly exercised its jurisdiction in entertaining the writ petition under Article 226 of the Constitution and declared that the appellant was not entitled to sit in Tamil Nadu Legislative Assembly with consequent restraint order on him from functioning as a member of the Legislative Assembly, The net effect is that the appellant ceases to be a member of the Tamil Nadu Legislative Assembly. Period of the Legislative Assembly is long since over. Otherwise we would have directed respondent No. 2, who is Secretary to Tamil Nadu Legislative Assembly, to intimate to Election Commission that Lalgudi Assembly constituency seat has fallen vacant and for the Election Commission to take necessary steps to hold fresh election from that Assembly Constituency. Normally in a case like this Election Commission should invariably be made a party."

10. A perusal of the underlined portion of the judgment undoubtedly goes to show that the Hon'ble Supreme Court held that Article 226 of the Constitution is couched in widest possible terms and unless there was a clear bar to the jurisdiction of the High Court its power under Article 226 of the Constitution could be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when

recourse cannot be had to the provisions of the Act for the appropriate relief. It was specifically held that the bar under Article 329 (b) of the Constitution would not come into play.

11. But then the aforesaid judgment was itself explained and distinguished by the Hon'ble Supreme Court in a later decision in ***Kurapati Maria Das*** vs. ***Dr. Ambedkar Seva Samajan and others (2009) 7 SCC 387*** in the following manner:

> "25.*"Learned counsel Shri Gupta, however, invited our attention to some other decisions of this Court reported as K. Venkatachalam v. A Swamickan & Anr. [1999 (4) SCC 526] where a writ of quo warranto was sought against the member of the Legislative Assembly on the ground that his name was not found in the voters' list of that particular constituency from where he was elected. Our attention was invited to paragraphs 27 and 28. In paragraph 27 after referring to the decision of the Election Commission of India v. Saka Venkata Rao [AIR 1953 SC 210] and considering the Article 192, the Court observed that Article 226 is couched in widest possible language and unless there is a clear bar to the jurisdiction of the High Court, its powers under Article 226 can be exercised when there is any act which is against any provision of law or vioative of constitutional provisions and when the recourse cannot be had to the provisions of the Act for appropriate relief. Then the Court observed: (A. Swamickan case, SCC p. 544, para 27)*
>
> > *"27…."In circumstances like the present one, bar Under Article 329 (b) will not come into play when the case falls under Articles 191 and 193 and the whole process of election is over. Consider the case where a person elected is not a citizen of India. Would the court allow the foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution?"*
>
> *In paragraph 28, the Court went on to hold that the High Court had rightly exercised its jurisdiction in entertaining the writ petition under Article 226. This case has been very heavily relied on in the impugned judgment of the Division Bench.*
>
> *26. Shri L. Nageshwar Rao further points out that the factual scenario in that case was different. That was a case where admittedly the name of the elected candidate was not in the voters' list and the elected candidate had tried to use similar name in the voters' list which was admittedly not that of the elected candidate. There was no necessity of any proof, as a voter list was an admitted document and it clearly displayed that the name of the Legislator was not included in the list. Therefore, the Court observed in that case in paragraph 27 which we have quoted above to the effect: (Swamickan case, SCC p. 544, para 27)*
>
> > *"27….."In circumstances like the present one, bar Under Article 329 (b) will not come into play when the case false under Articles 191 and 193 and the whole process of election is over."*
> >
> > *(emphasis supplied)*
>
> *27. We are afraid, we are not in position to agree with the contention that the case of K. Venkatachalam v. A Swamickan & Anr. [1999 (4) SCC 526] is applicable to the present situation. Here the appellant had very specifically asserted in his counter affidavit that he did not belong to the Christian religion and that he further asserted that he was a person belonging to the Scheduled Caste. Therefore, the Caste status of the appellant was a disputed question of*

fact depending upon the evidence. Such was not the case in K. Venkatachalam v. A Swamickan & Anr. [1999 (4) SCC 526]. Every case is an authority for what is actually decided in that. We do not find any general proposition that even where there is a specific remedy of filing an Election Petition and even when there is a disputed question of fact regarding the caste of a person who has been elected from the reserved constituency still remedy of writ petition under Article 226 would be available.

28. Again as we have stated earlier, there was no dispute and no challenge to the findings of the High Court that K. Venkatachalam, the petitioner in case of K. Venkatachalam v. A Swamickan & Anr. [1999 (4) SCC 526] was not a Legislator in electoral roll of the constituency for the general elections for December, 1984 and he blatantly and fraudulently represented himself to be a Legislator of the constituency using the similarity with the name of another person. The situation in the present case is, however, entirely different in the sense that here the petitioner very seriously asserted that firstly, he was not a Christian and, secondly, that he belongs to the Scheduled Caste.

33. There is yet another distinguishing feature in case of K. Venkatachalam v. A Swamickan & Anr. [1999 (4) SCC 526]. In that case there is a clear finding that the elected person therein played a fraud with the Constitution inasmuch as that he knew that his name was not in Electoral Roll of that constituency and he impersonated for some other person taking the advantage of the similarity of names. The appellant herein asserts on the basis of his Caste Certificate that he still belongs to Scheduled Caste. We are, therefore, of the clear opinion that the case of K. Venkatachalam v. A Swamickan & Anr. [1999 (4) SCC 526] is not applicable to the present case and the High Court erred in relying upon that decision."

12. The Hon'ble Apex Court further held that the writ petition to set aside an election under the garb of writ of quo- warranto was not maintainable. It is apt to reproduce the following observations:

"22. *There is no dispute that Rule 1 of the Andhra Pradesh Municipalities (Decision on Election Disputes) Rules, 1967, specifically provides for challenging the election of Councillor or Chairman. It was tried to be feebly argued that this was a petition for quo warranto and not only for challenging the election of the appellant herein. This contention is clearly incorrect. When we see the writ petition filed before the High Court, it clearly suggests that what is challenged is the election. In fact the prayer clauses (b) and (c) are very clear to suggest that it is the election of the appellant which is in challenge.*

23. Even when we see the affidavit in support of the petition in paragraph 8, it specifically suggested that the Ward No. 8 was reserved for the persons belonging to the Scheduled Castes from where the appellant contested the election representing himself to be a person belonging to the Scheduled Caste. Paragraph 9 speaks about the election of the appellant as the Chairperson. Paragraph 30 also suggests that the complaint has been made against the appellant that he had usurped the public office by falsely claiming himself to be a person belonging to the Scheduled Caste. In paragraph 33, it is contended that the first petitioner had no remedy to question the election of the 9th respondent by way of an election petition. Therefore, though apparently it is suggested in the writ petition was only for the writ of quo warranto, what is

prayed for is the setting aside of the election of the appellant herein on the ground that he did not belong to the Scheduled Caste.

24. It is further clear from the writ petition that the writ-petitioners were themselves aware of the situation that the writ of quo-warranto could have been prayed for only on invalidation or quashing of the election of the appellant, firstly as a Councillor and secondly, as a Chairman and that was possible only by an Election Petition. The two decisions quoted above, in our opinion, are sufficient to hold that a writ petition of the nature was not tenable though apparently the writ petition has been couched in a safe language and it has been represented as if it is for the purpose of a writ of quo warranto."

13. The Hon'ble Supreme Court thereafter placed reliance upon an earlier decision rendered in ***Gurdeep Singh Dhillon*** vs**.** ***Satpal and others (2006) 10 SCC 616*** wherein after quoting Article 243-ZG (b) the Court observed that the shortcut of filing the writ petition and invoking constitutional jurisdiction of the High Court under Articles 226/227 was not permissible and the only remedy available to challenge the election was by raising the election dispute under the local statute.

14. Article 329 of the Constitution of India reads thus:

"***329. Bar to interference by courts in electoral matters.***- *Notwithstanding anything in this Constitution*

(a) *the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court;*

(b) *no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."*

15. It would be seen that under Article 329 (b), there is a specific prohibition against any challenge to an election either to the house of Parliament or to the House of the Legislature except by an election petition presented to such authority and in such manner as may be provided for in a law made by the appropriate Legislature. Parliament has by enacting the R P Act, 1951 provided for such a forum for questioning such elections hence, under Article 329 (b) no forum other than such forum constituted under the R P Act can entertain a complaint against any election.

16. In ***N.P. Ponnuswami vs. Returning Officer, Namakkal Constituency AIR 1952 SC 64*** the Hon'ble Supreme Court held that "*the law of elections in India does not contemplate that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), and another after they have been completed by means of an election petition."*

17. A Constitution Bench in ***Durga Shankar Mehta vs. Raghuraj Singh, AIR 1954 SC 520*** observed that "*the non obstante clause with which Article 329 of the Constitution begins debars any other Court in the land, to entertain a suit or a proceeding calling in question any election to the Parliament or the State Legislature. It is the Election Tribunal (now the High Court) alone that can decide such disputes and the proceeding has to be initiated by an election petition and in such manner as may be provided by a statute…."*

18. To similar effect are the observations made by the Hon'ble Supreme Court in ***Hari Vishnu Kamath vs. Syed Ahmad Ishaq, AIR 1955 SC 233*** wherein it was observed as under:

> *"……These are instances of original proceedings calling in question an election, and would be within the prohibition enacted in Article 329 (b). But when once proceedings have been instituted in accordance with Article 329 (b) by presentation of an election petition, the requirements of that article are fully satisfied. Thereafter when the election petition is in due course heard by a Tribunal (now the High Court) and decided, whether its decision is open to attack, and if so, where and to what extent, must be determined by the general law applicable to decisions of Tribunals. ………The view that Article 329 (b) is limited in its operation to initiation of proceedings for setting aside an election and not to the further stages following on the decision of the Tribunal is considerably reinforced, when the question is considered with reference to a candidate whose election has been set aside by the Tribunal."*

19. In the celebrated case of ***Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others (1978) 1 SCC 405*** the Constitution Bench of the Hon'ble Supreme Court held that under Article 329 (b) the sole remedy for an aggrieved party, if he wants to challenge any election, is an election petition and this exclusion of all other remedies includes constitutional remedies like Article 226 because of the non-obstante clause. It was further held that paramount policy of the Constitution-makers in declaring that no election shall be called in question except the way it is provided for in Article 329 (b) and the Representation of the People Act, 1951, shows that the Constitution and the Act should be read as an integrated scheme.

20. In ***Krishna Ballabh Prasad Singh vs. Sub Divisional Officer Hilsa-cum-Returning Officer and others (1985) 4 SCC 194,*** the Hon'ble Supreme Court held that the bar under Article 329(b) against filing of the writ petition operates only after process of election comes to an end and it shall be apt to reproduce para-5 which reads thus:

> *"5. We are of opinion that the process of election came to an end only after the declaration in Form 21-C was made and the consequential formalities were completed. The bar of clause (b) of Article 329 of the Constitution came into operation only thereafter and an election petition alone was maintainable. The writ petition cannot be entertained."*

21. In ***Indrajit Barua and others vs. Election Commission of India and others AIR 1986 SC 103***, a Constitution Bench of the Hon'ble Supreme Court was again confronted with the proposition as to whether a writ petition under Article 226 could be maintained for challenging the election to the State Legislature. The Hon'ble Supreme Court after placing reliance upon ***Hari Vishnu Kamath*** case (supra) and Constitution Bench decision in ***Durga Shankar Mehta*** case (supra) observed as follows:

> *"6. These are clear authorities – and the position has never been assailed – in support of the position that an election can be challenged only in the manner prescribed by the Act. In this view of the matter, we had concluded that writ petitions under Article 226 challenging the election to the State Legislature were not maintainable and election petitions under Section 81 of the Act had to be filed in the High Court. The Act does not contemplate a challenge to the election to the Legislature as a whole and the scheme of the Act is clear. Election of each of the returned candidates has to be challenged by filing of a separate election petition. The proceedings under the Act are quite strict and clear provisions have been made as to how an election petition has to be filed*

and who should be parties to such election petition. As we have already observed, when election to a Legislature is held it is not one election but there are as many elections as the legislature has members. The challenge to the elections to the Assam Legislative Assembly by filing petitions under Article 226 of the Constitution was, therefore, not tenable in law."

22. In ***Jaspal Singh Arora vs. State of Madhya Pradesh (1998) 9 SCC 594*** the election of President of the Municipal Council had been challenged by medium of the writ petition and it was held :

"3. These appeals must be allowed on a short ground. In view of the mode of challenging the election by an election petition being prescribed by the M.P. Municipalities Act, it is clear that the election could not be called in question except by an election petition as provided under that Act. The bar to interference by courts in electoral matters contained in Article 243-ZG of the Constitution was apparently overlooked by the High Court in allowing the writ petition. Apart from the bar under Article 243-ZG, on settled principles interference under Article 226 of the Constitution for the purpose of setting aside election to a municipality was not called for because of the statutory provision for election petition and also the fact that an earlier writ petition for the same purpose by a defeated candidate had been dismissed by the High Court."

23. In ***Election Commission of India through Secretary vs. Ashok Kumar and others (2000) 8 SCC 216***, after taking into consideration the entire law on the subject, it was held as under:

"28. *Election disputes are not just private civil disputes between two parties. Though there is an individual or a few individuals arrayed as parties before the Court but the stakes of the constituency as a whole are on trial. Whichever way the lis terminates it affects the fate of the constituency and the citizens generally. A conscientious approach with overriding consideration for welfare of the constituency and strengthening the democracy is called for. Neither turning a blind eye to the controversies which have arisen nor assuming a role of over- enthusiastic activist would do. The two extremes have to be avoided in dealing with election disputes.*

30. To what extent Article 329 (b) has an overriding effect on Article 226 of the Constitution? The two Constitution Benches have held that Representation of the People Act, 1951 provides for only one remedy; that remedy being by an election petition to be presented after the election is over and there is no remedy provided at any intermediate stage. The non-obstante clause with which Article 329 opens, pushes out Article 226 where the dispute takes the form of calling in question an election (see para 25 of Mohinder Singh Gill case). The provisions of the Constitution and the Act read together do not totally exclude the right of a citizen to approach the Court so as to have the wrong done remedied by invoking the judicial forum; nevertheless the lesson is that the election rights and remedies are statutory, ignore the trifles even if there are irregularities or illegalities, and knock the doors of the courts when the election proceedings in question are over. Two-pronged attack on anything done during the election proceedings is to be avoided ---- one during the course of the proceedings and the other at its termination, for such two-pronged attack, if allowed, would unduly protract or obstruct the functioning of democracy.

> *32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:-*
>
> > *(1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.*
> >
> > *(2) Any decision sought and rendered will not amount to "calling in question an election" if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.*
> >
> > *(3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.*
> >
> > *(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the Court.*
> >
> > *(5) The Court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The Court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the Court would act with reluctance and shall not act except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material."*

24. In view of the aforesaid exposition of law, we have no hesitation to hold that in view of the non-obstante clause with which Article 329 opens pushes out Article 226 where the dispute takes the form of calling in question an election. The election rights and remedies being statutory cannot be ignored and the petitioner cannot be permitted to resort to a short cut method of filing a writ petition and the only remedy available to challenge the election is by raising an election dispute in accordance with law.

25. In view of the aforesaid discussion, it can safely be concluded that the present writ petition in view of the specific bar as contained under Article 329 (b) of the

Constitution is not maintainable. Consequently, the same is dismissed as such. The parties are left to bear their own costs.

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

Bachitar Singh & ors. ……Petitioners.

Versus

Divisional Commissioner Mandi & ors. …….Respondents.

CWP No. 8873 of 2014.
Reserved on: 18.6.2015.
Decided on: 20.6.2015.

Constitution of India, 1950- Article 226- Land was allotted to the father of the petitioner No.1- no objection was raised by the respondent to the allotment of the land- however, a Revision Petition was filed which was allowed without a speaking order- a Writ Petition was filed which was allowed and the petitioners were permitted to approach Divisional Commissioner, Mandi who dismissed the application filed by the petitioners- a Revision was filed after 17 years – such revision was not maintainable- authorities had not adverted to the question of delay- hence, petition allowed and the order set aside. (Para-4 to 8)

Cases referred:

Gram Panchayat, Kakran vrs. Addl. Director of Consolidation and another, (1997) 8 SCC 484
State of H.P. & ors. vrs. Raj Kumar Brijender Singh and ors., (2004) 10 SCC 585
State of Andhra Pradesh and another vrs. T.Yadagiri Reddy and others, (2008) 16 SCC 299
Bhup Singh vrs. The Director of Consolidation & ors., Latest HLJ 2008 (HP) 516
Ramesh Chand and another vrs. Director of Consolidation & ors., 2008(2) Shim. LC 176

For the petitioners: Mr. Surinder Saklani, Advocate.
For the respondents: Mr. Parmod Thakur, Addl. AG for respondent No.1.
Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 2 to 5.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.(oral)

The consolidation proceedings were carried out in Village Mohin in the year 1992-93. The father of the petitioner No. 1 was allotted Kh. No. 1867/1440 (old) 1127 (new), Kh. No. 1870/1400 (old) 1170 (new), measuring 0-32-00 hectares and Kh. No. 1498 (old) 1215 (new) measuring 0-00-45 hectares. The total land allotted to the father of the petitioner No. 1 after the consolidation was 0-34-96 hectares. Kh. No. 1498 (old) and 1215(new) measuring 0-00-45 hectares is adjoining to the house of the petitioners and they are using the same as their courtyard. A scheme was framed for carrying out the consolidation proceedings in the area. The parties were put in their respective possessions of their land in the year 1992-93 itself.

2. The respondents No. 2 to 5 did not raise any objection to the allotment of Kh. No. 1498 (old) and 1215 (new) to the father of petitioner No. 1 under Section 30 of the H.P.

Holdings (consolidation and Prevention of Fragmentation) Act, 1971. The respondents No. 2 to 5 instituted a revision before the learned Divisional Commissioner on 3.8.2010. He decided the same against the petitioners on 21.1.2011 without a speaking order. The petitioners assailed the decision dated 21.1.2011 before this Court. This Court permitted the petitioners to approach the Divisional Commissioner, Mandi seeking correction of the order by moving appropriate application. The appropriate application was filed on 22.6.2013. However, the fact of the matter is that the appeal was dismissed on 27.8.2014 and the order dated 21.1.2011 was upheld.

3. The consolidation proceedings, as noticed hereinabove, were concluded in the year 1992-93. The revision has been filed after almost 17 years. It was not maintainable. The learned Divisional Commissioner and Financial Commissioner, while passing the orders dated 21.1.2011 and 27.8.2014 could not be oblivious to the gross delay in filing the petitions. The learned Divisional Commissioner, while passing the order dated 21.1.2011, without making reference to record, has come to the conclusion that the private respondents were in possession of the suit land and the same has been wrongly allotted to the petitioners. It is not believable that the private respondents were not aware of the allotment of Kh. No. 1498 (old) and 1215 (new) in favour of the petitioners in the year 1992 and they came to know only in the year 2010.

4. Their lordships of the Hon'ble Supreme Court in the case of ***Gram Panchayat, Kakran vrs. Addl. Director of Consolidation and another,*** reported in ***(1997) 8 SCC 484***, have held that even if limitation prescribed under Rule 18 of the E.P. Holdings (Consolidation and Prevention of Fragmentation) Rules, 1949, is not directly attracted, the application must be filed within a reasonable time.

5. Their lordships of the Hon'ble Supreme Court in the case of ***State of H.P. & ors. vrs. Raj Kumar Brijender Singh and ors.,*** reported in ***(2004) 10 SCC 585,*** have held that though the Financial Commissioner can exercise *suo motu* power and pass appropriate orders under Section 20 of the Himachal Pradesh Ceiling on Landholdings Act, 1972, but this expression does not mean that there would be no time limit or it is in infinity. All that is meant is that such powers should be exercised within a reasonable time. No fixed period of limitation may be laid but unreasonable delay in exercise of the power would tend to undo the things which have attained finality. Their lordships have held as under:

> "6. We are now left with the second question which was raised by the respondents before the High Court, namely, the delayed exercise of the power under sub-section (3) of Section 20. As indicated above, the Financial Commissioner exercised the power after 15 years of the order of the Collector. It is true that sub-section 3 provides that such a power may be exercised at any time but this expression does not mean there would be no time limit or it is in infinity. AU that is meant is, that such powers should be exercised within a reasonable time. No fixed period of limitation may be laid but unreasonable delay in exercise of the power would tend to undo the things which have attained finality. It depends on the facts and circumstances of each case as to what is the reasonable time within which the power *suo moto* action could be exercised. For example, in this case, as the appeal had been withdrawn but the Financial Commissioner had taken up the matter in exercise of his *suo moto* power, well it could be open for the State to submit that the facts and the circumstances were such that it would be within reasonable time but as we have already noted the order of the Collector which has been interfered with, was passed in January 1976 and the

appeal preferred by the State was also withdrawn sometime in March 1976. The learned counsel for the appellant was not able to point out such other special facts and circumstances by the reason of which it could be said that exercise of *suo moto* power after 15 years of the order interfered with, was within a reasonable time. That being the position in our view, the order of the Financial Commissioner stands vitiated having been passed after a long lapse of 15 years of the order which has been interfered with. Therefore, while holding that the Financial Commissioner would have power to proceed suo moto in a suitable case even though an appeal preferred before lower appellate authority is withdrawn may be by the State. Thus, the view taken by the High Court, is not sustainable. But the order of the Financial Commissioner suffers from vice of the exercise of the power after unreasonable lapse of time and such delayed action on his part nullifies the order passed by him in exercise of power in sub-section (3) of Section 20."

6. Their lordships of the Hon'ble Supreme Court in the case of ***State of Andhra Pradesh and another vrs. T.Yadagiri Reddy and others,*** reported in ***(2008) 16 SCC 299,*** have held that action was to be taken within a reasonable time, though the words "at any time" were used in the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1973 and moreover, when the rights of the parties were crystallized. Their lordships have held as follows:

"68. This Court has considered the nature of that power in the case of *Ibrahimpatnam Taluk Vyavasaya Coolie Sangham Vs. K. Suresh Reddy and Others* (cited supra) and observed in para 9:-

"9. ...... Use of the words "at any time" in sub-Section (4) of Section 50-B of the Act only indicates that no specific period of limitation is prescribed within which the suo moto power could be exercised reckoning or starting from a particular date advisedly and contextually. Exercise of suo moto power depended on facts and circumstances of each case. In cases of fraud, this power could be exercised within a reasonable time from the date of detection or discovery of fraud. While exercising such power, several factors need to be kept in mind such as effect on the rights of the third parties over the immovable property due to passage of considerable time, change of the provisions of other Acts (such as Land Ceiling Act)......................."

From this, the Learned Senior Counsel argued that since there is no period of limitation prescribed for this power, the Collector would be justified in initiating an action. In our opinion the argument is firstly, premature. No such action have ever been proposed. Secondly, the Court has further observed that such action has to be within reasonable time though the words "at any time" are used in the provision. In the same para, the Court further observed:

"9. .... Use of the words "at any time" in sub-section (4) of Section 50-B of the Act cannot be rigidly read letter by letter. It must be read and construed contextually and reasonably. If one has to simply proceed on the basis of the dictionary mean sing of the words "at any time", the suo moto power under sub-Section (4) of Section 50-B of the Act could be exercised even after decades and then it would lead to anomalous position leading to uncertainty and complications

seriously affecting the rights of the parties, that too, over immovable properties. Orders attaining finality and certainty of the rights of the parties accrued in the light of the orders passed must have sanctity. Exercise of suo moto power "at any time" only means that no specific period such as days, months or years are not prescribed reckoning from a particular date. But, that does not mean that "at any time" should be unguided and arbitrary. In this view, "at any time" must be understood as within a reasonable time depending on the facts and circumstances of each case in the absence of prescribed period of limitation."

The observations are extremely fitting in the present case. Here also, after the Certificates have been issued, 25 long years have elapsed. The rights of the parties have already been crystallized. Not only this, but, it is the report of Shri Rao that the said lands have now been converted and sold for to as many as approximately 1100 persons, by way of residential plots. We do not think that there is any justification at this stage to use a suo moto power and to cancel the Certificates, so as to put the clock back. That would be, in our opinion, a completely unnecessary exercise, not warranted by any of the Sections. In that view, even this argument has to be rejected."

7. This Court in the case of ***Bhup Singh vrs. The Director of Consolidation & ors.,*** reported in ***Latest HLJ 2008 (HP) 516,*** has held that even if no period of limitation has been prescribed under section 54 of the Act and the expression 'at any time' has been used but the power is to be exercised within a reasonable period. The Court has held as under:

"4. Even if no period of limitation has been prescribed under section 54 of the Act and the expression :at any time' has been used but the power is to be exercised within a reasonable period. In the present case, the consolidation proceedings were concluded in the year 1986-87 but the revision petition has been preferred by respondent No.2 before the Additional Director Consolidation of holdings of 12th August, 1997. Consequently, it is held that the revision petition preferred after a period of 10 years before the Additional Director Consolidation of Holdings was not maintainable. Moreover, Additional Director Consolidation of Holdings had not assigned any reason for exercising the revisional power after a period of 10 years. Respondents No.2 could file the revision petition within a period 3-5 years. The other wholesome principle for filing the revision within the reasonable time is that the settled things should not be permitted to be unsettled."

8. The Division Bench of this Court in the case of ***Ramesh Chand and another vrs. Director of Consolidation & ors.,*** reported in ***2008(2) Shim. LC 176,*** has also explained 'reasonable time' as under:

"4. The issue was as to whether the Director, Consolidation of Holdings, Himachal Pradesh has exercised his powers under Section 54 of the 'Act 1971' within reasonable time or not. Such issue has already been adjudicated upon by the Supreme Court in Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd. and others, 2007(8) SCC 705. The term 'reasonable time' used under Section 54 of the 'Act 1971' by the Director, Consolidation of Holdings shall be

deemed to be settled in terms of the decision of the Supreme Court in State of H.P. and others v. Raj Kumar Brijender Singh and others (2004 (10) SCC 585), whereby, the Hon'ble Supreme Court while expressing its view under Section 20(3) of H.P. Ceiling on Land Holdings Act, 1972 has observed that reasonable time as indicated in Section 20(3) of the said Act would depend upon the facts and circumstances of each case. For convenience, relevant paragraph 6 of the decision Raj Kumar Brijender Singh (supra) is quoted as below:-

> "We are now left with the second question which was raised by the respondents before the High Court, namely, the delayed exercise of the power under sub-section (3) of Section 20. As indicated above, the Financial Commissioner exercised the power after 15 years of the order of the Collector. It is true that sub-section (3) provides that such a prayer may be exercised at any time but this expression does not mean there would be no time-limit or it is in infinity. All that is meant is that such powers should be exercised within a reasonable time. No fixed period of limitation may be laid but unreasonable delay in exercise of the power would tend to undo the things which have attained finality. It depends on the facts and circumstances of each case as to what is the reasonable time within which the power of suo motu action could be exercised. For example, in this case/as the appeal had been withdrawn but the Financial Commissioner had taken up the matter in exercise of his suo motu power, it could well be open for the State to submit that the facts and circumstances were such that it would be within reasonable time but as we have already noted that the order of the Collector which has been interfered with was passed in January 1976 and the appeal preferred by the State was also withdrawn sometime in March, 1976. The learned counsel for the appellant was not able to point out such other special facts and circumstances by reason of which it could be said that exercise of suo motu power after 15 years of the order interfered with was within a reasonable time. That being the position in our view, the order of the Financial Commissioner stands vitiated having been passed after a long lapse of 15 years of the order which has been interfered with. Therefore, while holding that the Financial Commissioner would have power to proceed suo motu in a suitable case even though an appeal preferred before the lower appellate authority is withdrawn, may be, by the State. Thus the view taken by the High Court is not sustainable. But the order of the Financial Commissioner suffers from the vice of the exercise of the power after unreasonable lapse of time and such delayed action on his part nullifies the order passed by him in exercise of power under sub-section (3) of Section 20."

9. Accordingly, the Writ Petition is allowed. The order dated 21.1.2011 (annexure P-5) and 27.8.2014 (Annexure P-9) and subsequent proceedings carried out by the authorities are quashed and set aside. Pending application(s), if any shall also stand disposed of.

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

Balbir Singh. …Petitioner.

Versus

State of Himachal Pradesh and another. …Respondents.

CWP No. 2351/2015
Reserved on: 18.6.2015
Decided on: 20.6.2015

Constitution of India, 1950- Article 226- Petitioner filed a Civil Writ Petition before the High Court which was allowed and a supernumerary post was created- case of the petitioner was considered by the Departmental Promotion Committee and his name was recommended for promotion on notional basis- petitioner claimed that he has not been paid the actual salary though he was ready to work on the higher post- held, that petitioner has been kept away from discharging the duties of the higher post- he was always ready and willing to work on the higher post- thus, petition allowed and the respondent directed to pay salary from the date of promotion till the date of superannuation.

Case referred:

Union of India and others vs. K.V. Jankiraman and others, (1991) 4 SCC 109

For the Petitioner: Mr. Anshul Attri, Advocate vice Mr. Neeal Kamal Sood, Advocate.

For the Respondents: Mr. Ramesh Thakur, Asstt. Advocate General.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge:

In sequel to the judgment dated 28.11.2011 rendered in CWP No. 9837/2011, supernumerary post of District Public Relation Officer/Information Officer was created. Case of the petitioner was duly considered by the Departmental Promotion Committee. His name was recommended for promotion to the post of District Public Relation Officer/Information Officer in the pay scale of Rs. 7220-11660 (pre-revised) and Rs. 10300-34800 + 5000 grade pay (revised) with effect from 26.7.2000 to 31.5.2007 on notional basis. Copy of the office order dated 16.7.2012 promoting the petitioner to the post of District Public Relation Officer/Information Officer is Annexure P-12.

2. Case of the petitioner, in a nutshell, is that he has not been paid the actual salary with effect from 26.7.2000 to 31.5.2007 though he was always ready and willing to work on the higher post. Case of the respondent-State is that since the petitioner has not worked on the higher post, he will not be entitled to the salary of the post under FR 17.

3. This question is no more *res integra* in view of the law laid down by their Lordships of the Hon'ble Supreme Court in ***Union of India and others*** vs. ***K.V. Jankiraman and others***, (1991) 4 SCC 109. Their Lordships have held as under:

> **"25. We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of "no work no pay" is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of**

his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R. 17(1) will also be inapplicable to such cases."

4. In the instant case also, petitioner has been kept away from discharging the duties of the higher post. He was always ready and willing to work on the higher post. He has approached the courts of law repeatedly for the redressal of his grievance.

5. Accordingly, the writ petition is allowed. Annexure P-12 dated 16.7.2012 is modified to the extent by applying the principles of severability that the petitioner shall be paid the salary of District Public Relation Officer/Information Officer from 26.7.2000 till the date of his superannuation, i.e. 31.5.2007. The pension of the petitioner would be worked out on the basis of actual salary paid to the petitioner of the higher post with effect from to 31.5.2007. Pending application(s), if any, also stands disposed of. No costs.

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

M/s Samsung India Electronics Pvt. Ltd. …… Petitioner.
Vs.
State of H.P. & ors. ….. Respondents

CWP No. 1596 of 2015.
Judgement reserved on: 15.6.2015.
Date of decision: 20.6.2015.

Himachal Pradesh Value Added Tax Act, 2005- Section 16(xiii)- Petitioner was paying tax @ 5% on the sale of cell phone chargers and other accessories instead of 13.75%- a show cause notice was issued to it to revise the assessment order- petitioner filed a Writ Petition challenging the show cause notice- held that petitioner has an alternate remedy of filing an appeal under the H.P. VAT Act 2005 -mere illegal or irregular exercise of powers will not make the order without jurisdiction - when an effective remedy is available Court should not entertain the Writ Petition- Writ Petition dismissed for the lack of maintainability.

(Para-6 to 16)

Cases referred:

State of Punjab vs. Nokia India Pvt. Ltd. AIR 2015 SC 1068.
Janardhan Reddy & others vs. The State of Hyderabad & others AIR 1951 SC 217
Sarwan Kumar and another vs. Madan Lal Aggarwal (2003) 4 SCC 147
Assistant Commissioner, Income Tax, Rajkot vs. Saurashtra Kutch Stock Exchange Limited (2008) 14 SCC 171
Union of India and others vs. Major General Shri Kant Sharma and another 2015 AIR SCW 2497
Kanaiyalal Lalchand and Sachdev and others vs. State of Maharasthra and others (2011) 2 SCC 782
Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) and another vs. Sri Seetaram Rice Mill (2012) 2 SCC 108
Cicily Kallarackal vs. Vehicle Factory 2012 (8) SCC 524
Union of India vs. Brigadier P.S. Gill (2012) 4 SCC 463

For the petitioner : Mr. Tarun Gulati, Advocate with Mr. Sanjeev Bhushan and Mr. Shashi Mathews, Advocates.

For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Addl. Advocate General, Mr. J.K. Verma and Mr. Vikram Singh Thakur, Dy. Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

By medium of this petition, the petitioner has called in question the show cause notice issued by respondent No. 4 on 22.12.2014 under section 16(8) of the Himachal Pradesh Value Added Tax Act, 2005 (for short, H.P. VAT Act, 2005). The petitioner has been asked to personally appear alongwith the relevant documents for the years 2010-2012 to 2014-2015 (up to 30.11.2014) for the reason that petitioner was paying VAT at the rate of 5% on the sale of cellphone chargers and other accessories instead of 13.75%. The petitioner is further aggrieved by the show cause notice dated 30.12.2014 issued under section 46 of the Act by respondent No. 3, which seeks to revise the assessment order dated 16.11.2012 for the year 2011-2012 on the ground that the assessment order is not legal and proper as the same needs to be revised on the grounds that tax on sale of battery charger was levied at 5% whereas the same should have been levied at 13.75% in view of the judgement of Hon'ble Supreme Court in **State of Punjab** vs. **Nokia India Pvt. Ltd. AIR 2015 SC 1068.**

2. The case initially came up before this court on 5.3.2015, on which date the learned counsel for the petitioner was asked to address arguments on the issue of maintainability of the writ petition and the matter was ordered to be listed on 10.3.2015. On 10.3.2015, the petitioner sought adjournment to lay motion for amendment of the writ petition and the case was ordered to be listed on 1.4.2015. On 1.4.2015 notice on the application for amendment was issued and the respondents prayed one week's time to file reply to the application. Thereafter, the matter was ordered to be listed from time to time to consider the application for amendment. By way of amendment, the petitioner has sought to lay challenge to the order passed by respondent No.3 on 3.3.2015 whereby it has been directed to pay a sum of Rs.81,16,112/- (Rupees eighty one lacs sixteen thousands and one hundred twelve) into the appropriate government treasury within 30 days.

3. The learned counsel for the petitioner does not dispute that there is an alternate remedy available by way of an appeal under the H.P. VAT Act 2005, but contends that the same would not operate as a bar for entertainment of a petition under Articles 226, 227 of the Constitution of India. He would contend that the rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion and this has been so held by this Bench while deciding **CWP No. 4779 of 2014** titled **M/s Indian Technomac Company Ltd.** vs. **State of H.P. & ors. decided on 4.8.2014.** He would further contend that in an appropriate case in spite of availability of alternative remedy, a writ court would still exercise its discretionary jurisdiction of judicial review in the following cases:-

(1) where the writ petitioner seeks enforcement of the Fundamental Right; or

(2) where there is a failure of principle of natural justice; or

(3) where order or proceedings are wholly without jurisdiction or vires of the Act is challenged; or

(4) where the statutory authority has not acted in accordance with the provisions of the enactment in question; or in defiance of the Fundamental principles of judicial procedure.

4. The learned counsel for the petitioner has further argued that the impugned notice dated 22.12.2014 issued by respondent No.4 proposing to levy penalty is without jurisdiction as no notice was issued to assess tax at higher rate and therefore, in the absence of assessment at higher rate, question of imposition of penalty would not arise. He further argued that the impugned order dated 3.3.2015 passed under section 16 pursuant to notice under section 16(8) does not impose penalty but seeks to assess tax at higher rate and in absence of notice in form –XXIX under section 21 read with Rule 67, no assessment could be made and therefore, the impugned order is without jurisdiction as it was issued without following the prescribed procedure. The respondent No. 3, who had passed the impugned order, cannot be regarded as an Assessing Authority under rule 73 and therefore, also the impugned order is without jurisdiction. It is further argued that subsequent judgement of the Hon'ble Supreme Court in **Nokia's** case (supra) cannot be used to change the course of past assessment.

5. On the other hand, the learned Advocate General has strenuously argued that the writ petition is not maintainable since the alternative and efficacious remedy by way of statutory appeal is available to the petitioner under section 45 of the H.P. VAT Act, 2005. He further submits that the writ petition has been filed just to avoid the deposit of tax, which is a pre-condition for the maintainability of the appeal under section 45 (5) of the H.P. VAT Act, 2005. He therefore, prayed for dismissal of the writ petition at the threshold.

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

6. It is not in dispute that respondents No. 3 and 4 are authorities constituted under the H.P. VAT Act, 2005, and therefore, even if it is assumed that there is an illegal or irregular exercise of jurisdiction the same would not result in the order being without jurisdiction. Even if there has been some defect in the procedure followed during the hearing of the case, it does not follow that the authority has acted without jurisdiction. It may make the order irregular or defective, but the order cannot be a nullity so long as it has been passed by an authority which was competent to pass the order. There is basic difference between want of jurisdiction and an illegal or irregular exercise of jurisdiction and if there is non-compliance of rules of procedure, the same cannot be a ground for granting one of the writs prayed for. In either case, the defect, if any, can according to the procedure established by law be corrected only by a court of appeal or revision.

7. In **Janardhan Reddy & others** vs. **The State of Hyderabad & others AIR 1951 SC 217,** the Hon'ble Supreme Court has held as follows:-

> "6. ……. *But, for the purpose of the present case, it is sufficient to point out that even if we assume that there was some defect in the procedure folld. at the trial, it does not follow that the trial Ct. acted without jurisdiction. There is a basic difference between want of jurisdiction & an illegal or irregular exercise of jurisdiction, & our attention has not been drawn to any authority in which mere non-compliance with the rules of procedure has been made a ground for granting one of the write prayed for. In either case, the 'defect, if any, can according to the procedure established by law be corrected only by a Ct. of appeal or revision. Here, the appellate Ct. which was competent to deal with the matter has pronounced its judgment against the petitioners. & the*

manner having been finally decided is not one to be reopened in a proceeding under Art. 32 of the Constitution."

8. Now in so far as the contention of the petitioner that a subsequent judgement i.e. **Nokia's** case (supra) cannot be used to change the course of past assessment is concerned, it is more than settled that the judgements of the courts declare the law as it was always. Though the courts some time order that the judgements would have prospective effect, but in absence of such restrictions, the law declared by the courts is deemed to be always the law so interpreted i.e. the law as it stood right from the beginning as per its decision.

9. In **Sarwan Kumar and another** vs. **Madan Lal Aggarwal (2003) 4 SCC 147,** the Hon'ble Supreme Court has held as follows:-

> *"20. ....When the court decides that the interpretation given to a particular provision earlier was not legal, it declares the law as it stood right from the beginning as per its decision. In Gian Devi Anand's case (supra) the interpretation given by the Delhi High Court that commercial tenancies were not heritable was overruled being erroneous. Interpretation given by the Delhi High Court was not legal. The interpretation given by this Court declaring that the commercial tenancies heritable would be the law as it stood from the beginning as per the interpretation put by this Court. It would be deemed that the law was never otherwise."*

10. Similarly in **Assistant Commissioner, Income Tax, Rajkot** vs. **Saurashtra Kutch Stock Exchange Limited (2008) 14 SCC 171,** the Hon'ble Supreme Court has held as follows:-

> *"35. In our judgment, it is also well- settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the Court to pronounce a `new rule' but to maintain and expound the `old one'. In other words, Judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the Court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.*
>
> *36. Salmond in his well-known work states;*
>
> *"The theory of case law is that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are res judicatae or accounts that have been settled in the meantime". (emphasis supplied)*

11. In so far as the maintainability of the writ petition is concerned, the facts herein are similar to the ones in **M/s Indian Technomac Company Ltd.** case (supra), wherein this court was confronted with the proposition regarding the maintainability of the petition when an alternative remedy existed under the H.P. VAT Act, 2005 and this court held as follows:-

"6. Before we deal with the question of maintainability of the writ petitions, we deem it proper to make a brief reference to the averments contained in the leading writ petition, (CWP No.4779 of 2014), which are, by and large, similar in the other writ petitions. It is averred in the writ petition that the Assessing Authority has not heard the petitioners before making the impugned orders, and thus, have been passed without providing sufficient opportunity of being heard to the writ petitioners. It is also pleaded that the impugned orders have been passed in a biased manner, under the dictation of high officials. It is further pleaded that the impugned orders have been passed without jurisdiction, though, during the course of hearing, as discussed hereinabove, no such argument was advanced to substantiate the fact that the Assessing Authority passed the impugned orders without jurisdiction or that the said Authority has acted with bias.

7. Now, coming to the core question of maintainability of the writ petitions, in terms of the HP VAT Act, 2005, the Assessing Authority is vested with the authority to pass orders and against such orders, provision of appeal is envisaged, and the orders passed in the appeal, are further appealable to the Tribunal. Section 48 of the HP VAT Act, 2005 further provides that the order of the Tribunal can be assailed by way of revision before the High Court.

8. We deem it proper to reproduce Sections 45, 46 and 48 of the HP VAT Act, 2005 here under:

> *"**45**. **Appeal**. - (1) An appeal from every original order passed under this Act or rules made thereunder shall lie-*
>
> *(a) if the order is made by an Assessing Authority or by an officer–in–charge of the check post or barrier or any other officer not below the rank of the Excise and Taxation Officer, to the Deputy Excise and Taxation Commissioner;*
>
> *(b) if the order is made by the Deputy Excise and Taxation Commissioner, to the Commissioner or the Additional Excise and Taxation Commissioner, posted at the State Headquarters;*
>
> *(c) if the order is made by the Commissioner or the Additional Excise and Taxation Commissioner posted at the State Headquarters any officer exercising the powers of the Commissioner, to the Tribunal.*
>
> *(2) An order passed in appeal by a Deputy Excise and Taxation Commissioner or by the Additional Excise and Taxation Commissioner posted at the State Headquarters or by the Commissioner or any officer, on whom the powers of the Commissioner are conferred, shall be further appealable to the Tribunal.*
>
> *(3) Every order of the Tribunal, the Commissioner or any officer exercising the powers of the Commissioner or the Additional Excise and Taxation Commissioner posted at the State Headquarters or the order of the Deputy Excise and Taxation Commissioner or of the Assessing Authority or an officer in-charge of check-post or barrier or any other officer not below the rank of an Excise and Taxation Officer, if not challenged in appeal or revision, shall be final.*

(4) No appeal shall be entertained unless it is filed within sixty days from the date of communication of the order appealed against, or such longer period as the Appellate Authority may allow, for reasons to be recorded in writing.

(5) No appeal under sub-section (1) shall be entertained by an Appellate Authority unless such appeal is accompanied by satisfactory proof of the payment of the tax (including interest payable) or of the penalty, if any, imposed or both as the case may be:

Provided that if such Authority is satisfied that the dealer is unable to pay the tax (including interest payable) assessed or the penalty, if any, imposed or both, he may, for reasons to be recorded in writing, entertain an appeal without the tax (including interest payable) or penalty or both having been paid in full or after part payment of such tax (including interest payable) or penalty or both.

(6) Subject to such rules of procedure as may be prescribed, an Appellate Authority may pass such order on appeal as it deems just and proper.

***46. Revision**.- (1) The Commissioner may, of his own motion, call for the record of any proceedings which are pending before, or have been disposed of by, any Authority subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such proceedings or order made therein and, on finding the proceedings or the orders prejudicial to the interest of revenue, may pass such order in relation thereto as he may think fit:*

Provided that the powers under this sub-section shall be exercisable only within a period of five years from the date on which such order was communicated.

(2) The State Government may, by notification, confer on any officer powers of the Commissioner under sub-section (1) to be exercised subject to such conditions and in respect of such areas as may be specified in the notification and such officer shall be deemed to be the Commissioner for the purposes of sub-section (1).

(3) The tribunal, on application made to it against an order of the Commissioner under this section within sixty days from the date of the communication of the order, for the purpose of satisfying itself as to the legality or propriety of such order, may call for and examine the record of any such case and may pass such orders thereon as it thinks just and proper.

(4) No order shall be passed under this section, which adversely affects any person unless such person has been given a reasonable opportunity of being heard.

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***48. Revision to High Court**. - (1) Any person aggrieved by an order made by the tribunal under sub-section (2) of section 45 or under sub-section (3) of section 46, may, within 90 days of the communication of such order, apply to the High Court of Himachal Pradesh for revision of such order if it involves any question of law arising out of erroneous decision of law or failure to decide a question of law.*

(2) The application for revision under sub-section (1) shall precisely state the question of law involved in the order, and it shall be competent for the High Court to formulate the question of law.

(3) Where an application under this section is pending, the High Court may, or on application, in this behalf, stay recovery of any disputed amount of tax, penalty or interest payable or refund of any amount due under the order sought to be revised:

Provided that no order for stay of recovery of such disputed amount shall remain in force for more than 30 days unless the applicant furnishes adequate security to the satisfaction of the Assessing Authority concerned.

(4) The application for revision under sub-section (1) or the application for stay under sub-section (3) shall be heard and decided by a bench consisting of not less than two judges.

(5) No order shall be passed under this section which adversely affects any person unless such person has been given a reasonable opportunity of being heard."

9. Provision of sub section (1) of Section 45 of the HP VAT Act, 2005 clearly provides that if the order is made by an Assessing Authority or by an officer–in–charge of the check post or barrier or any other officer not below the rank of the Excise and Taxation Officer, the appeal against such order shall lie to the Deputy Excise and Taxation Commissioner; if the order is made by the Deputy Excise and Taxation Commissioner, the same can be appealed before the Commissioner or the Additional Excise and Taxation Commissioner, posted at the State Headquarters; and if the order is made by the Commissioner or the Additional Excise and Taxation Commissioner posted at the State Headquarters any officer exercising the powers of the Commissioner, the same is appealable before the Tribunal. Sub Section (2) of Section 45 of the HP VAT Act, 2005 further provides that an order passed in appeal by a Deputy Excise and Taxation Commissioner or by the Additional Excise and Taxation Commissioner posted at the State Headquarters or by the Commissioner or any officer, on whom the powers of the Commissioner are conferred, shall be appealable before the Tribunal.

10. Admittedly, the impugned orders, in the present cases, have been issued by the Assistant Excise and Taxation Commissioner-cum-Assessing Authority. Therefore, remedy of appeal is available to the petitioners as per Section 45 of the HP VAT Act, 2005.

11. Now, the question which arises for determination is – when an Act provides mechanism to have remedy(ies), can a writ lie in the given circumstances? The answer is in the negative for the following reasons. It is well settled principle of law that High Courts have imposed rule of self limitation in entertaining the writ petition in terms of writ jurisdiction when alternative remedy is available. High Court must not interfere if there is adequate efficacious alternative remedy available and the practice of approaching the High Court, without availing the remedy(ies) provided, must be deprecated, unless express case is made out.

12. The Apex Court in **Union of India and another vs. Guwahati Carbon Limited, (2012) 11 SCC 651,** while dealing with the similar question, has observed in paragraphs 8, 9, 10, 11, 14 and 15 as under:

> *"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta, AIR 1979 SC 1250. In the said decision, this Court was pleased to observe that: (SCC p.88, para 23)*
>
> "23. .... when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner and all the -other forums and modes of seeking remedy are excluded."
>
> *9. A Bench of three learned Judges of as Court, in Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433, held: (SCC p.440, para 11)*
>
> > "11......The Act provides for a complete-machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where right or liability is created by a statute which gives a special remedy for 1 enforcing it, the remedy provided by that statute must be availed...."
>
> *10. In other words, existence of an adequate alternate remedy is a factor to be considered by the writ court before exercising its writ jurisdiction (See Rashid Ahmed v. Municipal Board, Kairana, 1950 SCR 566).*
>
> *11. In Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1, this Court held:*
>
> > *"15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of the Fundamental Rights or where there has been a violation of the principle of natural justices or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged......"*
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>
> *14. Having said so, we have gone through the orders passed by the Tribunal. The only determination made by the Tribunal is with regard to the assessable value of the commodity in question by*

excluding the freight/ transportation charges and the insurance charges from the assessable value of the commodity in question. Since what was done by the Tribunal is the determination of the assessable value of the commodity in question for the purpose of the levy of duty under the Act, in our opinion, the assessee ought to have carried the matter by way of an appeal before this Court under Section 35L of the Central Excise Act, 1944.

15. In our opinion, the assessee ought not to have filed a writ petition before the High Court questioning the correctness or otherwise of the orders passed by the Tribunal. The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under Article 226 of the Constitution. Therefore, the learned Single Judge was justified in observing that since the assessee has a remedy in the form of a right of appeal under the statute, that remedy must be exhausted first. The order passed by the learned Single Judge, in our opinion, ought not to have been interfered with by the Division Bench of the High Court in the appeal filed by the respondent/assessee."

13. The Apex Court in **Nivedita Sharma vs. Cellular Operators Association of India and others, (2011) 14 SCC 337,** after discussing its various earlier decisions, held that the High Court had committed error in entertaining the writ petition without noticing and referring to the relevant provisions of law applicable in that case, which contained statutory remedy of appeal and accordingly set aside the order of the High Court in terms of which the writ petition was entertained. It is apt to reproduce paragraphs 24 and 25 hereunder:

"24. Section 19 provides for remedy of appeal against an order made by the State Commission in exercise of its powers under sub-clause (i) of Clause (a) of Section 17. If Sections 11, 17 and 21 of the 1986 Act which relate to the jurisdiction of the District Forum, the State Commission and the National Commission, there does not appear any plausible reason to interpret the same in a manner which would frustrate the object of legislation.

25. What has surprised us is that the High Court has not even referred to Sections 17 and 19 of the 1986 Act and the law laid down in various judgments of this Court and yet it has declared that the directions given by the State Commission are without jurisdiction and that too by overlooking the availability of statutory remedy of appeal to the respondents."

14. The Apex Court in a recent decision in **Commissioner of Income Tax and others vs. Chhabil Dass Agarwal, (2014) 1 SCC 603,** has discussed the law, on the subject, right from the year 1859 till the date of judgment i.e. 8th August, 2013. We deem it proper to reproduce paragraphs 12, 13, 15, 16 and 17 hereunder:

"12. The Constitution Benches of this Court in K.S. Rashid and Sons vs. Income Tax Investigation Commission, AIR 1954 SC 207; Sangram Singh vs. Election Tribunal, AIR 1955 SC 425; Union of India vs. T.R. Varma, AIR 1957 SC 882; State of U.P. vs. Mohd.

Nooh, AIR 1958 SC 86 and K.S. Venkataraman and Co. (P) Ltd. vs. State of Madras, AIR 1966 SC 1089, have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. (See: N.T. Veluswami Thevar vs. G. Raja Nainar, AIR 1959 SC 422; Municipal Council, Khurai vs. Kamal Kumar, (1965) 2 SCR 653; Siliguri Municipality vs. Amalendu Das, (1984) 2 SCC 436; S.T. Muthusami vs. K. Natarajan, (1988) 1 SCC 572; Rajasthan SRTC vs. Krishna Kant, (1995) 5 SCC 75; Kerala SEB vs. Kurien E. Kalathil, (2000) 6 SCC 293; A. Venkatasubbiah Naidu vs. S. Chellappan, (2000) 7 SCC 695; L.L. Sudhakar Reddy vs. State of A.P., (2001) 6 SCC 634; Shri Sant Sadguru Janardan Swami (Moingiri Maharaj); Sahakari Dugdha Utpadak Sanstha vs. State of Maharashtra, (2001) 8 SCC 509; Pratap Singh vs. State of Haryana, (2002) 7 SCC 484 and GKN Driveshafts (India) Ltd. vs. ITO, (2003) 1 SCC 72).

13. In Nivedita Sharma vs. Cellular Operators Assn. of India, (2011) 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows: (SCC pp.343-45 paras 12-14)

> *"12. In Thansingh Nathmal v. Supdt. of Taxes, AIR 1964 SC 1419 this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7).*

'7. … The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.'

13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 this Court observed: (SCC pp. 440-41, para 11)

'11. … It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New

Waterworks Co. v. Hawkesford, 141 ER 486 in the following passage: (ER p. 495)

> *"… There are three classes of cases in which a liability may be established founded upon a statute. … But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. … The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."*

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd., 1919 AC 368 and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd., 1935 AC 532 (PC) and Secy. of State v. Mask and Co., AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.'

14. In Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536 B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

> *'77. … So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.'" (See: G. Veerappa Pillai v. Raman & Raman Ltd., AIR 1952 SC 192; CCE v. Dunlop India Ltd., (1985) 1 SCC 260; Ramendra Kishore Biswas v. State of Tripura, (1999) 1 SCC 472; Shivgonda Anna Patil v. State of Maharashtra, (1999) 3 SCC 5; C.A. Abraham v. ITO, (1961) 2 SCR 765; Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433; H.B. Gandhi v. Gopi Nath and Sons, 1992 Supp (2) SCC 312; Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1; Tin Plate Co. of India Ltd. v. State of Bihar, (1998) 8 SCC 272; Sheela Devi v. Jaspal Singh, (1999) 1 SCC 209 and Punjab National Bank v. O.C. Krishnan, (2001) 6 SCC 569)*

14. In Union of India vs. Guwahati Carbon Ltd., (2012) 11 SCC 651, this Court has reiterated the aforesaid principle and observed: (SCC p.653, para 8)

> *"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta,*

(1979) 3 SCC 83. In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23).

'23. … when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded.'"

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15. Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case AIR 1964 SC 1419, Titagarh Paper Mills case 1983 SCC (Tax) 131 and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

16. In the instant case, the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In Ram and Shyam Co. vs. State of Haryana, (1985) 3 SCC 267 this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility.

17. In the instant case, neither has the writ petitioner assessee described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case. In light of the same, we are of the considered opinion that the Writ Court ought not to have entertained the Writ Petition filed by the assessee, wherein he has only questioned the correctness or otherwise of the notices issued under Section 148 of the Act, the re-assessment orders passed and the consequential demand notices issued thereon."

15. The decisions referred to by the learned counsel for the petitioners have been discussed by the Apex Court in the decisions of **Union of India and another vs. Guwahati Carbon Limited, Nivedita Sharma vs. Cellular Operators Association of India and others** and **Commissioner of Income Tax and others vs. Chhabil Dass Agarwal**, referred to hereinabove.

16. The sum and substance of the above discussion is that the writ petitioners-Company have remedies of appeal(s), before approaching the High Court by way of the writ petitions, for the redressal of their grievances. The petitioners ought to have exhausted the remedy of appeal before the Deputy Excise and Taxation Commissioner or Additional Excise and Taxation Commissioner or the Excise Commissioner, as the case may be, and if the petitioners were not successful in those appeal proceedings, another remedy available to them was to challenge the said order(s) by the medium of appeal before the Tribunal, and again, if they were unsuccessful, they could have availed the remedy of revision before the High Court in terms of Section 48 of the HP VAT Act, 2005. Keeping in view the above discussion, read with the fact that the dispute raised in these writ petitions relates to revenue/tax matters, it can safely be concluded that the petitioners have sufficient efficacious remedy(ies) available.

17. It also appears that these writ petitions are aimed at to give a slip to law for the reason that the petitioners have to deposit the tax liability, alongwith interest payable, as assessed, and penalty, if any, imposed, in terms of Section 45(5) of HP VAT Act, 2005, referred to above, which provides that no appeal has to be entertained unless it is accompanied by satisfactory proof of the payment of tax including interest payable alongwith penalty, if any, imposed, subject to exception provided by proviso to sub section (5) of Section 45 of the HP VAT Act, 2005.

18. Having said so, we are of the considered view that the writ petitioners have alternative efficacious remedy available and these writ petitions are not maintainable. Accordingly, the same merit to be dismissed in limine. However, it is made clear that the observations made herein shall not cause any prejudice to the petitioners in case they intend to file appeal(s) before the prescribed Authority and the period spent by the petitioners for prosecuting these writ petitions shall be excluded by the Appellate Authority while computing the period of limitation."

12. The judgement in **M/s Indian Technomac Company Ltd.** case (supra), has attained finality, inasmuch as, the same has been upheld by the Hon'ble Supreme Court vide its order dated 22.8.2014 in SLP (C) Nos. 22626-22641 of 2014.

13. At this stage, we may also take note of recent decision of the Hon'ble Supreme Court in **Union of India and others** vs. **Major General Shri Kant Sharma and another 2015 AIR SCW 2497,** wherein the Hon'ble Supreme Court was confronted with the similar proposition regarding maintainability of writ petition when alternative remedy was available to the aggrieved party under the Armed Forces Tribunal Act and the Hon'ble Supreme Court after making a reference to the judgements as cited in **M/s Indian Technomac Company Ltd.** case (supra) and in addition thereto after taking into consideration the judgement rendered by it in *Kanaiyalal Lalchand and Sachdev and others vs. State of Maharasthra and others (2011) 2 SCC 782, Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) and another vs. Sri Seetaram Rice*

Mill (2012) 2 SCC 108, Cicily Kallarackal vs. Vehicle Factory 2012 (8) SCC 524 and Union of India vs. Brigadier P.S. Gill (2012) 4 SCC 463 culled out the following principles:

> "34. ....(i) The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India.(Refer: L. Chandra (AIR 1997 SC 1125) and S.N. Mukherjee) (AIR 1990 SC 1984).
>
> (ii) The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act.(Refer: Mafatlal Industries Ltd.).
>
> (iii) When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: Nivedita Sharma).
>
> (iv) The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: Nivedita Sharma)."

14. Thereafter the Hon'ble Supreme Court further took into consideration the provisions of Article 141 of the Constitution of India and held as follows:-

> "35. ....Article 141. Law declared by Supreme Court to be binding on all courts.-The law declared by the Supreme Court shall be binding on all courts within the territory of India.
>
> 36. In Executive Engineer, Southern Electricity Supply Company of Orissa Limited(SOUTHCO) this Court observed that it should only be for the specialized tribunal or the appellate authorities to examine the merits of assessment or even the factual matrix of the case.
>
> In Chhabil Dass Agrawal this Court held that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.
>
> In Cicily Kallarackal this Court issued a direction of caution that it will not be a proper exercise of the jurisdiction by the High Court to entertain a writ petition against such orders against which statutory appeal lies before this Court.
>
> In view of Article 141(1) the law as laid down by this Court, as referred above, is binding on all courts of India including the High Courts."

15. The aforesaid exposition of law makes it abundantly clear that where an effective alternative remedy is available to the aggrieved person, a writ petition should not be entertained.

16. Like in **M/s Indian Technomac Company Ltd.** case (supra), this petition also appears to be aimed at to give a slip to law for the reason that the petitioner has to deposit the tax liability alongwith interest payable as assessed and penalty, if any imposed in terms of section 45(5) of the H.P. VAT Act, 2005, which clearly provides that no appeal would be entertained unless it is accompanied by a statutory proof of the payment of tax

including interest payable alongwith penalty, if any subject to the exception provided by proviso to sub-section (5) of section 45 of H.P. VAT Act, 2005.

17. Having said so, we are of the considered view that the writ petitioner has not only an alternative and efficacious, rather a proper remedy under the provisions of H.P. VAT Act, 2005 and therefore, the present petition is not maintainable. Accordingly, the same is dismissed in limine. However, it is made clear that the observations made hereinabove shall not cause any prejudice to the petitioner in case it intends to file an appeal(s) before the prescribed authority and the period spent by the petitioner for prosecuting this petition shall be excluded by the appellate authority while computing the period of limitation.

18. In view of the aforesaid discussion, the writ petition is dismissed in limine alongwith all pending application(s), if any. The parties are left to bear their own costs.

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

1. Cr. Appeal No. 13 of 2008.
2. Cr. Appeal No.272 of 2008
3. Cr. Revision No. 57 of 2008.

Judgment reserved on: 2.6.2015.
Date of Judgment: June 22, 2015.

1.Cr.Appeal No. 13 of 2008.

Dharam Pal and another. .....Appellants.
Vs.
State of H.P. .....Respondent.

For the appellants. Mr.Onkar Jairath, Advocate.
For the respondent: Mr.V.S.Chauhan, Addl. A.G. with Mr.Vikram Singh Thakur Dy. A.G

2.Cr.Appeal No. 272 of 2008

State of HP. ...Appellant
Vs.
Dharam Pal and others ....Respondents.

For the appellant: Mr.V.S.Chauhan, Addl. Advocate General with Mr.Vikram Singh Thakur, Dy. Advocate General.
For respondents 1&2: Mr.Onkar Jairath, Advocate.
For respondent No.3 Mr.Ajay Sharma, Advocate.
For respondent No.4 Mr.Rakesh K.Dogra, Advocate.

3.Cr.Revision No. 57 of 2008.

Prithvi Raj S/o Parma Nand ...Revisionist.
Vs.
Dharam Pal and others. ...Non-revisionists.
For the revisionist: Mr.N.K.Thakur, Sr. Advocate with Mr.Rohit Bharoll, Advocate.
For Non-revisionist No.6 Mr.V.S.Chauhan, Addl. A.G. with Mr.Vikram Singh Thakur, Dy.A.G.
For Non-revisionist-1&2: Mr.Onkar Jairath, Advocate.
For Non-revisionist-3: Mr.Ajay Sharma, Advocate.
For Non-revisionists-4&5: Mr.Rakesh K.Dogra, Advocate.

Indian Penal Code, 1860- Sections 302, 323, 324, 427 and 201- Accused and the deceased went to attend the marriage where accused and deceased had a scuffle – injuries were caused to the deceased with sharp edged weapon- accused pelted stone on the car and damaged window panes- injured was brought to the Civil Hospital where he was declared brought dead- PW-1 specifically stated that when they had placed injured in the car and were taking him to the Hospital, accused did not allow him to take the deceased to the Hospital and they pelted stones on the car- this was corroborated by other witnesses- mere fact that accused had been acquitted of the commission of other offences is no ground to acquit them- related witnesses cannot be called to be interested witnesses- minor contradictions in the testimonies are not sufficient to discredit, the testimonies of the prosecution witnesses when they are examined after considerable lapse of time.

(Para-10 to 17)

Cases referred:

Bhe Ram Vs. State of Haryana, AIR 1980 SC 957
Rai Singh Vs. State of Haryana, AIR 1971 SC 2505
State of HP Vs. Tara Dutt, AIR 2000 SC 297
Sangharabonia Sreenu Vs. State of A.P., 1997 (4) Supreme 214
Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat, 2011 (6) SCC 312
Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh, AIR 1991 SC 1853
Bhajju @ Karan Singh Vs. State of Madhya Pradesh, 2012 (4) SCC 327
Ramesh Harijan Vs. State of Uttar Pradesh, 2012 (5) SCC 777
Bhagwan Singh Vs. State of Haryana, AIR 1976 SC 202
Ravindra Kumar Vs. State of Orissa, AIR 1977 SC 170
Syad Akbar Vs. State of Karnataka, AIR 1979 SC 1848
Surendra Tiwari Vs. State of MP, AIR 1971 SC 1853
State of Rajasthan Vs. Kalki and another, AIR 1981 SC 1390
Anjlus Dungdung Vs. State of Jharkhand, 2005 (9) SCC 765
Nanhar Vs. State of Haryana, 2010 (11) SCC 423
State (Delhi Administration) Vs. Gulzarilal Tandon, AIR 1979 SC 1382
Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622
Bhugdomal Gangaram and others Vs. State of Gujarat, AIR 1983 SC 906
State of UP Vs. Sukhbasi and others, AIR 1985 SC 1224
Babbo and others Vs. State of Madhya Pradesh, AIR 1979 SC 1042

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Criminal Appeal No. 13 of 2008 titled Dharam Pal and another Vs. State of HP, Criminal Appeal No. 272 of 2008 titled State of HP Vs. Dharam Pal and others and Criminal Revision No. 57 of 2008 titled Prithvi Raj Vs. Dharam Pal and others are filed against the same judgment and sentence passed by learned Additional Sessions Judge Fast Track Court Una District Una HP in Sessions case No. 12 of 2007 titled State of HP Vs. Dharam Pal and others decided on 31.12.2007. In order to avoid conflict judgment Criminal Appeal No. 13 of 2008, Criminal Appeal No.272 of 2008 and Cr. Revision No. 57 of 2008 are consolidated for disposal.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of case as alleged by prosecution are that on dated 21.6.2007 at about 11.30 pm at village Badhmana Tehsil Amb District Una HP accused persons in

furtherance of common intention committed murder of Sunil Dutt by way of causing his death. It is further alleged by prosecution that on the same date, time and place accused persons in furtherance of common intention caused simple injuries to Ritender Singh, Sitender, Atul Kumar and Mukal Sood by way of beating them. It is further alleged by prosecution that accused persons in furtherance of common intention voluntarily caused hurt to Ritender Singh with sharp edged weapon. It is further alleged by prosecution that at the same date, time and place accused persons committed mischief by causing damage to maruti car of Jiwan Singh bearing registration No. HP-19A-4696. It is further alleged by prosecution that marriage of one Raj Kumar resident of Amb took place on dated 21.6.2007 at village Badhmana Tehsil Amb District Una. It is further alleged by prosecution that marriage party reached at village Badhmana at about 10 PM and marriage was also attended by the friends of Raj Kumar namely Mukal Sood, Ritender Singh, Sitender and Atul Kumar and deceased Sunil Kumar. It is further alleged by prosecution that they have gone to village Badhmana in a car bearing registration No. HP-19-4696 and reached at Badhmana at about 10.30 PM. It is further alleged by prosecution that thereafter they met with bridegroom and his father who asked them to take dinner and thereafter all of them except Vineet Kumar went to the house of bride to take meals. It is further alleged by prosecution that there was rush at the dinning place and they were asked by the people from bride side to sit in the verandah on the roof of bride house. It is further alleged by prosecution that co-accused Dharam Pal along with his two children and two other persons were also sitting on the roof of house. It is further alleged by prosecution that deceased Sunil Kumar told that co-accused Dharam Pal was the captain of their football team. It is further alleged by prosecution that thereafter co-accused Dharam Pal did not respond and thereafter deceased Sunil Kumar asked co-accused Dharam Pal whether he was angry with him upon which co-accused Dharam Pal told to deceased Sunil Kumar that he was not angry and he shook hands with deceased Sunil Kumar. It is further alleged by prosecution that thereafter there was a call for dinner and the persons sitting on the roof of house started coming down and while coming down co-accused Dharam Pal pushed deceased Sunil Kumar due to which altercation took place between them and there was a scuffle between Dharam Pal and Ritender Singh but they were separated by PW4 Gurpiara. It is further alleged by prosecution that thereafter co-accused Dharam Pal called other persons present in the court yard and thereafter co-accused Ajit Kumar, Sanjiv Kumar @ Happy and some other persons came there and thereafter co-accused Dharam Pal and co-accused Ajit Kumar beaten deceased Sunil Kumar and co-accused Kewal Krishan and Sanjeev Kumar have beaten Mukal Sood, Ritender Singh Sitender and Atul Kumar. It is further alleged by prosecution that thereafter co-accused Dharam Pal caused injury to deceased Sunil Kumar with sharp edged weapon in his chest and blood started oozing out from the chest of deceased Sunil Kumar. It is further alleged by prosecution that thereafter Mukal Sood, Satinder and Atul Kumar brought deceased Sunil Kumar to road side and as soon as the injured was placed in a car co-accused Dharam Pal, co-accused Ajit Kumar, co-accused Kewal Krishan and one Rajiv Kumar resisted and pelted stones on car and broken window panes of car. It is further alleged by prosecution that thereafter injured was brought to civil hospital Chintpurni but hospital was closed and thereafter injured was brought to civil hospital Amb where the doctor declared him dead and informed police officials. Charges were framed by learned Additional Sessions Judge Una on dated 10.10.2007. Accused persons did not plead guilty and claimed trial.

3. Prosecution examined following oral witnesses in support of its case:

Sr.No.	Name of Witness
PW1	Mukal Sood

PW2	Satinder Kumar
PW3	Atul
PW4	Gurpiara
PW5	Jagish Ram@ Kaka
PW6	Ratinder Singh
PW7	Dhani Ram
PW8	Rajesh Kumar
PW9	H.C. Rajesh Kumar
PW10	Sh. Ashok Kumar
PW11	H.C. Pawan Kumar
PW12	Dr. S.K. Bansal
PW13	Sh. Kuldeep Chand
PW14	Sh. Makhan Singh
PW15	Sh. Krishan Dutt
PW16	Dr. R.K. Garg
PW17	Dr. M.K. Pathak
PW18	M.H.C. Kusha Dutt
PW19	HHC Ashwani Kumar
PW20	HHC Sarup Lal
PW21	Inspector Mehar Chand

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

Sr.No.	Description:
Ex. PW 1/A	Statement of Mukal Sood u/s 154 Cr.P.C.
Ex. PW 1/B	Memo recovery Maruti Car No. Hp.19-a-4696 along with RC /IC and key.
Ex. PW 8/A	Memo recovery of blood
Ex. PW 9/A	Memo recovery of pant and shirt
Ex. PW 10/A	Memo recovery of pant, shirt and vest.
Ex. PW 10/B	Memo regarding disclosure statement of co-accused Ajit Kumar.
Ex. PW 11/A	Memo recovery blood stained knife (iron)
Ex. PW 12/A	Report FSL, Junga
Ex. PW 12/B	Post Mortem Report
Ex. PW 12/C	Application for conducting post Mortem
Ex. PW 13/A	Rough sketch of weapon of offence
Ex. PW 16/A	Application for medical examination of Mukal Sood.
Ex. PW 16/B	MLC of Mukal Sood.
Ex. PW 16/C&D	Application for medical and MLC of Satinder
Ex. PW 16/E&F	Application and medical of Atul Kumar.
Ex. PW 16/G&H	Application and MLC of Ritender Singh.
Ex. PW 16/J&K	Application for medical and MLC of Dharam Pal
Ex. PW 16/L	MLC of Ajit Kumar

Ex. PW 20/A	Mechanical report of accidental vehicle.
Ex. PW 21/A	Rapat No. 25 dated 22.6.2007
Ex. PW 21/B	Death Report(Form No 25,35)
Ex.PW 21/C & 21/E	Statement of Mukal Sood u/s 154 Cr.P.C
Ex. PW 21/D	FIR
Ex. PW 21/F,G	Site Plans
Ext PW21/H&J	Information of arrest.
Ex. PW 21,1/4K	Application for taking blood sample.
Ex.PW 21,1/4 L to R	Statements of PW Mukal Sood Ratinder Singh, Satinder, Atul Kumar, Gurpiara, Jagdish and Dhani Ram u/s 161 Cr.P.C
Ex. PW 21/S & 1/T	Report FSL Junga
Ex. PW 21/U	Statement of Makhan Singh u/s 161 Cr.P.C.
Ex. PW 21/V	Site Plan of House of Gurbux Singh
Ex. PW 21/Wto Z	Seal impression
Ext PW21/1 to 25	Photographs & negatives of photographs.

5. Learned trial Court acquitted co-accused Dharam Pal, co-accused Ajit Kumar and co-accused Kewal Krishan qua criminal offence punishable under Sections 302, 323 and 324 IPC. Learned trial Court convicted co-accused Dharam Pal, co-accused Ajit Kumar and co-accused Kewal Krishan qua criminal offence punishable under Section 427 IPC. Learned trial Court acquitted co-accused Gurbax Singh and co-accused Rukam Deen qua criminal offence punishable under Section 201 IPC. Learned trial Court after hearing convicted persons upon quantum of sentence observed that co-accused Dharam Pal and co-accused Ajit Kumar were arrested on dated 23.6.2007 and co-accused Kewal Krishan was arrested on dated 26.6.2007. Learned trial Court further held that all the convicted persons were in judicial custody for more than six months. Learned trial Court sentenced all the convicted persons to imprisonment for the period which they have already undergone in judicial custody and in addition learned trial Court sentenced all convicted persons to pay fine to the tune of Rs.2,000/- each. Learned trial Court further directed that in default of payment of fine convicted persons would go simple imprisonment for a period of one month.

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court Criminal Appeal No. 13 of 2008, Criminal Appeal No. 272 of 2008 and Criminal Revision No. 57 of 2008 were filed.

7. We have heard learned Advocates and learned Additional Advocate General and we have also gone through the entire record carefully.

8. Point for determination before us is whether learned trial court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice.

9.ORAL EVIDENCE ADDUCED BY PROSECUTION:

9.1 PW1 Mukal Sood has stated that he is running a shop of ready made garments at Amb. He has stated that on dated 21.6.2007 he along with his friends Rocky, Bantu, Atul, Vaneet and Sunil went to the house of his friend namely Raj Kumar at Amb to attend his marriage at about 7.30 pm. He has stated that when they reached there at that time marriage party had already moved for village Badhmana. He has stated that thereafter

they went to village Badhmana and reached Badhmana at about 10.30 pm. He has stated that firstly they met the bridegroom and his father who asked them to take dinner in the house of bride. He has stated that thereafter they all went to the house of bride. He has stated that there was rush at the dinning place and they were asked by the people from bride side to go to upstairs and wait there for some time. He has stated that brother of bridegroom and co-accused Dharam Pal and 2/3 other persons were sitting upon the roof of house and they shook hands with the brother of bridegroom. He has stated that deceased Sunil Kumar told them that co-accused Dharam Pal was the captain of football team in their school. He has stated that thereafter deceased Sunil Kumar went near to co-accused Dharam Pal and inquired from him whether he was angry with deceased Sunil Kumar upon which co-accused Dharam Pal told that he was not angry with deceased Sunil Kumar. He has stated that thereafter co-accused Dharam Pal started moving downward to take meal and after him deceased Sunil Kumar and Bantu also started moving downward to take meal. He has stated that after two minutes he heard that fight took place and he rushed towards the spot of quarrel and saw that Bantu and co-accused Dharam Pal were quarrelling with each other while deceased Sunil Kumar was trying to separate them. He has stated that thereafter co-accused Dharam Pal raised cries and thereafter 10/15 boys came on the roof and without listening anything started beating them. He has stated that those persons beaten him, Rocky, Bantu, Atul and Sunil. He has stated that in the meanwhile he saw that deceased Sunil Kumar was sitting on the chair and Sunil Kumar told him that co-accused Dharam Pal had given serious injury to him with sharp edged weapon. He has stated that Sunil Kumar told him to take him to hospital for medical treatment. He has stated that he had not seen who had caused injury to deceased Sunil Kumar. He has stated that thereafter they placed the injured in a car. He has stated that when they started moving from the place of incident co-accused Dharam Pal, co-accused Kewal Krishan and younger brother of Dharam Pal present in Court did not allow them to take the injured to hospital and they broken window panes of the vehicle with the help of stones. He has stated that one of the accused person dragged deceased Sunil Kumar out side the car and they again managed to place deceased Sunil Kumar in the car. He has stated that thereafter deceased Sunil Kumar was brought to hospital at Chintpurni. He has stated that hospital at Chintpurni was closed and they brought deceased Sunil Kumar to hospital at Amb. He has stated that deceased Sunil Kumar was declared dead. He has stated that thereafter police officials visited at the spot and recorded his statement Ext PW1/A which bears his signature. He has stated that during the investigation car having registration No. HP-19A-4696 with broken window panes took into possession vide seizure memo Ext PW1/B which bears his signature. He has stated that he did not see anybody inflicting injury upon deceased Sunil Kumar. Witness was declared hostile by prosecution and witness was cross-examined. He has denied suggestion that co-accused Dharam Pal and co-accused Ajit Kumar have inflicted injury upon deceased Sunil Kumar with sharp edged weapon. He has denied suggestion that he had suppressed the facts of causing injury to deceased Sunil Kumar by co-accused Dharam Pal. He has denied suggestion that he had compromised the matter with accused persons. He has stated that 300/400 persons were present in the marriage ceremony. He has denied suggestion that accused persons did not hurl any bricks upon car.

9.2 PW2 Satinder Kumar has stated that he is running a cloth shop at Amb. He has stated that on dated 21.6.2007 he along with Ratinder, Atul, Sunil, Vaneet and Mukal Sood went to village Badhmana to attend the marriage of his friend Raj Kumar. He has stated that they reached at village Badhmana at about 10.30 pm. He has stated that they firstly met Raj Kumar and his father and thereafter they went to bride house to take meals. He has stated that when they reached in the house of bride they were told that there was no space for taking meal and they were requested to go to upper portion of house and sat on the chair. He has stated that he and deceased Sunil Kumar asked co-accused Dharam Pal

as to why he was not talking with them. He has stated that thereafter co-accused Dharam Pal told that there was nothing and he shook hands with him. He has stated that in the meanwhile there was a call for dinner upon which co-accused Dharam Pal came down from upper portion of house. He has stated that thereafter his brother Bantu also came down. He has stated that thereafter quarrel took place between co-accused Dharam Pal and deceased Sunil Kumar and one person separated them. He has stated that some noise came that quarrel took place but he does not know what happened. He has stated that thereafter he saw that deceased Sunil Kumar was in injured condition and he was sitting on the chair. He has stated that he does not know who had inflicted injuries upon deceased Sunil Kumar. He has stated that thereafter injured was brought to a car and took him to hospital for medical treatment. He has stated that co-accused Dharam Pal, brother of co-accused Dharam Pal and co-accused Kewal Krishan pelted stones upon car and obstructed them and they broken window panes of the car. He has stated that thereafter they took injured to hospital at Chintpurni but the hospital was closed and thereafter injured was brought to civil hospital at Amb where deceased Sunil Kumar was declared dead by medical officer. He has stated that during investigation he produced his car to the investigating agency along with documents which were took into possession vide seizure memo Ext PW1/B which bears his signature. He has stated that he does not know who had caused injury to deceased Sunil Kumar. Witness was declared hostile by prosecution. He has denied suggestion that co-accused Dharam Pal had caused injury upon deceased Sunil Kumar with sharp edged weapon in his presence. He has denied suggestion that co-accused Dharam Pal had pushed deceased Sunil Kumar with his shoulder. He has denied suggestion that he had entered into compromise with co-accused Dharam Pal. He has stated that he identified co-accused Dharam Pal, co-accused Ajit Kumar and co-accused Kewal Krishan in Court. He has denied suggestion that co-accused Dharam Pal, co-accused Ajit Kumar and co-accused Kewal Krishan did not hurl any stones on the car. He has denied suggestion that he deposed falsely regarding pelting stones by accused persons.

9.3. PW3 Atul has stated that he is shopkeeper at Amb. He has stated that on dated 21.6.2007 he along with Ratinder, Satinder, Sunil Kumar, Vaneet and Mukal Sood went to village Badhmana to attend the marriage of Raj Kumar in a car and they reached there at about 10 pm. and after meeting with Raj Kumar and his father they went to the house of bride to take meals. He has stated that there was rush of people who were taking meals on the ground floor of the house and they were asked to sit upon upper portion of house. He has stated that on the upper portion of house co-accused Dharam Pal, his children and 3/4 other persons were already sitting on the upper portion of house. He has stated that deceased Sunil Kumar told that co-accused Dharam Pal was the captain of football team in the school but co-accused Dharam Pal was not talking with them. He has stated that thereafter co-accused Dharam Pal came and shook hands with deceased Sunil Kumar. He has stated that thereafter a call came to take meal and thereafter co-accused Dharam Pal came down along with Bantu and Sunil Kumar. He has stated that in the meanwhile he heard noise that quarrel took place and he came down and separated co-accused Dharam Pal and Bantu. He has stated that thereafter somebody slept deceased Sunil Kumar. He has stated that thereafter some persons came at upper portion of house and also beaten them. He has stated that deceased Sunil Kumar had sustained serious injuries and he was brought down and was placed in car. He has stated that as soon as deceased Sunil Kumar was placed in car co-accused Dharam Pal and other persons did not allow them to go ahead. He has stated that thereafter co-accused Dharam Pal and co-accused Ajit Kumar and some other persons whom he does not know pelted stones on car. He has stated that ultimately they took deceased Sunil Kumar to hospital. He has stated that hospital at Chintpurni was closed and thereafter deceased Sunil Kumar was brought to hospital at Amb. He has stated that he does know who had caused injury to deceased Sunil

Kumar. Witness was declared hostile. He has denied suggestion that co-accused Dharam Pal had caused injury upon deceased Sunil Kumar with sharp edged weapon in his presence. He has denied suggestion that he had not disclosed the name of co-accused Dharam Pal as assailant in order to save him. He has denied suggestion that co-accused Dharam Pal and co-accused Ajit Kumar did not try to stop car.

9.4 PW4 Gurpiara has stated that he is working with M/s Ashok Kumar Satish Kumar merchant at Amb. He has stated that Raj Kumar is his nephew and his marriage took place on dated 21.6.2007. He has stated that on dated 21.6.2007 he went to village Badhmana with marriage party and reached there at about 9.30 pm. He has stated that after receipt of marriage party from the side of bride they were requested to take dinner. He has stated that after taking dinner he along with one of his relative who was about 75 years of age went to the upper portion of house. He has stated that 4/5 persons were already sitting on upper portion of house. He has stated that Banti and Pawan started quarrelling and he asked them not to quarrel. He has stated that he was told by Banti that his sandal was lost. He has stated that in the meantime number of persons came to upper portion of house from down side and they were quarrelling with each other. He has stated that he does not know what happened thereafter. Witness was declared hostile and was cross examined. He has stated that he heard noise of breaking of window of panes car. He has admitted that in the morning they heard that Sunil Kumar had died. He has denied suggestion that he had suppressed material facts from the Court just to save accused persons. He has stated that he came back in the morning from house of bride.

9.5 PW5 Jagdish Ram has stated that he is running a shop at Amb. He has stated that on dated 21.6.2007 there was marriage of his brother Raj Kumar. He has stated that marriage party had gone to village Badhmana and they reached there at about 9.30 pm. He has stated that he was also one of the members of marriage party. He has stated that after some marriage ceremony they were asked to take dinner in the house of bride. He has stated that since there was no space for dinner they were asked to wait and sat on upper portion of house. He has stated that numbers of people were sitting on the upper portion of house including co-accused Dharam Pal and co-accused Ajit Kumar. He has stated that co-accused Kewal Krishan was not present on the upper portion of house. Witness was declared hostile. He has denied suggestion that deceased Sunil Kumar was sitting on the chair in an injured condition. He has denied suggestion that co-accused Kewal Krishan was sitting on upper portion of house along with co-accused Dharam Pal. He has denied suggestion that co-accused Dharam Pal had caused injury to deceased Sunil Kumar with sharp edged weapon. He has denied suggestion that he has resiled from his earlier statement in order to save accused persons. He has admitted that co-accused Dharam Pal and his two small children were present.

9.6 PW6 Ratinder Singh has stated that he is working as Assistant Secretary co-operative society Amb. He has stated that on dated 21.6.2007 he along with his brother Satinder, Atul, Mukal Sood, Vineet Kumar and Sunil Kumar went to village Badhmana to attend marriage of Raj Kumar. He has stated that they reached at about 10 pm at village Badhmana and met bridegroom and his father and went to the house of bride to take meals. He has stated that there was crowd of people who were taking meals and they were sent upstairs to wait for taking meals. He has stated that on upper portion of house co-accused Dharam Pal, co-accused Kewal Krishan, one Jagdish and other persons were already sitting there. He has stated that deceased Sunil Kumar told that co-accused Dharam Pal was the captain of football team of their school but he was not talking with deceased Sunil Kumar. He has stated that in the meanwhile co-accused Dharam Pal came to deceased Sunil Kumar and shook hands with him. He has stated that thereafter call came for dinner and co-

accused Dharam Pal and others went downward to take dinner. He has stated that thereafter he along with Sunil Kumar, Atul, Satinder and Mukal also went downward for taking meals and when they were going downward then co-accused Dharam Pal came upward and pushed Sunil Kumar who fell down. He has stated that thereafter he and co-accused Dharam Pal started hot exchanges and thereafter they came to the blows. He has stated that in the meanwhile Gurpiara came on the roof and separated them. He has stated that his sandal was lost somewhere. He has stated that thereafter Atul and Satinder handed over sandal to him. He has stated that thereafter they were going downward through stairs then Happy, Kewal Krishan and Ajit came upward and they started beating deceased Sunil Kumar and four other persons have also beaten them. He has stated that he does not know what happened thereafter. He has stated that deceased Sunil Kumar was sitting on the chair and he requested to bring car to take deceased Sunil Kumar to hospital. He has stated that thereafter he brought car. He has stated that Mukal, Atul and Satinder brought deceased Sunil Kumar to the car. He has stated that co-accused Dharam Pal, co-accused Ajit Kumar and co-accused Kewal Krishan started pelting stones on the car. He has stated that thereafter they placed deceased Sunil Kumar in car with great struggle and took him to hospital at Chintpurni which was locked. He has stated that thereafter deceased Sunil Kumar was brought to Amb hospital. He has stated that during investigation police officials took into possession car vide memo Ext PW1/B. He has stated that he did not see any injury given to deceased Sunil Kumar. Witness was declared hostile. He has denied suggestion that co-accused Dharam Pal or his brother Ajit Kumar have given injury on the chest of deceased Sunil Kumar. He has denied suggestion that co-accused Dharam Pal had given blows to deceased Sunil Kumar with sharp edged weapon in his presence. He has denied suggestion that he had resiled from his earlier statement because he has compromised with accused persons. He has denied suggestion that he deposed falsely regarding pelting of stones on the car by accused persons.

9.7. PW7 Dhani Ram has stated that he is working as Chowkidar in Gram Panchayat Amb. He has stated that Raj Kumar is his younger son. He has stated that on dated 21.6.2007 marriage of his son Raj Kumar was solemnized at village Badhmana. He has stated that marriage party reached at about 10 pm. He has stated that some friends of his son were also present in the marriage party but he does not know their names. He has stated that after performing some marriage ceremony they went to the house of bride for taking meal. He has stated that some people have started consuming meal but due to rush other persons were asked to take meal after some time. He has stated that after taking meal he along with some other members of marriage party proceeded towards 'Dera' (Place for the stay of marriage party). He has stated that he heard noise and fight and thereafter he was asked by his brother-in-law to go and see what had happened. He has stated that he did not see anything. He has admitted that marriage was attended by the friends of his son namely Ratinder, Satinder, Atul, Sunil, Vaneet and Mukal Sood. He has admitted that he heard noise and fight from the roof of house. He has denied suggestion that he was informed that co-accused Dharam Pal and co-accused Ajit Kumar caused injury upon deceased Sunil Kumar with sharp edged weapon. He has stated that he could not state that co-accused Dharam Pal, co-accused Ajit Kumar and one Happy along with other persons pelted stones on the car in which deceased Sunil Kumar was taken to hospital. He has stated that stones were pelted on the car but he does not know who pelted stones. He has stated that he does not know that Ratinder and Satinder were also beaten by accused persons. He has admitted that co-accused Dharam Pal and co-accused Ajit Kumar are his relatives and he has good relation with them. He has denied suggestion that he deposed falsely in order to save accused persons being his relatives.

9.8 PW8 Rajesh Kumar son of Amar Singh has stated that he was associated in the investigation of present case. He has stated that in his presence the investigating agency collected blood from the pillar and from leg of chair from the house of Gurbax Singh and thereafter the same was placed in small bottle which was sealed with seal impression 'M'. He has stated that thereafter blood taken from the leg of chair was placed in match box and sealed with seal impression 'M'. He has stated that memo Ext PW8/A was prepared which bears his signature.

9.9 PW9 Rajesh Kumar HC has stated that he was posted as Head Constable in police station Amb in the year 2005. He has stated that on dated 22.6.2007 he was associated in the investigation of present case. He has stated that on the same day Satinder Singh produced car having registration No. HP-19A-4696 along with documents and key. He has stated that front panes of the car were broken. He has stated that there were pieces of glass, stones and one shoe of right foot in the car. He has stated that Investigating Officer took into possession all the articles vide seizure memo Ext PW1/B. He has stated that stones Ext P3, pieces of glass Ext P4 and shoes Ext P5 are the same which were took into possession by Investigating Officer in his presence. He has stated that on dated 23.6.2007 co-accused Ajit Kumar had produced his clothes to investigating agency in his presence which were took into possession vide memo Ext PW9/A. He has stated that pant Ext P6 and shirt Ext P7 are the same which were produced by co-accused Ajit Kumar before investigating agency. He has denied suggestion that nothing was produced in his presence. He has denied suggestion that clothes Ext P6 and Ext P7 did not belong to co-accused Ajit Kumar. He has denied suggestion that he deposed falsely being police official.

9.10. PW10 Ashok Kumar has stated that on dated 23.6.2007 he joined investigation in the present case. He has stated that in his presence police officials took into possession clothes of co-accused Ajit Kumar. He has stated that clothes of co-accused Dharam Pal were also took into possession by investigating agency in his presence. He has stated that co-accused Dharam Pal produced shirt, pant and undergarments which were torn from left shoulder. He has stated that clothes of co-accused Dharam Pal were sealed by investigating agency in a sealed parcel with seal impression 'MC' and memo Ext PW10/A was prepared. He has stated that shirt Ext P8, pant Ext P9 and undergarments Ext P10 are the same which were produced before investigating agency by co-accused Dharam Pal. He has stated that co-accused Ajit Kumar had made disclosure statement to investigating agency in his presence that he had concealed knife in the bushes and he could recover the same. He has stated that disclosure statement bears his signature. He has denied suggestion that co-accused Ajit Kumar did not give any disclosure statement to investigating agency regarding recovery of knife. He has denied suggestion that co-accused Dharam Pal and co-accused Ajit Kumar did not produce any clothes to investigating agency in his presence.

9.11. PW11 Pawan Kumar has stated that on dated 22.6.2007 he was associated in the investigation of present case. He has stated that Satinder Kumar produced his car along with documents and key to the investigating agency. He has stated that in the car there were stones, broken pieces of glass and shoes which were took into possession by investigating agency vide recovery memo Ext PW1/B. He has stated that stones Ext P3, pieces of glass Ext P4 and shoes Ext P5 are the same. He has stated that co-accused Ajit Kumar led police officials to the bushes behind the house of Gurbax Singh and thereafter knife stained with blood was recovered. He has stated that photographs were also obtained and sketch of knife was also prepared. He has stated that knife Ext P11 was recovered at the instance of co-accused Ajit Kumar. He has denied suggestion that alleged place of recovery

was field. He has denied suggestion that alleged place of recovery was approachable to all. He has denied suggestion that no recovery was effected in his presence.

9.12. PW12 Dr.S.K.Bansal has stated that he was posted as medical officer District Hospital Una since 2002. He has stated that on dated 22.6.2007 at about 4.30 pm he conducted post mortem of deceased Sunil Kumar and observed as follow: "Moderately built, moderately nourished, intact body of adult male rigor mortis present, Post mortem staining present over dependant parts. 2.5" wound with clear cut margins present in left fifth intercostals' space. Wound was gapping margins were retracted, copious blood present at wound site. Wound was penetrating in nature 10 CM deep. Cranium and spinal cord within normal limits. 2.5" cut wound present over left side chest, left lung had 1.5cm ruptured wound at level of apex of heart. Apex PF heart has a punctured wound of 1cm x 0.5cm in size about two liters of clotted blood was present in thoracic cavity surrounding the heart and abdomen within normal limits." He has stated that deceased Sunil Kumar died due to rupture of left lung and heart leading to massive loss of blood and due to hemorrhage shock. He has stated that time between injury and death within few minutes and time within death and post mortem within 24 hours. He has stated that no poison was detected in the viscera as per report of chemical analyst Ext PW12/A. He has stated that he issued post mortem report Ext PW12/B which bears his signature. He has stated that injury on the person of deceased Sunil Kumar is not possible with knife Ext P11 shown to him in Court. He has denied suggestion that width of wound has been wrongly written as 2.5" in place of 2.5 cm. He has admitted that Dr. Umesh Gautam was also member of the board and he also signed post mortem report Ext PW12/B. He has admitted that dead body was having only one injury which was possible with one blow.

9.13. PW13 Kuldeep Chand has stated that he is agriculturist by profession and Ex-Pradhan Gram Panchayat Indora. He has stated that on dated 26.6.2007 he was associated in the investigation of present case. He has stated that co-accused Ajit Kumar was present in police station. He has stated that knife was recovered at the instance of co-accused Ajit Kumar. He has stated that knife was placed in a cloth parcel and sealed with seal impression 'J'. He has stated that knife Ext P11 is the same. He has denied suggestion that behind the house of Gurbax Singh there is open field. He has denied suggestion that place of recovery was open and approachable to all. He has denied suggestion that no recovery was effected in his presence. He has denied suggestion that he deposed falsely at the instance of police officials.

9.14. PW14 Makhan Singh has stated that he is labourer by profession. He has stated that he is residing at village Darwari. He has stated that Jaswant Singh and Gurbax Singh are running a tent house at Jallo-de-bar. He has stated that he was engaged by Jaswant Singh and Gurbax Singh to fix tent in the house of Jaswant Singh. He has stated that marriage party reached at about 10 pm in the house of Jaswant Singh at village Badhmana. He has stated that he arranged lights in the passage. He has stated that when they were in the field they heard noise of fight amongst marriage party on roof of the house of Jaswant Singh. He has stated that place where the fight was going was not visible from the field where he was present. He has stated that he did not visit the place of fight. He has stated that thereafter marriage party left the place and they went upstairs and saw that some blood was lying on the leg of chair. He has stated that he does not know who washed blood from that place. He has denied suggestion that at the time of fight he was present at the spot. He has denied suggestion that he was arranging chairs and meals on the roof of house. He has denied suggestion that in his presence some boys took injured to down side from the roof and placed injured in car. He has denied suggestion that when injured was placed in car then accused persons hurled stones on the car. He has denied suggestion that

father of bride had washed blood from chair, pillar and roof of the house through co-accused Rukam Deen. He has stated that he does not know accused persons present in Court. He has denied suggestion that he resiled from his earlier statement in order to save accused persons.

9.15. PW15 Krishan Dutt has stated that he joined investigation in present case. He has stated that on dated 26.6.2007 co-accused Ajit Kumar was in police custody. He has stated that in his presence he disclosed that he had concealed knife behind bushes at village Badhmana. He has stated that disclosure statement Ext PW10/B was prepared by investigating agency which bears his signature. He has stated that deceased Sunil Kumar was his relative. He has stated that he did not attend marriage in which alleged occurrence took place. He has denied suggestion that co-accused Ajit Kumar did not give any disclosure statement. He has denied suggestion that he deposed falsely because he is relative of deceased Sunil Kumar. He has stated that co-accused Ajit Kumar was not known to him earlier.

9.16. PW16 Dr.R.K.Garg has stated that he was posted at CHC Amb in the year 2000. He has stated that he medically examined Mukal son of Sandeep Sood on dated 22.6.2007 at 7.10 pm and found following injuries. (1) 10 cm long abrasion with bruises was seen on the back of neck extending up to lateral side of neck. (2) Left elbow had multiple small wound on the postrial side. Swelling was present. X-ray was advised. (3) Blunt trauma to the left knee joint on lateral side. He has stated that injured person refused to get X-ray conducted. He has stated that all the injuries were opined as simple caused with blunt object with probable duration of 10 to 24 hours. He has stated that he issued MLC Ext PW16/B which bears his signature. He has stated that on the same day as per request of investigating agency he also medically examined Satinder and found following injuries. (1). Right hand ring finger has penetrating wound on both sides. Wound had stated crushed formation. (2) Two lines parallel bruises was seen on the upper arm biceps region. (3) A small abrasion on the both fore arm 4 to 6 cms and lungs were present. (4) Blunt trauma to the left ear with hearing loss. He has stated that injuries No. 1 to 3 were simple in nature caused with blunt weapon with probable duration of 12 to 24 hours. He has stated that as per N&T Surgeon injury No.4 was simple in nature. He has stated that he issued MLC Ext. PW16/D. He has stated that on the same day on the application of investigating agency he also examined Atul Kumar and observed that multiple small bruise area were seen on the back. He has stated that all injuries were simple in nature caused with blunt weapon. He has issued MLC Ext PW16/F. He has stated that on the same day he also examined Ratinder Singh and observed (1) 1 cm long cut and incised wound on the right elbow (2) 1 cm long cut and incised wound on the left thigh upper area were present. He has stated that both injuries were simple caused with sharp edged weapon. He has stated that probable duration was 12 to 24 hours. He has stated that he issued MLC Ext PW16/H which bears his signature. He has stated that injuries on the persons of Mukal, Atul and Satinder could be caused during scuffle with fist and kick blows. He has stated that injuries on the person of Ratinder Singh could be caused if person strike against sharp object iron angle during scuffle. He has stated that injuries on the person of Ratinder Singh were superficial and skin deep. He has stated that possibility of self inflicted injuries on the person of Ratinder Singh could not be ruled out. He has stated that he also examined co-accused Dharam Pal and found following injuries. (1) Multiple small abrasion on the right side of neck with crushed formation was seen. (2) A small abrasion on the upper lip right side no swelling was seen. (3) Blunt trauma to the left eyebrow area. No swelling was seen. (4) Patient was complaining of pain on whole of scalp. No loose hairs were present. (5) Blunt trauma to the right thigh. (6) Blunt trauma to the right elbow and right hand. He has stated that all injuries were simple in nature with duration of 2 to 3 days caused with blunt weapon. He has stated that he

issued MLC Ext PW16/K which bears his signature. He has stated that on the same day he also examined co-accused Ajit Kumar and found no injury on his person. He has stated that he issued MLC Ext PW16/L which bears his signature. He has stated that injuries could be caused if person fell on hard surface while running. He has stated that injuries No.3,4,5 and 6 are not visible injuries. He has stated that injury No.1 could be caused if person is caught from neck. He has stated that emergency service is provided round the clock at CHC Amb and CH Chintpurni.

9.17. PW17 Dr.M.K.Pathak SMO has stated that he was posted at regional hospital Una since 2004. He has stated that on dated 16.7.2007 the then SMO Una directed him to collect DNA sample of Prithvi Raj and his wife Kashmiro Devi. He has stated that above named persons were identified by police officials and thereafter he got sample collected through laboratory technician under his supervision and got them properly sealed and thereafter handed over the same to police officials. He has stated that while collecting sample he had properly followed the procedure.

9.18. PW18 Kusha Dutt has stated that he remained posted as MHC Police Station Amb since February 2007. He has stated that on dated 22.6.2007 Inspector Mehar Chand SHO police station Amb deposited with him one sealed parcel containing match box, one bottle containing blood sealed with seal impression 'M', one sealed parcel containing clothes of deceased Sunil Kumar and one sealed parcel containing viscera of deceased Sunil Kumar. He has stated that on dated 23.6.2007 one sealed parcel containing clothes of co-accused Ajit Kumar sealed with seal impression 'T' and one sealed parcel of blood stained clothes of co-accused Dharam Pal were deposited with him. He has stated that on dated 26.6.2007 one sealed parcel containing knife weapon of offence sealed with seal impression 'J' were deposited with him. He has stated that on dated 16.7.2007 blood sample of Prithvi Raj and Kashmiro Devi sealed with seal of mortuary Una were also deposited with him. He has stated that blood sample of parents of deceased Sunil Kumar and sealed parcel of blood stained clothes of co-accused Dharam Pal were sent for DNA test through MHC Ashwani Kumar vide RC No. 132 of 2007 on dated 17.7.2007 to CFSL Chandigarh. He has stated that HHC Ashwani Kumar on dated 17.7.2007 after depositing the same at CSFL Chandigarh handed over RC to him. He has stated that sealed parcels containing match box and bottle having blood, blood stained clothes of co-accused Ajit Kumar, one parcel containing knife, one sealed parcel containing blood stained clothes of deceased Sunil Kumar and one sealed parcel containing viscera of deceased Sunil Kumar were sent to FSL Junga vide RC No. 134 of 2007 through constable Ram Kishore. He has stated that case property remained intact in his custody. He has denied suggestion that he deposed falsely in Court. He has stated that his statement was not recorded by Investigating Officer on the day when case property was deposited with him.

9.19. PW19 Ashwani Kumar has stated that he remained posted in police station Amb for the last two years. He has stated that on dated 17.7.2007 MHC Kusha Dutt police station Amb handed over one sealed parcel containing blood sample of parents of deceased Sunil Kumar, one blotting paper sealed with seal of mortuary Una containing an ice box and one sealed parcel containing blood stained clothes of co-accused Dharam Pal sealed with seal 'MC' along with papers for depositing the same at CFSL Chandigarh. He has stated that he deposited the same at CFSL Chandigarh and returned RC to MHC Amb. He has stated that sealed parcels remained intact in his custody.

9.20. PW20 Sarup Lal has stated that he was posted as Motor Mechanic at police line Una since 1980. He has stated that on dated 3.7.2007 he mechanically examined maruti car No. HP-19A-4696 which was parked in the premises of police station Amb. He has stated that after checking vehicle he issued his report Ext PW20/A which bears his

signature. He has stated that there was no mechanical defect in the vehicle. He has stated that front mirror of car was broken.

9.21. PW21 Mehar Chand has stated that he remained posted as Inspector police station Amb since January 2007. He has stated that on dated 22.6.2007 he received telephonic message from medical officer CHC Amb that one Sunil Kumar was brought dead in hospital. He has stated that on the basis of statement of medical officer CHC Amb report No.25 dated 22.6.2007 Ext PW21/A was recorded. He has stated that thereafter he along with police officials proceeded to CHC Amb and reached there at about 12.50 AM. He has stated that he took photographs of dead body of deceased Sunil Kumar Ext PW21/1 to Ext PW21/8 and negatives of photographs are Ext PW21/9 to Ext PW21/16 and filled inquest report Ext PW21/B. He has stated that he also forwarded application Ext PW12/C for conducting post mortem of deceased Sunil Kumar. He has stated that he recorded the statement of PW1 Mukal Sood Ext PW1/A as per his version and forwarded the same to police station along with his endorsement Ext PW21/C for registration of FIR. He has stated that thereafter FIR Ext PW21/D was recorded by SI Om Parkash who was working under him at that time. He has stated that he identified his signatures. He has stated that Om Parkash made endorsement Ext PW21/E on rukka which bears his signatures. He has stated that on dated 22.6.2007 he proceeded to the spot and reached there at about 12 noon. He has stated that he inspected the spot and took photographs of the spot which are Ext PW21/17 to Ext PW21/25. He has stated that thereafter he took into possession blood from the pillar and chair after scratching the same and put the same into bottle and sealed with seal impression 'M' and memo Ext PW21/A was prepared. He has stated that he also prepared site plan Ext PW21/F and took into possession maruti car No. HP-19A-4696 along with documents and key vide seizure memo Ext PW1/B. He has stated that he took into possession stones, pieces of glass and one shoe which are Ext P3 to Ext P5. He has stated that bottle Ext P1 and match box Ext P2 are same. He has stated that he sent dead body of deceased Sunil Kumar for post mortem examination to District Hospita l Una and received post mortem report Ext PW12/B. He has stated that he deposited aforesaid case property with MHC police station Amb. He has stated that on dated 23.6.2007 he arrested co-accused Dharam Pal and co-accused Ajit Kumar from Partap Nagar Amb. He has stated that co-accused Ajit Kumar produced his clothes i.e. pant Ext P6 and shirt Ext P7 and same were took into possession vide seizure memo Ext PW9/A. He has stated that on the same day co-accused Dharam Pal deposited his clothes i.e. shirt Ext P8, pant Ext P9 and undergarments Ext P10 which were took into possession vide memo Ext PW10/A. He has stated that on dated 26.6.2007 co-accused Ajit Kumar made his disclosure statement under Section 27 of Evidence Act and thereafter he recovered weapon of offence and disclosure statement Ext PW10/B was recorded. He has stated that thereafter co-accused Ajit Kumar took police officials to the disclosed place and got recovered knife Ext P11 regarding which memo Ext PW11/A was prepared. He has stated that he also prepared rough sketch of weapon Ext PW13/A. He has stated that all articles were sealed separately and memos were signed by witnesses. He has stated that he prepared site plan of the place of recovery of knife Ext PW21/G. He has stated that on dated 26.6.2007 co-accused Kewal Krishan was arrested by him. He has stated that after arrest of accused persons they were also medically examined on dated 23.6.2007. He has stated that information regarding arrest of co-accused Dharam Pal Ext PW21/H and co-accused Ajit Kumar Ext PW21/J given to concerned JMIC. He has stated that car in question was mechanically examined from Sarup Chand mechanic and obtained his report Ext PW20/A. He has stated that on dated 16.7.2007 he called the parents of deceased Sunil Kumar and their blood sample for DNA test was obtained at District Hospital Una. He has stated that he moved application Ext PW21/K to SHO Una who marked the same to Dr. M.K.Pathak. He has stated that he recorded the statement of witnesses under Section 161 Cr.PC. He has stated that statement of Mukal Sood Ext PW1/A

under Section 154 Cr.PC, supplementary statement Ext PW21/L under Section 161 Cr PC, statement of Ratinder Singh Ext PW21/M including portion A to A, statement of Satinder Singh Ext PW21/N including portion A to A, statement of Atul Kumar Ext PW21/O including marked portion, statement of Gurpiara Ext PW21/P including marked portion, statement of Jagdish Ext PW21/Q including marked portion and statement of Dhani Ram Ext PW21/R including marked portion were recorded by him as per their versions. He has stated that during the course of investigation one Sanjiv @ Happy could not be arrested and proceedings under Sections 82 and 83 Cr.PC were initiated against him. He has stated that report of FSL Ext PW21/S and Ext PW21/T were received by him. He has stated that thereafter on completion of investigation he prepared charge sheet and submitted the same in Court. He has stated that on dated 10.7.2007 he handed over the investigation of present case to K.C.Bhatia District Inspector who arrested co-accused Rukam Deen and co-accused Gurbax Singh and also recorded statement of witnesses. He has stated that site plan Ext PW21/V was prepared from JE Bharwain and he also obtained sample of seal on the piece of cloth Ext PW21/W to Ext PW21/Z. He has denied suggestion that accused persons did not give any disclosure statement. He has denied suggestion that he planted the recovery of knife against accused persons. He has admitted that as per investigation as well as per statements of injured witnesses namely Mukal Sood and Satinder it has not come on record that deceased Sunil Kumar told anybody that injury was caused by co-accused Dharam Pal or co-accused Ajit Kumar. He has denied suggestion that he conducted investigation in partial manner. He has denied suggestion that accused persons have been falsely implicated in the present case.

10. Statements of accused persons recorded under Section 313 Cr.PC. Accused persons have stated that they are innocent and have been falsely implicated in the present case. Accused persons did not lead any defence evidence.

11. Submission of learned Advocate appearing on behalf of appellants in Criminal Appeal No.13 of 2008 that there is no iota of evidence to connect appellants Dharam Pal and Ajit Kumar with the commission of offence punishable under Section 427 IPC and on this ground criminal appeal No. 13 of 2008 filed by appellants Dharam Pal and Ajit Kumar be accepted is rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that facts can be proved by way of oral evidence or by way of documentary evidence. It is well settled law that all facts except the contents of documents or electronic records can be proved by way of oral evidence as per Section 59 of the Indian Evidence Act 1872. We have carefully perused testimony of PW1 Mukal Sood eye witness of the incident. PW1 has specifically stated when he appeared in witness box that when they placed injured in car and started leaving from the place of incident then co-accused Dharam Pal and co-accused Kewal Krishan and younger brother of co-accused Dharam Pal did not allow to take deceased Sunil Kumar to hospital and they broken window panes of the vehicle with the help of stones. PW1 Mukal Sood has stated in positive manner that thereafter one of the co-accused tried to drag deceased Sunil Kumar from outside the car and thereafter they again placed deceased Sunil Kumar in car and brought deceased Sunil Kumar to civil hospital Chintpurni. PW1 Mukal Sood has specifically stated that civil hospital at Chintpurni was closed and thereafter deceased was brought to civil hospital Amb and the doctor at Amb declared Sunil Kumar dead. Testimony of PW1 Mukal Sood to this effect is trustworthy, reliable and inspires confidence of Court. There is no positive evidence on record in order to prove that PW1 has hostile animus against appellants at any point of time. Similarly PW2 Satinder Kumar has specifically stated in positive manner when he appeared in witness box that when deceased Sunil Kumar was brought to car to take him to hospital then co-accused Dharam Pal, brother of Dharam Pal and co-accused Kewal Krishan started pelting stones on the car and obstructed them. PW2 Satinder Kumar has specifically

stated in positive manner that co-accused Dharam Pal, his brother and co-accused Kewal Krishan also broken window panes of car. PW2 Satinder Kumar has specifically stated in positive manner that thereafter they took deceased Sunil Kumar to hospital at Chintpurni but the hospital was closed and thereafter they took deceased Sunil Kumar to hospital at Amb where Sunil Kumar was declared dead by medical officer. Testimony of PW2 Satinder Kumar is also trustworthy, reliable and inspires confidence of Court to this effect. There is no positive, reliable and cogent reason to disbelieve the testimony of PW2 Satinder Kumar to this effect. There is no positive evidence on record in order to prove that PW2 has hostile animus against appellants at any point of time. Similarly PW3 Atul has specifically stated when he appeared in witness box that as soon as they put deceased Sunil Kumar in car then co-accused Dharam Pal and other persons did not allow them to go ahead. PW3 Atul has stated in positive manner that co-accused Dharam Pal, co-accused Ajit Kumar and some other persons pelted stones on the car but ultimately they took deceased Sunil Kumar to hospital at Chintpurni. PW3 has stated in positive manner that hospital at Chintpurni was closed and thereafter they brought deceased to hospital at Amb for medical treatment. Testimony of PW3 Atul to this effect is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW3 Atul to this effect. There is no positive evidence on record that PW3 has hostile animus against appellants at any point of time. PW6 Ratinder Singh another eye witness of the incident has stated in positive manner that he brought car and thereafter PW1 Mukal Sood and PW2 Satinder Kumar brought deceased Sunil Kumar to car. PW6 Ratinder Singh has stated in positive manner that thereafter co-accused Dharam Pal, co-accused Kewal Krishan and co-accused Ajit Kumar started pelting stones on car. PW6 Ratinder Singh has specifically stated in positive manner that they put deceased Sunil Kumar in car with great struggle and thereafter they took deceased Sunil Kumar to hospital at Chintpurni but the hospital was closed and thereafter they brought deceased Sunil Kumar to hospital at Amb where he was declared dead by medical officer. Testimony of PW6 Ratinder Singh eye witness is also trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW6 Ratinder Singh to this effect. There is no positive evidence on record in order to prove that PW6 has any hostile animus against appellants at any point of time. It is held that it is proved beyond reasonable doubt as per oral testimony of PW1 Mukal Sood, PW2 Satinder Kumar, PW3 Atul and PW6 Ratinder Singh that both appellants namely Dharam pal and Ajit Kumar in furtherance of common intention intentionally committed mischief by causing loss and damage to maruti car bearing registration No.HP-19A-4696 belonging to Jeewan Singh.

12. Another submission of learned Advocate appearing on behalf of appellants in criminal Appeal No. 13 of 2008 that learned trial Court had acquitted accused persons qua criminal offence punishable under Sections 302, 323 and 324 IPC and on this ground appellants Dharam Pal and Ajit Kumar be also acquitted qua criminal offence under Section 427 IPC is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that criminal offence punishable under Section 427 IPC and criminal offence punishable under Sections 302, 323 and 324 IPC are independent criminal offence. It is well settled law that Court can convict accused person strictly as per proved facts relating to particular criminal offence. It is well settled law that concept falsus in uno falsus in omnibus is not applicable in criminal trials. See AIR 1980 SC 957 titled Bhe Ram Vs. State of Haryana. Also See AIR 1971 SC 2505 titled Rai Singh Vs. State of Haryana. Even as per section 222(2) of code of criminal procedure 1973 if a person is charged of major offence then he could be convicted for minor criminal offence if minor criminal offence is proved. See AIR 2000 SC 297 titled State of HP Vs. Tara Dutt. See 1997 (4) Supreme 214 titled Sangharabonia Sreenu Vs. State of A.P.

13. Another submission of learned Advocate appearing on behalf of appellants in Criminal Appeal No. 13 of 2008 that PW1 Mukal Sood, PW2 Satinder Kumar and PW3 Atul have been declared as hostile witness by prosecution and on this ground appeal filed by appellants Dharam Pal and Ajit Kumar be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It was held in case reported in 2011 (6) SCC 312 titled Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat that evidence of hostile witness may contain elements of truth and should not be entirely discarded. Also see AIR 1991 SC 1853 titled Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh, See 2012 (4) SCC 327 titled Bhajju @ Karan Singh Vs. State of Madhya Pradesh, Also see 2012 (5) SCC 777 titled Ramesh Harijan Vs. State of Uttar Pradesh, See AIR 1976 SC 202 titled Bhagwan Singh Vs. State of Haryana and Also See AIR 1977 SC 170 titled Ravindra Kumar Vs. State of Orissa. Also see AIR 1979 SC 1848 titled Syad Akbar Vs. State of Karnataka**.** Also see AIR 1971 SC 1853 titled Surendra Tiwari Vs. State of MP.

14. Another submission of learned Advocate appearing on behalf of appellants in Criminal Appeal No. 13 of 2008 that material question was not put to appellants Dharam Pal and Ajit Kumar under Section 313 Cr.PC relating to criminal offence under Section 427 IPC and on this ground appeal filed by appellants be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the statement of accused persons recorded under Section 313 Cr PC. It is held that learned trial Court had put material questions to co-accused Dharam Pal and co-accused Ajit Kumar relating to criminal offence under Section 427 IPC when statements of co-accused Dharam Pal and co-accused Ajit Kumar were recorded under Section 313 Cr.PC. It is held that no miscarriage of justice has been caused to co-accused Dharam Pal and co-accused Ajit Kumar by way of not putting material questions to appellants under Section 313 Cr PC. It is held that all incriminating questions were put to accused persons under Section 313 Cr.PC relating to criminal offence under Section 427 IPC.

15. Another submission of learned Advocate appearing on behalf of appellants in Criminal Appeal No.13 of 2008 that all prosecution witnesses are interested witnesses and on this ground conviction of co-appellant Dharam Pal and co-appellant Ajit Kumar under Section 427 IPC be set aside is also rejected being devoid of any force for the reason hereinafter mentioned. There is no evidence on record that prosecution witnesses have hostile animus against accused persons at any point of time. It was held in case reported in AIR 1981 SC 1390 titled State of Rajasthan Vs. Kalki and another that relative witness is not equivalent to interested witness. It was held that conviction in criminal case can be given on the testimony of relative witness if testimony of relative witness is trustworthy. It was held that there is difference between relative witness and interested witness.

16. Another submission of learned Advocate appearing on behalf of appellants in Criminal Appeal No 13 of 2008 that there is improvement in the testimony of PW1 Mukal Sood and PW7 Dhani Ram and on this ground appeal filed by appellants be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused testimonies of PW1 Mukal Sood and PW7 Dhani Ram. There is no material improvement in the testimonies of PW1 and PW7 which goes to the root of case. It is well settled law that minor contradictions are bound to come in criminal case when testimony of prosecution witnesses is recorded after a gap of sufficient time. In the present case incident took place on dated 21.6.2007 at about 11.30 pm at village Badhmana Tehsil Amb District Una HP and statements of prosecution witnesses were recorded on dated 11.12.2007, 12.12.2007, 13.12.2007 and 14.12.2007. Hence it is held that material improvements in the testimony of prosecution witnesses are not proved on record in the present case. It was held

in case reported in 2015 (3) SC 1 titled Pawan Kumar Vs. State of UP that minor discrepancies in criminal case should be ignored.

17. Submission of learned Additional Advocate General appearing on behalf of State in Criminal Appeal No. 272 of 2008 that learned trial Court had wrongly acquitted accused persons under Sections 302, 323 and 324 IPC is rejected being devoid of any force for the reason hereinafter mentioned. PW1 Mukal Sood eye witness of the incident has specifically stated when he appeared in witness box that he did not see anybody causing injury to deceased Sunil Kumar. Similarly PW2 Satinder Kumar has stated in positive manner when he appeared in witness box that he does not know who caused injury to deceased Sunil Kumar. PW3 Atul another eye witness of the incident has specifically stated in positive manner that he does not know who had caused injury to deceased Sunil Kumar. Similarly PW6 Ratinder Kumar eye witness has also stated in positive manner that he did not see anybody inflicting injury upon deceased Sunil Kumar. None of the witness has stated in positive manner that which of the accused had caused injury upon deceased Sunil Kumar with knife. It was held in case reported in 2005 (9) SCC 765 titled Anjlus Dungdung Vs. State of Jharkhand that suspicion however strong cannot take place of proof. It was held in case reported in 2010 (11) SCC 423 titled Nanhar Vs. State of Haryana that prosecution must stand or fall on its own leg and it cannot derive any strength from the weakness of the defence. It was held in case reported in AIR 1979 SC 1382 titled State (Delhi Administration) Vs. Gulzarilal Tandon that moral conviction however strong or genuine cannot amount to legal conviction sustainable in law. Also See: AIR 1984 SC 1622 titled Sharad Birdhichand Sarda Vs. State of Maharashtra, See AIR 1983 SC 906 titled Bhugdomal Gangaram and others Vs. State of Gujarat, See AIR 1985 SC 1224 titled State of UP Vs. Sukhbasi and others.

18. Another submission of learned Additional Advocate General appearing on behalf of State in Criminal Appeal No. 272 of 2008 that presence of co-accused Dharam Pal at the place of incident is proved on record and on this ground co-accused Dharam Pal be convicted under Section 302, 323 and 324 IPC is also rejected being devoid of any force for the reason hereinafter mentioned. We are of the opinion that simply presence of co-accused Dharam Pal at the place of incident is not sufficient to hold that co-accused Dharam Pal had inflicted injury upon deceased Sunil Kumar with sharp edged weapon. There is no positive, cogent and reliable evidence on record in order to prove that co-accused Dharam Pal had inflicted injury upon deceased Sunil Kumar with sharp edged weapon.

19. Another submission of learned Additional Advocate General appearing on behalf of State in Criminal Appeal No. 272 of 2008 that as per testimony of prosecution witnesses connectivity of accused persons with the commission of offence punishable under Sections 302, 323 and 324 IPC is proved beyond reasonable doubt is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of entire prosecution witnesses. It is held that fact of connectivity of accused persons is not proved on record qua commission of offence punishable under Sections 302, 323 and 324 IPC. There is no positive, cogent and reliable evidence on record in order to prove that accused persons have intentionally and voluntarily caused murder of deceased Sunil Kumar. There is no positive, cogent and reliable eye witness on record in order to prove that accused persons have voluntarily caused hurt to deceased Sunil Kumar with dangerous weapon. PW1 Mukal Sood, PW2 Satinder Kumar, PW3 Atul and PW6 Ratinder Singh eye witness of the incident did not support prosecution case relating to criminal offence punishable under Sections 302, 323 and 324 IPC. PW1, PW2, PW3 and PW6 have not stated in positive manner that accused persons in their presence have caused murder of deceased Sunil Kumar and they have also not stated that accused persons have voluntarily

caused hurt with sharp edged weapon to deceased Sunil Kumar in their presence. On the contrary PW1 Mukal Sood, PW2 Satinder Kumar, PW3 Atul and PW6 Ratinder Singh have stated in positive manner that accused persons did not inflict injury upon the body of deceased Sunil Kumar in their presence. Even as per testimony of PW12 Dr.S.K.Bansal who conducted post mortem of deceased injuries on the person of deceased are not possible with knife Ext P11. Even prosecution did not prove the fact that knife Ext P11 was used in the commission of murder of deceased as per testimony of PW12.

20. Another submission of learned Additional Advocate General appearing on behalf of State in Criminal Appeal No. 272 of 2008 that as per disclosure statement given by co-accused Ajit Kumar accused persons be convicted under Sections 302, 323 and 324 IPC is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that disclosure statement is not a substantive evidence to convict accused persons but it is only corroborative evidence. It was held in case reported in AIR 1979 SC 1042 titled Babbo and others Vs. State of Madhya Pradesh that in the absence of substantive evidence recovery has no probative value.

21. Submission of learned Advocate appearing on behalf of revisionist Prithvi Raj in Criminal Revision No. 57 of 2008 that it is proved on record that accused persons have given blows on the chest of deceased Sunil Kumar as a result of which blood started oozing out and blood fell on the ground as well as on the pillar of the house where incident took place and blood of deceased Sunil Kumar was also found in the car when deceased was taken for medical treatment and on this ground revision petition be accepted is rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of entire prosecution witnesses. PW1 Mukal Sood, PW2 Satinder Kumar, PW3 Atul and PW6 Ratinder Singh who are alleged eye witnesses of the incident have specifically stated in positive manner that they did not see the fact that accused persons have inflicted injuries upon the chest of deceased Sunil Kumar with sharp edged weapon. None of the prosecution witnesses have stated that accused persons have inflicted injuries upon deceased Sunil Kumar with sharp edged weapon in their presence. It is well settled law that criminal offence should be proved beyond reasonable doubt. Eye witnesses of the incident did not support the prosecution case qua inflicting injury upon the body of deceased Sunil Kumar with sharp edged weapon.

22. Another submission of learned Advocate appearing on behalf of revisionist in Criminal Revision No. 57 of 2008 that blood was found on the pillar of house, on the legs of chairs and on the car and on this ground accused persons be convicted is also rejected being devoid of any force for the reason hereinafter mentioned. There is no positive evidence on record in order to prove that which of the accused had inflicted injuries upon the body of deceased Sunil Kumar. As per chemical analyst report Ext PW21/T placed on record although human blood was found on dry blood scrapped from chair but same was found inconclusive for grouping. Similarly human blood was found on pant of Ajit Kumar but blood was insufficient for blood grouping. We are of the opinion that in the absence of proof of blood grouping it is not expedient in the ends of justice to convict accused persons under Sections 302, 323, 324 and 201 IPC.

23. Another submission of learned Advocate appearing on behalf of revisionist in Criminal Revision No. 57 of 2008 that deceased Sunil Kumar had sustained injury at the bride house and thereafter deceased Sunil Kumar died due to impact of injuries and on this ground accused persons be convicted is also rejected being devoid of any force for the reason hereinafter mentioned. We are of the opinion that there is no evidence on record in order to prove that which of the accused had inflicted injury upon deceased Sunil Kumar. All prosecution eye witnesses have stated in positive manner that injuries were not inflicted

upon deceased Sunil Kumar in their presence by accused persons. In the absence of proof of role of each accused persons relating to inflicting of injuries upon person of deceased it is not expedient in the ends of justice to connect accused persons under Sections 302, 323, 324 and 201 IPC. It is well settled law that prosecution is under legal obligation to prove its case against accused persons beyond reasonable doubt. It is well settled law that accused is presumed to be innocent till proven guilty in accordance with law.

24. Another submission of learned Advocate appearing on behalf of revisionist in Criminal Revision No. 57 of 2008 that learned trial Court had failed to appreciate the fact that young life of deceased Sunil Kumar was taken away by criminals and accused persons should not be allowed to go scot free on minor variations in the statements of prosecution witnesses is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of entire prosecution oral as well as documentary evidence. There is no positive, reliable and cogent evidence on record to prove that which of accused had inflicted injury upon deceased Sunil Kumar with sharp edged weapon. Although it is proved on record that deceased Sunil Kumar had sustained injuries and it is also proved on record that thereafter deceased Sunil Kumar died but it is not proved on record that which of the accused had inflicted injuries upon deceased Sunil Kumar with sharp edged weapon.

25. In view of above stated facts Criminal Appeal No. 13 of 2008 titled Dharam Pal and another Vs. State of HP, Criminal Appeal No. 272 of 2008 titled State of HP Vs. Dharam Pal and Criminal Revision No. 57 of 2008 titled Prithvi Raj Vs. Dharam Pal and others are dismissed. Judgment and sentence passed by learned trial Court are affirmed. It is held that learned trial Court had properly appreciated oral as well as documentary evidence placed on record in the present case. Criminal Appeal No. 13 of 2008, Criminal Appeal No. 272 of 2008 and Criminal Revision No. 57 of 2008 are disposed of. Certified copy of judgment be placed in each consolidated appeal file. Pending application if any also disposed of. Records of learned trial Court along with certified copy of judgment be sent back forthwith.

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

Bahadur. …Appellant.

Versus

Bratiya and others. …Respondents.

RSA No. 8 of 2003
Reserved on: 7.4.2015
Decided on: 23.6.2015

Hindu Succession Act, 1956- Sections 2(2) and 4- Plaintiff filed a Civil Suit pleading that his father was Gaddi and was governed by custom according to which daughters do not inherit the property of their father and the attestation of mutation in favour of the plaintiff and defendants was wrong- held, that any text, rule or interpretation of Hindu Law or any custom or usage immediately before the commencement of the Act shall cease to have effect with respect to which provision is made in the Act- custom providing that the daughters will not inherit the property will be in derogation of the provision of Hindu Succession Act and cannot be recognized- further, such custom will be in violation of Article 15 of the Constitution of India. (Para-21 to 63)

Cases referred:
Mahomed Ibrahim Rowther vs. Shaik Ibrahim Rowther and others, AIR 1922 Privy Council 59
Ram Narain and another vs. Mst. Har Narinjan Kaur and another, 1924 Lahore 116
Sundrabai Hanmantrao Kulkarni and others vs. Hanmant Gurunath Kulkarni and others, AIR 1932 Bombay 398
Effuah Amissah vs. Effauh Krabah and others, AIR 1936 Privy Council 147
Gokal Chand vs. Parvin Kumari, AIR 1952 SC 231
T. Saraswathi Ammal v. Jagadambal and another, AIR 1953 SC 201
Ujagar Singh vs. Mst. Jeo, AIR 1959 SC 1041
Indramani Devi and others vs. Raghunath Bhanja Birbar Jagadeb and another, AIR 1961 Orissa 9
Labishwar Manjhi vs. Pran Manjhi and others, (2000) 8 SCC 587
Manshan and others vs. Tej Ram and others, AIR 1980 SC 558
Velamuri Venkata Sivaprasad (dead) by LRs vs. Kothuri Venkateswarlu (Dead) by LRs and others, (2000) 2 SCC 139
Lalsai vs. Bodhan Ram and others, AIR 2001 Madhya Pradesh 159
Bhago vs. Satbir, AIR 2007 Punjab and Haryana 161
Mast. Taro vs. Darshan Singh and others, AIR 1960 Punjab 145
Punithawalli Ammal vs. Minor Ramalingam and another, AIR 1970 SC 1730
Manshan and others vs. Tej Ram and others, AIR 1980 SC 558
Bala Shankar Maha Shankar Bhattjee and others vs. Charity Commissioner, Gujarat State, AIR 1995 SC 167
Mahant Shri Srinivas Ramanuj Das vs. Surjanarayan Das and another, AIR 1967 SC 256
Dhabai Marandi vs. Bibhuti Marandi Lodo Marandi and others, 2009 Law Suit (Jhar) 1485
Kartik Oraon vs. David Munzni and another, AIR 1964 Patna 201
Manchegowda etc. vs. State of Karnataka and others, AIR 1984 SC 1151
Lingappa Pochanna Appelwar vs. State of Maharashtra and another, (1985) 1 SCC 479
C. Masilamani Mudaliar and others vs. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil and others, (1996) 8 SCC 525
Papaiah vs. State of Karnataka and others, (1996) 10 SCC 533
Ahmedabad Municipal Corporation vs.Nawab Khan Gulab Khan and ors, (1997) 11 SCC 121
Charan Singh etc. vs. State of Punjab and others etc., AIR 1997 SC 1052
Velamuri Venkata Sivaprasad (Dead) by Lrs. Vs. Kothuri Venkateswarlu (Dead) by Lrs. and others, (2000) 2 SCC 139
State of Kerala and another vs. Cahndramohanan, (2004) 3 SCC 429
Dayaram vs. Sudhir Batham and others, (2012) 1 SCC 333

For the Appellant : Mr. Anand Sharma, Advocate.
For the Respondents : Mr. C.P. Sood, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 5.10.2002 rendered by the District Judge, Chamba Division, Chamba in Civil Appeal No. 29 of 2002.

2. "Key facts" necessary for the adjudication of this appeal are that the appellant-plaintiff (herein after referred to as 'plaintiff' for convenience sake) instituted a suit for declaration against the respondents-defendants (hereinafter referred to as the "defendants" for convenience sake) to the effect that father of plaintiff Rasalu was Gaddi, therefore, belonged to Scheduled Tribe community. The parties were governed by custom, according to which, the daughters do not inherit the property of their father and the attestation of mutation No.288 dated 19.2.1987 by the Assistant Collector 2nd Grade, Chamba in favour of the plaintiff and defendants in respect of the land comprising Kitas 16, Khata Khatauni No. 96/124 measuring 39 bighas and 17 biswas to the extent of 1/6th share and the land comprising Khasra Kitas 3, Khata Khatauni No. 97/125 measuring 10 bighas 18 biswas to the extent of 7/98th share and the land comprising Khasra Kitas-10 Khata Khatauni No. 98/126 measuring 12 bighas and 19 biswas to the extent of 14/378th share situated in Mohal Aghar, Pargana Panjla, Tehsil and District Chamba is illegal, null and void and subsequent attestation of mutation No. 371 dated 23.8.1994 in favour of defendant No.1 by defendants No.2 to 5 in the suit land is also illegal, null and void. The suit land was previously owned and possessed by Rasalu, who was Gaddi and father of the plaintiff and defendant No.1. Rasalu being Gaddi belonged to Scheduled Tribe category and after his death, his estate including the suit land was to be inherited by the plaintiff and defendant No.1 being sons of Rasalu. There was a custom amongst the Gaddies that the daughters do not inherit the property of their father after his death.

3. The suit was contested by the defendants. Defendants have admitted that Rasalu was previously owner in possession of the suit land, but it is specifically denied that Rasalu was Gaddi by caste. It is denied that Rasalu was Scheduled Tribe. It is further averred that estate of Rasalu was rightly inherited by the plaintiff and defendants. The mutation has also rightly been attested.

4. Replication was filed by the plaintiffs. Issues were framed by the Senior Sub Judge Chamba on 31.7.1996. He decreed the suit on 20.2.2002 to the extent that defendants No.1 to 5 and their deceased father Rasalu were declared to be belonging to Gaddi community, which was a scheduled Tribe, to which provisions of Hindu Succession Act, in the matter of succession were not applicable and mutation No. 288 dated 19.2.1987 qua the share of deceased Rasalu in the suit land, attested in favour of defendants No. 2 to 5 and mutation No. 371 dated 27.8.1994 attested in favour of defendant No. 1 qua the relinquishment of their shares in the suit land by defendants No.2 to 5, was declared to be illegal, null and void. Defendants preferred an appeal before the District Judge. He allowed the same on 5.10.2002. Hence, the present appeal. It was admitted on 1.6.2004 on the following substantial questions of law:

> **"1. Whether the Learned lower Appellate Court had jurisdiction to hold the custom to be illegal being opposed to public policy, when the same had not been challenged as such by the respondents?**
>
> **2. Whether the learned Lower Appellate court has erred in placing reliance on Section 3 of the Limitation Act to come to the conclusion that the suit was barred by time?**
>
> **3. Whether the learned Lower Appellate Court has erred in invoking the provisions of Section 114 (g) of the Indian Evidence Act when the said provision was not at all attracted to the facts of the present case?"**

5. Mr. Anand Sharma, learned counsel for the appellants, has supported the judgment dated 20.2.2002 rendered by learned Senior Sub Judge Chamba.

6. Mr. C.P. Sood, learned counsel for defendant No.1 has supported the judgment and decree dated 5.10.2002 rendered by the learned District Judge, Chamba.

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

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

9. PW-1 Bhadur has testified that Rasalu was owner of the suit land. Rasalu had two sons and four daughters. Rasalu was Gaddi by caste. Gaddies are governed by customary law and as per customary law, property devolves upon sons and daughters are not legally entitled to inherit the property as per custom. Plaintiff and defendant No.1 were in possession of the suit land and daughters of Rasalu were residing in village Bharmour. They were married and they did not remain in possession of the suit land. He did not know whose names the mutation was sanctioned after the death of Rasalu. He has testified that plaintiff and defendant No.1 were the legal heirs of deceased Rasalu. He has come to know about the mutation one year ago.

10. PW-2 Karmo has testified that the parties were known to him. Plaintiff and defendants are Gaddi by caste. According to him, the daughters were not entitled for the property of their father.

11. DW-1 Bratia has testified that name of his father was Rasalu and father of Rasalu was Bhangasi. Bhangasi had three sons namely Rasalu, Hushnak and Chand. Defendants were Rajputs by caste. They used to reside in Tehsil Chamba. Rajput daughters legally inherit the property alongwith brothers. The property of Chand devolved upon his daughters and sons, who was his uncle. He has proved copies of Jamabandis Ext. D1, Ex.D-2, copy of Pariwar Register Ext. D-3, Ext. D-4, copy of Jamabandi Ext. D5, copy of pedigree table Ext. D-6, Ext. D-7, copy of Jamabandi Ext. D8 and copies of mutations Ext. D-9, D-10, D-11, D-12, D-13, D-14, D-15 and Ext. D-16, and the copies of decisions Ext. D-17 and D-18.

12. DW-2 Hoshiara Ram has testified that the parties were known to him. He was related to them. The parties are Rajputs. According to custom, the daughters are legally entitled to inherit the property amongst Gaddi Rajputs.

13. DW-3 Machlu has deposed that parties are known to him. He is a Gaddi Rajput. According to customs amongst Gaddi Rajputs, daughters are legally entitled to inherit the property of their father. Name of his father was Jawahar and after his death, the property devolved upon sons and daughters equally. Their custom is old and continuous. He used to reside in Tehsil Chamba.

14. Sub-section (2) of section 2 of the Hindu Succession Act reads is as under:-

> **" (2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (255) of Article 366 of the Constitution unless the Central government, by notification in the official Gazette, otherwise directs."**

15. Clause (1) of Article 342 of the Constitution of India provides that the President may with respect to any State or Union Territory and where it is a State, after consultation with the Governor, by public notification, specify the Tribes or Tribal communities or parts of or groups within tribes or tribal communities which shall for the

purposes of the Constitution deemed to be Scheduled Tribes in relation to that State or Union Territory as the case may be. According to clause (2), Parliament may, by law, include in or exclude from the list of Scheduled Tribes specified in a notification issued under Clause (1) any tribe or any tribal community or part of or a group, within any tribe or tribal community but save as a notification issued under the said clause shall not be valid by issuing subsequent notifications.

16. Clause (25) of Article 366 of the Constitution of India reads as under:

> **"Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution."**

17. Ext. P-8 is the certificate of scheduled tribes issued in favour of the plaintiff. Learned Sub-Judge 1st Class, Chamba vide Ext. PC had framed, *inter alia*, the following issue:

> **"Whether the parties to the suit are Gaddies (Scheduled Tribes) and governed by custom in the matter of succession as alleged? OPP"**

18. It was held by the trial Court that the parties were Gaddies and they were governed by custom in the matter of inheritance and in the absence of "will" Smt. Rukko was not entitled to the property of her father. Defendant Rukko filed an appeal against the judgment and decree dated 25.6.1994 before the District Judge bearing Civil Appeal No. 34 of 1994. The appeal was dismissed by the District Judge on 28.7.1997. The District Judge also held that a married daughter does not inherit the property of her father and in the absence of sons; the property goes to the reversioners. Ex.PD is the copy of judgment dated 28.6.1982 rendered by the Senior Sub Judge, Chamba where issue No.1 was framed to the following effect:

> **"Whether the parties are Gaddies and there is a custom in them under which widow and daughter do not inherit the property of the deceased husband as also of father? OPP**

19. According to the findings of the learned Senior Sub Judge, Chamba, the parties were not governed under Succession Act, but under custom in which daughters do not inherit and widow has only life interest. Similarly, the Senior Sub Judge in Civil Civil No.72/87 decided on 28.4.1989 had framed the following issue:

> **"Whether Sh. Thelu was Gaddi and governed by custom in the matter of succession as alleged?" OPD**

20. Learned Senior Sub Judge gave the findings that in accordance with custom governing the Gaddies, married daughter in the presence of male co-lateral had no right in the estate of her deceased father. According to pedigree table Ex.PF, the parties have been shown as Gaddi Rajput. In Ex.P-2, i.e. copy of Pariwar register, Gaddi Rajput is mentioned. In Ex.P-4 also expression, "***Gaddi***" has been mentioned. Ex. P-6 is the statement of one of the defendant whereby he has admitted that he was Gaddi Rajput. In Ex.PG, a note has been appended qua mutation No. 365 [(Drusati Jati) correction of caste]. There is a reference to order dated 18.3.1993 on the basis of which correction of caste has been carried out. Order dated 18.3.1993 is not on record. Similarly, the caste has been changed on the basis of order dated 18.3.1993 in Ex.PK and Ex.PM as well. It is, thus, evident that before 1993, the parties were Rajput and not Gaddi as per Ex.PG, PK and PM. According to Jamabandi for the year 1990-91 Ex.D-1, defendants No.2 to 5 have relinquished their share in favour of defendant No.1. In Pariwar Register Ex.D-3, the caste Rajput has only been

mentioned. There is no reference of parties being Gaddi. In pedigree table Ex.D-6 and D-7, expression "***Rajput***" has been mentioned. Learned Sub Judge 1st Class in Civil Suit No.40 of 1981, i.e. Ex.D-17, has held that parties were governed by custom in matters of succession and according to their custom prevalent in the area; daughters also succeed to the property of their father. Learned District Judge in Civil Appeal No.10 of 1987/1983 dated 11.11.1987 Ex.D-18 has returned the findings that there was no custom amongst the Gaddies which prevented the widow and daughters to succeed to the property of their husband or father as the case may be and even if there was any custom, it has not been uniformly followed and there had been serious departure from it.

21. It is not in dispute that the parties are Hindus and they follow Hindu customs and practices.

22. In ***Mahomed Ibrahim Rowther*** vs. ***Shaik Ibrahim Rowther and others***, AIR 1922 Privy Council 59, their Lordships have held that customs should be ancient, invariable and established by clear evidence. The Privy Council has held as under:

> **"In their essential characteristics custom and an election to abide by the law of the old status differ fundamentally as sources of law, still there is no mode of proving this alleged election except by way of inference from actings and conduct that would establish a custom so that, along whatever line this case may be approached, the custom must be established and the burden of proof of this is on the defendants. In India, however, custom plays a large part in modifying the ordinary law and it is now established that there may be a custom at variance even with the rules of Mahomedan Law governing the succession in a particular community of Mahomedans. But the custom must be proved. The essentials of a custom or usage have been repeatedly defined. (45 Cal. 45: 45 I.A.10(P.C.).) followed. It is of special usages modifying the ordinary law of succession that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."**

23. The Division Bench of Lahore High Court in ***Ram Narain and another*** vs. ***Mst. Har Narinjan Kaur and another***, 1924 Lahore 116 has held that where the custom set up by the plaintiffs is most unusual as being opposed both to the Hindu Law and general agricultural custom the burden of proving the alleged special family custom, lies very heavily upon the plaintiffs. The Division Bench has further held that it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable, it is further essential that they should be established so by clear and unambiguous evidence.

24. The Division Bench of Bombay High Court in ***Sundrabai Hanmantrao Kulkarni and others*** vs. ***Hanmant Gurunath Kulkarni and others***, AIR 1932 Bombay 398 has held that when a party relies on a custom as establishing an exception to the general law, the burden is upon him to establish the custom.

25. In ***Effuah Amissah*** vs. ***Effauh Krabah and others***, AIR 1936 Privy Council 147, their Lordships have held that material customs must be proved in the first instance by calling witnesses acquainted with them until the particular customs have, by frequent proof in the courts, become so notorious that the courts take judicial notice of them.

26. In the present case, material placed on record does not prove the custom in the Gaddies where the daughters can be deprived of their right in the property.

27. Their Lordships of the Hon'ble Supreme Court in ***Gokal Chand*** vs. ***Parvin Kumari***, AIR 1952 SC 231 have laid down the following principles to be kept in view in dealing with questions of customary law:

> **"1. It should be recognized that many of the agricultural tribes in the Punjab are governed by a variety of customs, which depart from the ordinary rules of Hindu and Muhammadan law, in regard to inheritance and other matters mentioned in S. 5 of the Punjab Laws Act, 1872.**
>
> **2. In spite of the above, fact, there is no presumption that a particular person or class of persons is governed by custom, and a party who is alleged to be governed by customary law must prove that he is so governed and must also prove the existence of the custom set up by him, See 'DAYA RAM v. SOHEL SINGH', 110 P. R. 1906 P. 390 at 410: 'ABDUL HUSSEIN KHAN v. BIBI SONA DERO', 45 Ind App 10 (PC).**
>
> **3. A custom, in order to be binding, must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invaribaility as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality. See MT. SUBHANI v. NAWAB', AIR 1941 PC 21 at 32.**
>
> **4. A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence and its exercise without controversy, and such evidence may be safely acted on when it is supported by a public record of custom such as the Biwaj-i-am or Manual of Customary Law. See 'AHMED KHAN v. MT. CHANNI BIBI', AIR 1925 PC 267 at 271.**
>
> **5. No statutory presumption attaches to the contents of a Riwaj-i-am or similar compilation, but being a public record prepared by a public officer in the discharge of his duties under Government rules, the statements to be found therein in support of custom are admissible to prove facts recited therein and will generally be regarded as a strong piece of evidence of the custom. The entries in the Riwaj-i-am may, however, be proved to be incorrect, and the quantum of evidence required for the purpose of rebutting them will vary with the circumstances of each case. The presumption of correctness attaching to a Riwaj-i-am may be rebutted, if it is shown that if affects adversely the rights of females or any other class of persons who had no opportunity of appearing before the revenue authorities. See 'BEG v. ALLAH DITTA', AIR 1916 PC 129 AT 131, 'SALEH MOHAMMAD v. ZAWAR HUSSAIN', AIR 1944 PC 18; 'MT. SUBHANI v. NAWAB', AIR 1941 P C 21 at 25.**
>
> **6. When the question of custom applicable to an agriculturist is raised, it is open to a party who denies the application of custom the show that the person who claims to be governed by it has completely**

and permanently drifted away from agriculture and agricultural associations and settled for good in urban life and adopted trade, service etc., as his principal occupation and means and source of livelihood, and does not follow other customs applicable to agriculturists. See' MUHAMMAD HAYAT KHAN v. SANDHE KHAN', 55 P R. 1908 P.270 at 274: 'MUZAFFAR' MUHAMMAD v. IMAM DIN', 9 Lah 120 at p. 125.

7. The opinions expressed by the Compiler of a Riwaj-i-am or Settlement Officer as a result of his intimate knowledge and investigation of the subject, are entitled to weight which will vary with the circumstances of each case. The only safe rule to be laid down with regard to the weight to be attached to the Complier's remarks is that if they represent his personal opinion or bias and detract from the record of long standing custom, they will not be sufficient to displace the custom, but if they are the result of his inquiry and investigation as to the scope of the applicability of the custom and any special sense in which the exponents of the custom expressed themselves in regard to it, such remarks should be given due weight. See 'NARAIN SINGH v. MT. BASANT KAUR', AIR 1935 Lah 419 at 421, 422; 'MT. CHINTO v. THEBU', AIR 1935 Lah 985 : 'KHEDAM HUSSAIN v. MOHAMMED HUSSAIN', AIR 1941 Lah 73 at 79."

28. Their Lordships of the Hon'ble Supreme Court in ***T. Saraswathi Ammal*** v. ***Jagadambal and another***, AIR 1953 SC 201 have held that oral evidence as to instances which can be proved by documentary evidence cannot safely be relied upon to establish custom. Their Lordships have held as under:

"............5. Oral evidence as to instances which can be proved by documentary evidence cannot safely be relied upon to establish custom, when no satisfactory explanation for withholding the best kind of evidence is given.............."

29. Their Lordships of the Hon'ble Supreme Court ***in Ujagar Singh*** vs. ***Mst. Jeo***, AIR 1959 SC 1041 have held that many customs have been passed into law of land and proof of it becomes unnecessary under section 57 (1) of the Evidence Act.

30. However, in the present case, custom, as noticed hereinabove, has not been recognized consistently by the courts and thus has not passed into law of land. The plaintiff in this case has failed to prove that the custom prevailing in the area where the parties resided was ancient, invariable and unbroken custom and the same has not been judicially noticed by the court consistently.

31. Learned Single Judge in ***Indramani Devi and others*** vs. ***Raghunath Bhanja Birbar Jagadeb and another***, AIR 1961 Orissa 9 has held that burden of proving alleged custom by clear and unambiguous evidence lies on the plaintiff. Learned Single Judge has held as under:

"[5] There is no documentary evidence to prove the terms of the grant made by the plaintiff's father Pitabash, in favour of his younger brother Ramchan-dra. The contesting defendants are admittedly the heirs of Ramchandra and they would, under the ordinary rule of Hindu Law, be entitled to the property unless the special custom (Kulachara) of excluding female heirs in respect of maintenance grants, as alleged by the plaintiff, be held to have been clearly established. Though custom may supersede a rule of Hindu Law, as pointed out by the Privy Council

in Ramalakshmi Ammal v. Sivananatha Perumal, 14 Moo Ind. App 570 (586) (PC) :

"It is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

"This principle was reiterated by the Privy Council in Abdul Hussain v. Mst. Bibi Sona Dero, AIR 1917 PC 181 and was again cited with approval in Saraswathi Ammal v. Jagadamba, AIR 1953 SC 201 at p. 205. Thus, the burden had become doubly heavy on the respondent to prove the alleged custom by clear and unambiguous evidence because not only is he the plaintiff in the suit but he also claimed title to the property on the basis of a special custom (Kulachar) against the ordinary rule of Hindu Law."

32. Their Lordships of the Hon'ble Supreme Court in ***Labishwar Manjhi*** vs. ***Pran Manjhi and others***, (2000) 8 SCC 587 have held that though the parties belonged to Santhal scheduled tribes but they were Hinduised and they were following the Hindu traditions. Thus, sub-section (2) would not apply to exclude the parties from application of the Hindu Succession Act. The High Court fell into error in recording a finding to the contrary. Their Lordships have held as under:

"[5] The respondent filed second appeal before the High Court challenging the said finding contending that courts below had committed error in recording the finding that Hindu Succession Act will apply. However, the High Court allowed the appeal of the respondent by holding that Hindu Law as it stood prior to enactment of Hindu Succession Act, 1956 would apply, hence the appellant no. 1 inherited the property during her lifetime and on her death it would devolve to the agnates of her husband viz. contesting respondent no1. Challenging the said finding, the submission on behalf of the appellant is that the High Court committed error in concluding that the parties would be governed by the law as prevailed prior to coming into force of Hindu Succession Act, 1956. The submission is, once finding is recorded by the first Appellant Court and confirmed by the High Court that the parties are Hinduised then they would be governed by the law as is applicable on any Hindu and if that be so the Hindu Succession Act, 1956 would be applicable to the parties. Challenging this submission, learned Counsel for the respondent submits that the parties being tribals by virtue of Sub-section 2 of Section 2, the Hindu Succession Act, 1956 would not be applicable. It excludes the members of any Scheduled Tribes from their application to the said Act. Based on this submission is, even if the parties have Hinduised, the parties being of Santhal tribe, they are following their customary law of Santhal, hence Hindu Succession Act would not be applied. Reliance being placed to the decision of Patna High Court, reported in 1967 (15) Bihar Law Journal 323 (Satish Chandra Brahama v. Bagram Brahma and Anr.) This decision deals with the case of Scheduled Tribes, namely, Uraon. The court held that Uraon Tribe is a member of Scheduled Tribe within the

meaning of Clause 25 of Article 366 of the Constitution of India and by virtue of Sub-section 2 of Section 2 of the Hindu Succession Act, the provision of that Act will not apply to this tribe, consequently Section 14 would also not apply. The said decision further records, the Uraon can change their religion but by changing of the religion alone they do not cease to be Uraon for other purposes. The Court's findings based on various other factors, such as religious functions, marriages, disposal of the dead bodies by cremation or by burying the dead body etc. , has to be tested before such changes.

[6] The question which arises in the present case is, whether the parties who admittedly belong to Santhal tribe are still continuing with their customary tradition or have they after being Hinduised changed their customs to that what is followed by the Hindus. It is in this context when the matter came first before the High Court, the High Court remanded the case for decision in this regard. After remand, the first appellate court recorded the findings, that most of the names of their families of the parties are Hindu names. Even Public Witness-1 admits in the cross examination that they perform the pindas at the time of death of anybody. Females do not use vermillion on the forehead after the death of their husbands, widows do not wear ornaments. Even Public Witness-2 admits that they perform Shradh ceremonies for 10 days after the death and after marriage, females use vermilion on their foreheads. The finding is that they are following the customs of the Hindus and not of the Santhal's. In view of such a clear finding, it is not possible to hold that Sub-section 2 of Section 2 of Hindu Succession Act excludes the present parties from the application of the said Act. Sub-section 2 only excludes members of any Scheduled Tribe admittedly as per finding recorded in the present case though the parties originally belong to the Santhal Scheduled Tribe they are Hinduised and they are following the Hindu traditions. Hence, we have no hesitation to hold that Sub-section 2 will not apply to exclude the parties from application of Hindu Succession Act. The High Court fell into error in recording a finding to the contrary. In view of this, the widow of Lakhiram would become the absolute owner by virtue of Section 14 of the said Act, consequently the gift given by her to appellant nos. 2 and 3 were valid gift, hence the suit of respondent no. 1 for setting aside the gift deed and inheritance stand dismissed."

33. Their Lordships of the Hon'ble Supreme Court in ***Smt. Manshan and others*** vs. ***Tej Ram and others***, AIR 1980 SC 558 while consideration section 8 read with section 4 of the Hindu Succession Act, 1956 have held that the custom which prevented the daughters from inheriting the property got superseded by the provisions of the Act and hence the heirs of the collateral were no longer entitled to succeed to his property. Their Lordships have held as under:

"[3] The argument put forward on behalf of the respondents in the High Court with reference to Section 14 of the Hindu Succession Act was wholly misplaced. There was no question of applying either sub-section (1) or sub-sec. (2) of Section 14 of the said Act. Here the simple question which had to be answered was as to who was the heir of Chaudhary under the Hindu Succession Act on the date of his death. The property will revert to him or her. Reading Sections 4 and 8 of the Act together

> **it is clear to us that on the date of death of Chaudhary, in supersession of the prevalent custom, his daughters became the preferential heirs and were entitled to inherit his property. Chaudhary might have remained a life owner according to the custom. But the portion of the custom which prevented the daughters from inheriting got superseded by the provisions of the Act and hence Bhagat Ram's heirs were no longer entitled to succeed to the property of Chaudhary in the year 1957. The effect of the declaratory decree passed in the year 1950, it is plain, was merely to declare that whosoever would be the next reversioner to the estate of Chaudhary at the time of his death would get the property in respect of which the declaratory decree was made and not necessarily the person in whose favour the declaratory decree was passed.**
>
> **[4] The High Court also seems to have been influenced by the expression 'dying intestate' occurring in Section 8 of the Act, and appears to have taken the view that since Chaudhary had no power to bequeath his ancestral property by a will, Section 8 would not apply and the daughters would not be entitled to claim the property as his reversioners under Section 8. In our opinion this is an entirely erroneous view of the law. Section 8 would apply where a male Hindu dies intestate either not having made any will or having made any invalid will. It squarely covered the case of the respondents."**

34. Their Lordships of the Hon'ble Supreme Court in ***Velamuri Venkata Sivaprasad (dead) by LRs*** vs. ***Kothuri Venkateswarlu (Dead) by LRs and others***, (2000) 2 SCC 139 have held that in the matter of interpretation of statutes specially relating to womenfolk, due weightage should be given to the constitutional requirement of equality of status, therefore, Hindu Succession Act, 1956 should be interpreted accordingly. Their Lordships have held as under:

> **"[12] Undisputably, the Hindu Succession Act, 1956 in particular Section 14 has introduced far reaching changes having due regard to the role and place of womanhood in the country on the basis of the prevailing socio-economic perspective. It is now a well-settled principle of law that legislations having socio-economic perspective ought to be interpreted with widest possible connotation as otherwise, the intent of the legislature would stand frustrated. Recognition of Rights and protection thereof thus ought to be given its full play for which the particular legislation has been introduced in the Statute Book. Gender bias is being debated throughout the globe and the basic structure of the Constitution permeates quality of status and thus negates gender bias. Gender equality is one of the basic principles of our Constitution. The endeavour of the law court should thus be to give due weightage to the requirement of the Constitution in the matter of interpretation of statutes wherein specially the women folk would otherwise be involved. The legislation of 1956 therefore, ought to receive an interpretation which would be in consonance with the wishes and desires of framers of our Constitution. We ourselves have given this Constitution to us and as such it is a bounden duty and an obligation to honour the mandate of the Constitution in every sphere and interpretation which would go in consonance therewith ought to be had without any departure**

therefrom. Tulasamma's case, obviously having this in mind decided the issue and attributed the widest possible connotation to the words used in Section 14(1) of the Act of 1956. The decision in Tulasamma's case (AIR 1977 SC 1944) from time to time came up for consideration before this Court and the same stands accepted without any variation as noted herein before. One of the latest decisions where Tulasamma's case has been considered, is the decision of this Court in the case of Raghubir Singh v. Gulab Singh (1998) 6 SCC 314 (324) : (1998 AIR SCW 2393 : AIR 1998 SC 2401) wherein the Dr. Justice A. S. Anand, Chief Justice speaking for the Bench in paragraphs 24 and 26 of the Report observed :-

"24. Accordingly, we hold that the right to maintenance of a Hindu female flows from the social and temporal relationship between the husband and the wife and that right in the case of a widow is "a pre-existing right", which existed under the Shastric Hindu Law long before the passing of the 1937 or the 1946 Acts. Those Acts merely recognised the position as was existing under the Shastric Hindu Law and gave it a "statutory" backing. Where a Hindu widow is in possession of the property of her husband, she has a right to be maintained out of it and she is entitled to retain the possession of that property in lieu of her right to maintenance.

26. It is by force of Section 14(1) of the Act, that the widow's limited interest gets automatically enlarged into an absolute right notwithstanding any restriction placed under the document or the instrument. So far as sub-section (2) of Section 14 is concerned, it applies to instruments, decrees, awards, gifts etc., which create an independent or a new title in favour of the female for the first time. It has no application to cases where the instrument/document either declares or recognises or confirms her share in the property or her "pre-existing right to maintenance" out of that property. As held in Tulasamma case sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own, without interfering with the operation of Section 14(1) of the Act."

35. Learned Single Judge of Madhya Pradesh High Court in ***Lalsai*** vs. ***Bodhan Ram and others***, AIR 2001 Madhya Pradesh 159 has held that the Hindu law as amended from time to time is applicable to member of scheduled tribe of Madhya Pradesh, therefore, even though no notification has been issued by Central Government, yet Hindu Succession Act is applicable to members of uraon community. Learned Single Judge has held as under:

"[4] Having heard the learned counsel for both the sides and having scrutinised the entire records of the Courts below, it is apparent that the said findings of the Courts below are not based on the correct proposition of law. Admittedly, the parties are 'uraon'. The learned counsel for the respondents has drawn my attention on the provisions of S. 2 (2) of the Act, 1956 wherein it has been mentioned that the provisions of the said Act of 1956 shall not apply to the members of any scheduled tribe unless the Central Government by notification in the official gazette, otherwise directs. The contention of the learned counsel for the respondents is that since no notification has yet been issued by the Central Government, the provisions of the Act of 1956

shall not be applicable to the members of the 'Uraon' community. It has been held by this Court in Lachan Kunwar v. Budhwar in second Appeal No. 40 of 1982 (date of judgment 27-8-1987) that the Hindu Law as amended from time to time is applicable on the members of scheduled tribes of M.P. As such the provisions of the Act of 1956 are applicable to the members of scheduled tribe of Madhya Pradesh, though no notification as envisaged in S. 2 (2) of the said Act of 1956 has been issued by the Central Government. Therefore, in my view, the provisions of the Act, 1956 shall be applicable to 'Uraon' community even though no notification as above has so far been issued by the Central Government."

36. Learned Single Judge of Punjab and Haryana High Court in ***Smt. Bhago*** vs. ***Satbir***, AIR 2007 Punjab and Haryana 161 has held that when custom is not proved by leading cogent and convincing evidence, opinion expressed by complier of *Riwaj-i-am* or Settlement Officer in his book on customary law would carry no value. Learned Single Judge has held as under:

"[23] As far as Riwaj-i-am is concerned, no precedent has been cited by the plaintiff. No instance of unchaste Brahman widow having forfeited her rights in the property of her late husband has been brought on the record by way of evidence. Therefore, Riwaj-i-am described by E. Joseph ICS, Settlement Officer pertaining to question No. 55 stand exactly on the same footing as in hardayal v. Mst. Dakhan, AIR 1953 Punjab 209 and Arma Ram v. Mst. Chameli, AIR 1953 Punjab 211. Riwaj-i-am cannot be said to carry any evidentiary value all by itself, unless it is proved by leading cogent and convincing evidence that the said custom is being followed uninterruptedly by the Brahmans of District Rohtak. The existence of such custom if not sought to be established from any other evidence must be negatived. The report submitted by the Additional Civil judge, Sr. Division, Bahadurgarh carries nowhere as the same is not based on documentary proof so as to establish that a Brahman widow in Rohtak District leading an unchaste life loses her right of inheritance in the estate of her deceased husband. Therefore, no value can be attached to the report as well as to the question and answer No. 5 of the book written by E. Joseph, settlement Officer.

[25] In the absence of any evidence brought on the file it cannot be said that the opinion expressed by the Compiler of riwaj-i-am or Settlement Officer is of any help to the present appellant. Therefore, the substantial question of law raised in this appeal remains unproved by the plaintiff/appellant.

[32] I do not find any force in the contention of the learned counsel for the appellant for the reasons that the plaintiff/appellant has failed to prove with any instance or precedent on the record the custom that a Brahman widow leading an unchaste life cannot inherit the estate of her deceased husband. Ram Dai had become the full owner of the property after coming into force of the Hindu succession Act, 1956 thus she had a right to will away her property in favour of the defendants."

37. According to PW-1 Bhadur, property devolves upon sons and not on daughters. To the similar effect is the statement of PW-2 Karmo. However, DW-1 Bratia has

categorically stated that in Chamba district, the property devolves upon the boys and girls equally. His statement is corroborated by DW-2 Hoshiara Ram and DW-3 Machlu. The Court has gone through the judgments exhibited by the plaintiff and defendants. In few of the judgments of the Senior Sub Judge and District Judge, it is held that in the community of Gaddi, property devolves only upon the sons and it does not devolve upon the daughters, but in few of the judgments, it is held that property amongst Gaddi community would devolve upon sons and daughters equally. There is no consistency in the judgments cited hereinabove to prove the customs amongst the Gaddies that sons alone would inherit the property. The plaintiff has not even placed on record copy of ***Riwaj-i-aam*** to prove that there is custom prevalent in the Gaddi community that after the death of male collateral, the property devolves upon sons only and not upon daughters. In the copy of Pariwar register produced by the plaintiff, expression "***Rajput Gaddi***" has been mentioned. The cast "***Rajput Gaddi***" has only been changed on the basis of order dated 18.3.1993, as discussed hereinabove. The copy of order dated 18.3.1993 has not been placed on record. It further strengthens the case of the defendants that parties were Rajput and not Gaddi. Thus, there is no illegality in the mutation whereby the property was mutated in favour of daughters of Rasalu vide mutation No. 288 dated 19.2.1987 and thereafter the relinquishment of the proprietary rights in favour of defendant No.1 Bratia by the daughters of Rasalu vide mutation No. 371 dated 23.8.1994. Even if it is hypothetically held that the parties were Gaddi still the plaintiff has failed to prove that there was any custom whereby the girls were excluded from succeeding to the property of their father. Moreover, the mutations were attested on 19.2.1987 and 23.8.1994, but the suit has been filed beyond the period of limitation.

38. Section 4 of the Hindu Succession Act, 1956 reads as under:

> **"4. Overriding effect of Act :- (1) Save as otherwise expressly provided in this Act,-(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;**
>
> **(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act."**

39. According to the plain language of section 4 of the Hindu Succession Act, 1956, any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act shall cease to have effect with respect to any matter for which provision is made in the Act. In view of this though there is no conclusive evidence that the custom is prevailing in the Gaddi community that the daughters would have no rights in the property but even if it is hypothetically assumed that this custom does exist, the same would be in derogation of section 4 of the Hindu Succession Act, 1956.

40. Learned Single Judge of Punjab High Court in ***Mast. Taro*** vs. ***Darshan Singh and others***, AIR 1960 Punjab 145 has held that by virtue of sections 2 and 4 of the Hindu Succession Act, Punjab Agricultural custom, so far as it was applicable to Hindus, is no longer in force so far as the matters of succession etc. are concerned, which are now governed by the provisions of the Hindu Succession Act. Learned Single Judge has held as under:

> **"[2] In view of the provisions of the Hindu Succession Act and the further fact that both Mst. Achhari and Mst. Taro are alive, the reversioners have no locus standi to bring the present suit because,**

whether there be a will or not Mst. Taro is the next heir after the demise of Mst. Achhari and the reversioners do not come in till the entire line of Mst. Taro become extinct. On behalf of the plaintiffs-respondents it was urged in the first instance that the Hindu Succession Act (hereinafter referred to as the Act) does not apply to the Jats who are primarily governed by the Punjab Agricultural custom in mattes of succession.

Section 2 of the Act makes the Act applicable to all persons who are not Muslims, Christians, Parsis or Jews by religion, and, in particular, sub-clause (b) of sub-s. (1) of S. 2 specifically provides that the Act is applicable to Sikhs and it was not denied that the parties either belong to this religion or are otherwise Hindus and "are not Muslims, Christians, Parsis or Jews." Section 4 of the Act makes the provisions of this Act applicable to all persons governed by the Act to the exclusion of "any other law in force immediately before the commencement of this Act." According to sub-clause (a) of sub-s (1) of S. 4, inter alia, "any custom or usage as part of Hindu law in force immediately before the commencement of this Act" ceases to have effect with respect to any matter for which provision is made in this Act.

Prior to the coming into force of the Act, every person was governed by his personal law, which, in the case of Hindus and Sikhs, was the Hindu law as modified by custom. Thus, custom including agricultural custom modified the Hindu law so far as the Hindu Jats were concerned to the extent to which it went counter to the provisions of strict Hindu law. Thus, Punjab agricultural custom must be treated to be part of Hindu law as it was in force in this State. From the date of the enforcement of the Hindu Succession Act, Hindu law, as modified by custom, is no longer applicable, qua matters relating to succession. Sub-clause (b) of sub-s. (1) of S. 4 further makes it clear by providing that "any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

Agricultural custom is certainly "a law" governing succession amongst Jats. Thus, we have no doubt that by virtue of Ss. 2 and 4 of the Hindu Succession Act, Punjab Agricultural custom, so far as it was applicable to Hindus, is no longer in force so far as the matters of succession etc. are concerned which are now governed by the provisions of the Hindu Succession Act."

41. Their Lordships of the Hon'ble Supreme Court in ***Punithawalli Ammal*** vs. ***Minor Ramalingam and another***, AIR 1970 SC 1730 have held that rights conferred on a Hindu female under section 14 (1) of the Act are not restricted or limited by any rule of Hindu Law and the provision makes a clear departure from the Hindu law texts or rules. Their Lordships while interpreting section 14 (1) of the Hindu Marriage Act have held that the full ownership conferred on Hindu female by section 14 (1) is not defeated by subsequent adoption by her. Their Lordships have held as under:

"[6] The explanation to the section is not necessary for our present purpose. It was conceded at the Bar that Sellathachi was in possession of the property in dispute on the date the Act came into force. By virtue of the aforesaid provision, she became the full owner of the

property on that date. From a plain reading of section 14 (1), it is clear that the estate taken by a Hindu female under that provision is an absolute one and is not defeasible under any circumstance. The ambit of that estate cannot be cut by any text, rule or interpretation of Hindu law. The presumption of continuity of law is only a rule of interpretation. That presumption is inoperative if the language of the concerned statutory provision is plain and unambiguous. The fiction mentioned earlier is abrogated to the extent is conflicts with the rights conferred on a Hindu female under section 14 (1) of the Act. In Sukhram v. Gauri Shankar, (1968) 1 SCR 476 = (AIR 1968 SC 365) this Court held that though a male member of a Hindu family governed by the Benaras School of Hindu law is subject to restrictions qua alienation of his interest in the joint family property but a widow acquiring an interest in that property by virtue of Hindu Succession Act is not subject to any such restrictions. This Court held in Munna Lal v. Rajkumar, 1962 Supp (3) SCR 418 = (AIR 1962 SC 1493) that by virtue of section 4 of the Act the legislature abrogated the rules of Hindu law on all matters in respect of which there is an express provision in the Act. In our opinion the rights conferred on a Hindu female under section 14 (1) of the Act are not restricted or limited by any rule of Hindu law. The section plainly says that the property possessed by a Hindu female on the date the Act came into force whether acquired before or after the commencement of the Act shall be held by her as full owner thereof. That provision makes a clear departure from the Hindu law texts or rules. Those texts or rules cannot be used for circumventing the plain intendment of the provision.

[7] In our judgment the learned judges of the Madas High Court were not right in limiting the scope of section 14 (1) by taking the aid of the fiction mentioned earlier. That in our opinion is wholly impermissible. On the point under consideration the decision of the Bombay High Court in Yamunabai v. Ram Maharaj Shreedhar Maharaj (AIR 1960 Bom 463), lays down the law correctly."

42. Their Lordships of the Hon'ble Supreme Court in ***Smt. Manshan and others*** vs. ***Tej Ram and others***, AIR 1980 SC 558 have held that the custom which prevented the daughters from inheriting the property got superseded by the provisions of the Act and hence the heirs of the collateral were no longer entitled to succeed to his property. Their Lordships have held as under:

"[3] The argument put forward on behalf of the respondents in the High Court with reference to Section 14 of the Hindu Succession Act was wholly misplaced. There was no question of applying either sub-section (1) or sub-sec. (2) of Section 14 of the said Act. Here the simple question which had to be answered was as to who was the heir of Chaudhary under the Hindu Succession Act on the date of his death. The property will revert to him or her. Reading Sections 4 and 8 of the Act together it is clear to us that on the date of death of Chaudhary, in supersession of the prevalent custom, his daughters became the preferential heirs and were entitled to inherit his property. Chaudhary might have remained a life owner according to the custom. But the portion of the custom which prevented the daughters from inheriting got superseded by the provisions of the Act and hence Bhagat Ram's heirs were no longer entitled to succeed to the property of Chaudhary

in the year 1957. The effect of the declaratory decree passed in the year 1950, it is plain, was merely to declare that whosoever would be the next reversioner to the estate of Chaudhary at the time of his death would get the property in respect of which the declaratory decree was made and not necessarily the person in whose favour the declaratory decree was passed.

[4] The High Court also seems to have been influenced by the expression 'dying intestate' occurring in Section 8 of the Act, and appears to have taken the view that since Chaudhary had no power to bequeath his ancestral property by a will, Section 8 would not apply and the daughters would not be entitled to claim the property as his reversioners under Section 8. In our opinion this is an entirely erroneous view of the law. Section 8 would apply where a male Hindu dies intestate either not having made any will or having made any invalid will. It squarely covered the case of the respondents."

43. The Hindu law generally recognizes three types of customs local custom, class custom and family custom. In the present case, plaintiff has failed to prove the usages of any type of custom out of three customs conclusively either on the basis of oral or documentary evidence.

44. Article 15 of the Constitution of India prohibit discrimination on the ground of sex. Articles 38, 39 and 46 envisage socio-economic justice to the women and also Preamble to the Constitution. Rule of law should establish uniform pattern in the society. The women have to be advanced socially and economically to bestow upon them dignity. The daughters in a society, who are Hindu, cannot be left and segregated from main stream. They are entitled to equal share in the property. Needless to add that gender discrimination violates fundamental rights.

45. According to the Gazetteer of India Himachal Pradesh Chamba published on 19.3.1963, the Gaddies are divided into four classes, i.e. (i) Brahmans, (ii) Khatris and Rajputs, who regularly wear the sacred thread, (iii) Thakurs and Rathis who, as a rule, do not wear it and (iv) the last class, comprising Kolis, Riharas, Lohars, Badhies, Sipis and Halis, to which last class the title of Gaddi is disputedly applied as inhabitants of the Gaderan. Each class is divided into numerous gotras or exogamous sections. Thus, the jhunun gotra of the Khatris gives daughters to the Brahmans and the Brahmans of Kukti regularly inter-marry with the other groups. Hindu constitutes about 91% of the population. They follow the Hinduism. According to Himachal Pradesh District Gazetters Kinnaur published on 11.8.1971, out of total population of 40,980, 91% were Hindus, 9% Buddhists and only 27 sikhs. According to Gazetteer of India, Himachal Pradesh Lahul and Spiti published in the year 1975, in Lahul Sub Division, Hinduism is the leading religion and in Spiti it is Buddhism. According to District Gazetteer Kangra District published in the month of March, 1925, 95% of the population is Hindu.

46. Their Lordships of the Hon'ble Supreme Court in ***Bala Shankar Maha Shankar Bhattjee and others*** vs. ***Charity Commissioner, Gujarat Stat***e, AIR 1995 SC 167 have held that the historical material contained therein relating to dispute whether temple in question is public or private is evidence under section 45 though not conclusive, but court may consider such evidence in conjunction with other evidence. Their Lordships have held as under:

"[22] The contention of Sri Yogeshwar Prasad that the Asstt. Charity Commissioner has failed to prove that Kalika Mataji temple is a public trust; contrarily the evidence on records, namely the 'Will' of Bai Diwali,

widow of N. Girjashankar, establishes that the temple and its properties were always treated as private properties. It would get fortified and gets corroborated by decrees in Civil Suit No. 439 of 1985, one of the legatees sought to annul the Will in Exhibits 10, 59 and the decree in that behalf. The Civil Suit Nos. 353 of 1993, Ex. 24 and the Civil Suit No. 439 of 1885, Ex. 26 and the Civil Suit Nos. 904 of 1903 and 910 of 1903, Ex. 52 and Ex. 54, Civil Suit No. 912 of 1903, Ex. 55 would establish that the appellant's family had always treated the temple and the lands attached to temple as private properties. It has also been further contended that the entry into the temple was subject to permission and the devotees were not allowed to have Pooja, but have Darshan only. These circumstances have duly been taken into consideration by the District Judge while the High Court had not considered them in proper perspective. We find no force in the contention. It is seen that the Gazette of the Bombay Presidency, Vol. III published in 1879 is admissible under Sec. 35 read with Sec. 81 of the Evidence Act, 1872. The Gazette is admissible being official record evidencing public affairs and the Court may presume their contents as genuine. The statement contained therein can be taken into account to discover the historical material contained therein and the facts stated therein is evidence under Sec. 45 and the Court may in conjunction with other evidence and circumstances take into consideration in adjudging the dispute in question, though may not be treated as conclusive evidence. The recitals in the Gazette do establish that Kalika Mataji is on the top of the hill. Mahakali temple and Bachra Mataji on the right and left to the Kalika Mataji. During Moughal rule another Syed Sadar Peer was also installed there, but Kalika Mataji was the chief temple. Hollies and Bills are the main worshippers. On full Moon of Chaitra (April) and Dussehra (in the month of October), large number of Hindus of all classes gather there and worship Kalika Mataji, Mahakali, etc. After the downfall of Moughal empire, Marathas took over and His Highness Scindia attached great importance to the temple. One of the devotees in 1700 offered silver doors. The British annexed the territory pursuant to the treaty between Her Majesty's Government of India and His Highness Scindia on the 12th December, 1860. A condition was imposed in the treaty for continued payment of fixed cash grants to all the temples from the Treasury and that British emperors accepted the condition. Regular cash grants of fixed sums were given to all the temples by Scindias and British rulers, as evidenced by Exhibits 27, 28, 29 and 30. The historical statement of noted historian, stated by the High Court, by name M. S. Commissionaria in his Vol. 1 of 1938 Edition corroborates the Gazette on the material particulars, which would establish that the temple was constructed on the top of the hill around 14th century and the people congregate in thousands and worship, as of right, to Kalika Mataji and other deities. R. N. Joglekar's Alienation manual brought up in 1921 in the Chapter 5 Devasthana also corroborates the historical evidence. It is true that Bai Diwali in her Will, Ex. 22 treated the temple and the properties to be private property and bequeathed to her brother and the litigation ensued in that behalf. At that time, as rightly pointed out by the High Court, the concept of public trust and public temple was not very much in vogue. Therefore,

the treatment meted out to these properties at that time is not conclusive. On the other hand, the fixed cash grants given by the Rulers Scindias and the successor British emperors, the large endowment of lands given to Kalika Mataji temple by the devotees do indicate that the temple was treated as public temple. The appropriation of the income and the inter se disputes in that behalf are self-serving evidence without any probative value. Admittedly, at no point of time, the character of the temple was an issue in any civil proceedings. All the lands gifted to the deity stand in the name of the deities, in particular large extent of agricultural lands belong to Kalika Mataji. The entries in Revenue records corroborated it. The Gazette and the historical evidence of the temple would show that the village is the pilgrimage centre. Situation of the temples on the top of the hill away from the village and worshipped by the people of Hindus at large congregated in thousands without any let or hindrance and as of right, devotees are giving their offerings in large sums in discharge of their vows, do establish that it is a public temple. It is true that there is no proof of dedication to the public. It is seen that it was lost in antiquity and no documentary evidence in that behalf is available. Therefore, from the treatment meted out to the temple and aforesaid evidence in our considered view an irresistible inference would be drawn that the temple was dedicated to the Hindu public or section thereof and the public treat the temple as public temple and worship thereat as of right. It is true that there is evidence on record to show that there was board with inscription thereon that "No entry without permission" and that only Darshan was being had and inside pooja was not permitted. But that is only internal regulation arranged for the orderly Darshan and that is not a circumstance to go against the conclusion that it is a public temple. Enjoyment of the properties and non-interference by the public in the management are not sufficient to conclude that the temple is a private temple. It is found by the District Court and the High Court that the appellants are heredity priests and when the public found that they are in the management of the properties, they obviously felt it not expedient to interfere with the management of the temples. It is seen that the High Court considered the evidence placed on record and has drawn the necessary conclusions and inferences from the proved facts that Kalika Mataji temple is a public temple. It is a finding of fact. As regard the oral evidence the High Court rightly appreciated the evidence and it being a question of fact, we find no error in the assessment of the evidence by the High Court."

47. Their Lordships of the Hon'ble Supreme Court in ***Mahant Shri Srinivas Ramanuj Das*** vs. ***Surjanarayan Das and another***, AIR 1967 SC 256 have held that Gazetteer can be consulted on matter of public history and the statements in such Gazetteer can be relied on as providing historical material. Their Lordships have held as under:

"[26] It is urged for the appellant that what is stated in the Gazetteer cannot be treated as evidence. These statements in the Gazetteer are not relied on as evidence of title but as providing historical material and the practice followed by the Math and its head. The Gazetteer can be consulted on matters of public history."

48. Learned Single Judge of Jharkhand High Court in ***Dhabai Marandi*** vs. ***Bibhuti Marandi Lodo Marandi and others***, 2009 Law Suit (Jhar) 1485 has held as under:

> **"13. Section 2 of the Act defines Hindu which is as follows:**
>
> **2(1)(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj.**
>
> **(b) to any person who is a Buddhist, Jaina or Sikh by religion, and**
>
> **(c) to any other person, who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by this Hindu Law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.**
>
> **Clause (c) finds a negative definition of Hindu by excluding Muslims, Christian, Parsi or Jews, meaning thereby that if they are not Christian, Muslim, Jews they are Hindu provided they could not have been governed by Hindu Law or its custom. Section 2(1) of the aforesaid clause do not exclude the scheduled tribes from the definition of Hindu. Section 2(2) only postpones the application of Hindu Succession Act till the notification as required under this provision is issued. This by implication means that S.T. are also Hindues only, the application of Hindu Succession Act is simply contingent to certain notification. A scheduled tribe, pure and simple who is adhering to his custom is to be distinguished from that who has been Hinduised prior to commencement of the Hindu Succession Act and in my view such Hinduised tribal do fall within Section 2(1)(c) of the Act and may be treated as Hindu because there is no proving on the record that such tribals could not have been governed by the Hindu Law. Nothing has been shown that the custom bars the Munda from adopting any form of Hindu Religion."**

49. In view of the definite law laid down by their Lordships of the Hon'ble Supreme Court and the judgments of various other courts, provisions of sub-section (2) of section 2 of Hindu Succession Act, 1956 will not come in the way of inheritance of the property by the daughters belonging to tribal area where Hinduism and Buddhism is followed.

50. The Division Bench of Patna High Court in ***Kartik Oraon*** vs. ***David Munzni and another***, AIR 1964 Patna 201 has explained the term "tribe" as under:

> **"............14 "Tribe" has been defined in Encyclopaedia Britannica, Volume 22, 1961 edition, at page 465, by W. H. R. Rivers as "a social group of a simple kind, the members of which speak a common dialect, have a single government, and act together for such common purposes as "warfare". Other typical characteristics include a common name, a contiguous territory, a relatively uniform culture or way of life and a tradition of common descent. Tribes are usually composed of a number of local communities, e.g., bands, villages or neighbourhoods, and are often aggregated in clusters of a higher order called nations. The term is seldom applied to societies that have achieved a strictly territorial organization in large states but is usually confined to groups whose**

unity is based primarily upon a sense of extended kinship ties. It is no longer used for kin groups in the strict sense, such as clans…………"

51. Dr. Gupta, Jai Prakash in "The customary laws of the Munda and the Oraon" has defined the tribe as under:

> **"Tribe in the Dictionary of Anthropology is defined as 'a social group, usually with a definite area, dialect, cultural homogeneity, and unifying social organization. It may include several sub-groups, such as sibs or villages. A tribe ordinarily has a leader and may have a common ancestor, as well as patron deity. The families or small communities making up the tribe are linked through economic, social, religious, family, or blood ties'."**

52. Their Lordships of the Hon'ble Supreme Court in ***Sri Manchegowda etc.*** vs**.** ***State of Karnataka and others***, AIR 1984 SC 1151 have held that the State consistently with the directive principles of the Constitution has made it a policy and very rightly to preserve, protect and promote the interests of the Scheduled Castes and Scheduled Tribes which by and large form the weaker and poorer sections of the people in our country. Their Lordships have held as under:

> **"[11] It is no doubt true that before the passing of the present Act any transfer of granted land in breach of the condition relating to prohibition on such transfer would not have the effect of rendering the transfer void and would make any such transfer only voidable. The present Act seeks to introduce a change in the legal position. The prohibition on transfer of granted land had been imposed by law, rules or regulations governing such grant or by the terms of the grant. The relevant provisions imposing such prohibition by rules, regulations and laws have been referred to in the judgment of the High Court. It is quite clear that the condition regarding prohibition of transfer of granted land had been introduced in the interest of the grantees for the purposes of up keep of the grants and for preventing the economically dominant sections of the community from depriving the grantees who belong to the weaker sections of the people of their enjoyment and possession of these lands and for safeguarding their interests against any exploitation by the richer sections in regard to the enjoyment and possession of these lands granted essentially for their benefit. As the Statement of Objects and Reasons indicates, this prohibition on transfer of granted land has not proved to be a sufficiently strong safeguard in the matter of preserving grants in the hands of the grantees belonging to the Scheduled Castes and Scheduled Tribes; and, in violation of the prohibition on transfer of the granted land, transfers of such lands on a large scale to the serious detriment of the interests of these poorer sections of the people belonging to the Scheduled Castes and Scheduled Tribes had taken place. In view of this unfortunate experience the Legislature in its wisdom and in pursuance of its declared policy of safeguarding, protecting and improving the conditions of these weaker sections of the community. thought it fit to bring about this change in the legal position by providing that any such transfer except in terms of the provisions of the Act will be null and void and not merely voidable. The Legislature no doubt is perfectly competent in pursuance of the aforesaid policy to provide that such**

transactions will be null and void and not merely voidable. Even under the Contract Act any contract which is opposed to public policy is rendered void. The State, consistently with the directive principles of the Constitution, has made it a policy and very rightly, to preserve, protect and promote the interests of the Scheduled Castes and Scheduled Tribes which by and large form the weaker and poorer sections of the people in our country. This may be said to be the declared policy of the State and the provisions seeking to nullify such transfers is quite in keeping with the policy of the State which may properly be regarded as public policy for rendering social and economic justice to these weaker sections of the society.

[12] In pursuance of this policy, the Legislature is undoubtedly competent to pass all enactment providing that transfers of such granted lands will be void and not merely voidable for properly safeguarding and protecting the interests of the Scheduled Castes and Scheduled Tribes for whose benefit only these lands had been granted. Even in the absence of any such statutory provisions, the transfer of granted lands in contravention of the terms of the grant or in breach of any law, rule or regulation covering such grant will clearly be voidable and the resumption of such granted lands after avoiding the voidable transfers in accordance with law will be permitted. Avoidance of such voidable transfers and resumption of' the granted lands through process of law is bound to take time. Any negligence and delay on the part of the authorities entitled to take action to avoid such transfers through appropriate legal process for resumption of such grant may be further impediments in the matter of avoiding such transfers and resumption of possession of the granted lands. Prolonged legal proceedings will undoubtedly be prejudicial to the interests of the members of the Scheduled Castes anti Scheduled Tribes for whose benefit the granted lands are intended to be resumed. As transfers of granted lands in contravention of the terms of the grant or any law, regulation or rule governing such grants can be legally avoided and possession of such lands can be recovered through process of law, it must be held that the Legislature for the purpose of avoiding delay and harassthent of protracted litigation and in its object of speedy restoration granted lands to the members of the weaker communities is perfectly competent to make suitable provision for resumption of such granted lands by stipulating in the enactment that transfers of such lands in contravention of the terms of the grant or any regulation, rule or law regulating such grant will be void and providing a suitable procedure consistent with the principles of natural justice for achieving this purpose without recourse to prolonged litigation in Court in the larger interests of benefiting the members of the Scheduled, Castes and Scheduled Tribes."

53. Their Lordships of the Hon'ble Supreme Court in ***Lingappa Pochanna Appelwar*** vs. ***State of Maharashtra and another***, (1985) 1 SCC 479 while considering Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 have explained the concept of distributive justice. Their Lordships have held as under:

"[14] Under the scheme of the Constitution, the Scheduled Tribes as a class require special protection against exploitation. The very existence

of Scheduled Tribes as a distinctive class and the preservation of their culture and way of life based as it is upon agriculture which is inextricably linked with ownership of land, requires preventing an invasion upon their lands. The impugned Act and similar measures undertaken by different States placing restrictions on transfer of lands by members of the Scheduled Castes and Tribes are aimed at the State Policy enshrined in Art. 46 of the Constitution which enjoins that "The State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular of the Scheduled Castes and Tribes and shall protect them from social injustice and all forms of exploitation." One has only to look at the artlessness, the total lack of guile, the ignorance and the innocence, the helplessness, the economic and the educational backwardness of the tribals pitted against the artful, usurious, greedy land grabber and exploiter invading the tribal area from outside to realize the urgency of the need for special protection for the tribals if they are to survive and to enjoy the benefits of belonging to the 'Sovereign, Socialist, Secular, Democratic Republic' which has vowed to secure to its citizens 'justice, social, economic and political' 'assuring the dignity of the individual'. The great importance which the Founding Fathers of the Constitution attached to the protection, advancement and prevention of exploitation of tribal people may be gathered from the several provisions of the Constitution. Apart from Art. 14 which, interpreted positively, must promote legislation to protect and further the aspirations of the weak and the oppressed, including the tribals, there are Arts. 15(4) and 16(4) which make special provision for reservation in Government posts and admissions to educational institutions. Even the Fundamental Rights guaranteed by Art. 19(1)(d) and (e), that is, the right to move freely throughout the territory of India and the right to reside and settle in any part of the territory of India are made expressly subject to reasonable restrictions for the protection of the interests of any Scheduled Tribe. The proviso to Art. 275 specially provides for the payment out of the Consolidated Fund of India as grants in aid of the revenues of a State such capital and recurring sums as may be necessary to meet the cost of developmental schemes for the promotion of the welfare of the Scheduled Tribes in the State. Art. 330 provides for reservation in the House of the People for the Scheduled Tribes. Art. 332 provides for the reservation of seats for the Scheduled Tribes in the Legislative Assemblies of the States. Art. 335 specially directs that the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of the State. Art. 343(2) empowers the President to specify the tribes or tribal communities or parts of them which shall be deemed to be Scheduled Tribes for the purposes of the Constitution. Arts. 244 and 244A of the Constitution make special provision for the administration and control of the scheduled areas and the scheduled tribes in any State by the application of the Fifth and the Sixth Schedules. Paragraph 3 of the Fifth Schedule particularly enjoins the Governor of each State having scheduled areas to report to the President annually or whenever

so required, regarding the administration of the scheduled area in that State, and the executive power of the Union is extended by that paragraph to giving directions to the State as to the administration of the said area. Paragraph 5(2) empowers the Governor to make regulations for the peace and good Government of any area in any State which is for the time being a scheduled area and, in particular, and without prejudice to the generality of the foregoing power, such regulations may (a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area; (b) regulate the allotment of land to members of Scheduled Tribes in such areas; and (c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area. Mention has already been made of Art 46 of the Directive Principle which specially enjoins the State to protect the Scheduled Castes and Tribes from all social injustice and from all forms of exploitation. All these provisions emphasize the particular care and duty required of all the organs of the State to take positive and stern measures for the survival, the protection and the preservation of the integrity and the dignity of the tribals.

[15] The problem of how far and to what extent the law of contract should be used as an instrument of distributive justice has been engaging the attention not only of the Legislatures and the Courts but also of scholars. Kronman in his recent article 'Contract Law and Distributive Justice' observes:

"If one believes it is morally acceptable for the State to forcibly redistribute wealth from one group to another, the only question that remains is how far the redistribution should be accomplished."

According to learned author, this could be achieved not only by taxation but also by regulatory control of private transactions. He accepts that distributive fairness can only be achieved by taxation or contractual regulation, at some sacrifice in individual liberty.

[20] The legislation is based on the principle of distributive justice. The impugned Act is intended and meant as an instrument for alleviating oppression, redressing bargaining imbalance, cancelling unfair advantages, and generally overseeing and ensuring probity and fair dealing. It seeks to reopen transactions between parties having unequal bargaining power resulting in transfer of title from one to another due to force of circumstances and also seeks to restitute the parties to their original position. Quite recently, this Court in Manchegowda v. State of Karnataka. (1984) 3 SCC 301 : (AIR 1984 SC 1151) upheld the constitutional validity of the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978. It provided for restoration of lands transferred by members of Scheduled Castes and Tribes where the grant of land was attached with a condition regarding prohibition of transfer of the granted lands. It repelled the contention that Ss. 4 and 5 of the Act which provided for avoidance of transfers were violative of Art. 14, Art. 19(1)(f) and Aft. 31 of the Constitution and observed that any transfer of such lands in violation of the prohibition conferred on the transferee only a defeasible

title and therefore the provisions could not be held to be arbitrary, illegal and void."

54. Their Lordships of the Hon'ble Supreme Court in ***C. Masilamani Mudaliar and others*** vs. ***Idol of Sri Swaminathaswami Swaminathaswami Thirukoil and others***, (1996) 8 SCC 525 have held that section 14 of the Hindu Succession Act should be constructed Harmoniously consistent with the constitutional goal of removing gender-based discrimination and effectuating economic empowerment of Hindu females. Their Lordships have further held that women have right to elimination of gender based discrimination particularly in respect of property so as to attain economic empowerment. This forms part of universal human rights and they have right to equality of status and opportunity which also forms part of the basic structure of the Constitution. The Supreme Court is obliged to effectuate these rights of women. The personal laws inconsistent with the constitutional mandates are void under Article 13 of the Constitution of India. Their Lordships have held as under:

"[15] It is seen that if after the Constitution came into force, the right to equality and dignity of person enshrined in the Preamble of the Constitution, Fundamental Rights and Directive Principles which are a trinity intended to remove discrimination or disability on grounds only of social status or gender, removed the pre-existing impediments that stood in the way of female or weaker segments of the society. In S. R. Bommai v. Union of India, [(1995) 1 SCC (sic)] this Court held that the Preamble is part of the basic structure of the Constitution. Handicaps should be removed only under rule of law to enliven the trinity of justice, equality and liberty with dignity of person. The basic structure permeates equality of status and opportunity. The personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they became void under Article 13 if they violated fundamental rights. Right to equality is a fundamental right. Parliament, therefore, has enacted Section 14 to remove pre-existing disabilities fastened on the Hindu female limiting her right to property without full ownership thereof. The discrimination is sought to be remedied by Section 14 (1) enlarging the scope of acquisition of the property by a Hindu female appending an explanation with it.

[18] Human Rights are derived from the dignity and worth inherent in the human person. Human Rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedom are inter-dependent and have mutual reinforcement. The human rights for woman, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth, culturally, socially and economically. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights.

[20] The Parliament made the Protection of Human Rights act, 1993. Section 2(b) defines human rights means "the rights relating to

life, liberty, equality and dignity of the individual guaranteed by the Constitution, embodied in the international conventions and enforceable by Courts in India." Thereby the principle embodied in CEDAW and the concomitant right to development became integral parts of the Indian Constitution and the Human Rights Act and became enforceable. Section 12 of Protection of Human Rights Act charges the commission with duty for proper implementation as well as prevention of violation of the human rights and fundamental freedoms.

[19] Article 5(a) of CEDAW to which the Government of India expressed reservation does not stand in its way and in fact Article 2 (f) denudes its effect and enjoin to implement Article 2(f) read with its obligation undertaken under Articles 3, a 14 and 15 of the Convention vis-a-vis Articles 1, 3, 6 and 8 of the Convention of Right to Development. The directive principles and fundamental rights, though provided the matrix for development of human personality and elimination of discrimination, these conventions add urgently and teeth for immediate implementation. It is, therefore, imperative of the State to eliminate obstacles, prohibit all gender based discriminations as mandated by Articles 14 and 15 of the Constitution of India. By operation of Article 2(f) and other related articles of CEDAW, the State should take all appropriate measures including legislation to modify or abolish gender based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women.

[23] Bharat Ratna Dr. B. R. Ambedkar stated, on the floor of the Constituent Assembly that in future both the legislature and the executive should not pay mere lip service to the directive principles but they should be made the bastion of all executive and legislative action. Legislative and executive actions must be conformable to and effectuation of the fundamental rights guaranteed in Part III and the directive principles enshrined in Part IV and the Preamble of the Constitution which constitutes conscience of the Constitution. Covenants of the United Nation add impetus and urgency to eliminate gender based obstacles and discrimination. Legislative action should be devised suitably to constellate economic empowerment of women in socio-economic restructure for establishing egalitarian social order. Law is an instrument of social change as well as the defender for social change. Article 2(e) of CEDAW enjoins that this Court to breath life into the dry bones of the Constitution, international convictions and the Protection of Human Rights Act and the Act to prevent gender based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights to women."

55. Their Lordships of the Hon'ble Supreme Court in ***Papaiah*** vs. ***State of Karnataka and others***, (1996) 10 SCC 533 have explained the right to economic justice to members of SCs/Sts/OBCs under Articles 14, 15, 21, 46, 39 (b) and Preamble as under:

"[8] It is seen that Art. 46 of the Constitution, in terms of its Preamble, enjoins upon the State to provide economic justice to the Scheduled Castes, Scheduled Tribes and other weaker Sections of the society and to prevent their exploitation. Under Art. 39(b) of the Constitution, the State is enjoined to distribute its largess, land, to subserve the public good. The right to economic justice to the Scheduled Castes, Scheduled

Tribes and other weaker sections is a fundamental right to secure equality of status, opportunity and liberty. Economic justice is a facet of liberty without which equality of status and dignity of person are teasing illusions. In rural India, land provides economic status to the owner. The State, therefore, is under constitutional obligation to ensure to them opportunity giving its largess to the poor to augment their economic position. Assignment of land having been made in furtherance, thereof, any alienation, in its contravention, would be not only in violation of the constitutional policy but also opposed to public policy under S. 23 of the Contract Act. Thereby, any alienation made in violation thereof is void and the purchaser does not get any valid right, title or interest thereunder. It is seen that rule 43 (a) specifically prohibits alienation of assigned land. It does not prescribe any limitation of time as such. However, it is contended that the appellant has obtained land by way of sale in 1958 long before the Act came into force and thereby he perfected his title by adverse possession. We find no force in contention. This Court had considered this question in similar circumstances R. Chandevarappa's case (1995 (5) SCALE 620) and had held thus :

"The question then is whether the appellant has perfected his title by adverse possession. It is seen that a contention was raised before the Assistant Commissioner that the appellant having remained in possession from 1968, he perfected his title by adverse possession. But the crucial facts to constitute adverse possession have not been pleaded. Admittedly the appellant came into possession by a derivative title from the original grantee. It is seen that the original grantee has no right to alienate the land. Therefore, having come into possession under colour of title from original grantee, if the appellant intends to plead adverse possession as against the State, he must disclaim his title and plead his hostile claim to the knowledge of the State and that the State had not taken any action thereon within the prescribed period. Thereby, the appellant's possession would become adverse. No such stand was taken nor evidence has been adduced in this behalf. The counsel in fairness, despite his research, is unable to bring to our notice any such plea having been taken by the appellant."

56. Their Lordships of the Hon'ble Supreme Court in ***Ahmedabad Municipal Corporation*** vs. ***Nawab Khan Gulab Khan and others***, (1997) 11 SCC 121 have held that Articles 38, 39 and 46 mandate the State as its economic policy to provide socio-economic justice to minimize inequalities in income and in opportunities and status and it positively charges the State to distribute its largess to the weaker sections of the society envisaged in Article 46 to make socio-economic justice a reality, meaningful and fruitful. Their Lordships have held as under:

"13. Socio-economic justice, equality of status and of opportunity and dignity of person to foster the fraternity among all the sections of the society in an integrated Bharat is the arch of the Constitution set down in its Preamble. Arts. 39 and 38 enjoin the State to provide facilities and opportunities. Arts. 38 and 46 of the Constitution enjoin the State to promote welfare of the people by securing social and economie justice to the weaker sections of the society to minimise inequalities in income and endeavour to eliminate inequalities in status. In that case,

it was held that to bring the Dalits and the Tribes into the mainstream of national life, the State was to provide facilities and opportunities as it is duty of the State to fulfil the basic human and Constitutional rights to residents so as to make the right to life meaningful. In Shantistar Builders v. Narayan Khimalal Totame, 1990(1) SCC 520 : AIR 1990 SC 630, another Bench of three Judges had held that basic needs of man have traditionally been accepted to be three - food, clothing and shelter. The right to life is guaranteed in any civilised society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For an animal, it is the bare protection of the body, for a human being, it has to be a suitable accommodation which would allow him to grow in every aspect - physical, mental and intellectual. The surplus urban-vacant land was directed to be used to provide shelter to the poor. In Olga Tellis case, (supra), the Constitution Bench had considered the right to dweil on pavements or in slums by the indigent and the same was accepted as a part of right to life enshrined under Art. 21; their ejection from the place nearer to their work would be deprivation of their right to livelihood. They will be deprived of their livelihood if they are evicted from their slum and pavement dwellings. Their eviction tantamounts to deprivation of their life. The right to livelihood is a traditional right to life, the easiest way of depriving a person of his right to life would be to deprive him of means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. The deprivation of right to life, therefore, must be consistent with the procedure established by law. In P. G. Gupta v. State of Gujarat, 1995 Supp (2) SCC 182, another Bench of three Judges had considered the mandate of human right to shelter and read it into Art. 19(l)(e) and Art. 21 of the Constitution and the Universal Declaration of Human Rights and the Convention of Civic, Economie and Cultural Rights and had held that it is the duty of the State to construct houses at reasonable cost and make them easily accessible to the poor. The aforesaid principles have been expressly embodied and in-built in our Constitution to secure economie democracy so that everyone has a right to life, liberty and security of the person. Art. 22 of the Declaration of Human Rights envisages that everyone has a right to social security and is entitled to its realisation as the economie, social and cultural rights are indispensable for his dignity and free development of his personality. It would, therefore, be clear that though no person nas a right to encroach and erect structures or otherwise on footpath, pavement or public streets or any other place reserved or earmarked for a public purpose, the State has the Constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over their heads to make the right to life meaningful, effective and fruitful. Right to livelihood is meaningful because no one can live without means of his living, that is the means of livelihood. The deprivation of the right to life in that context would not only denude right of the effective content and meaningfulness but

> **it would make life miserable and impossible to live. It would, therefore, be the duty of the State to provide right to shelter to the poor and indigent weaker sections of the society in fulfilment of the Constitutional objective."**

57. Their Lordships of the Hon'ble Supreme Court in ***Charan Singh etc.*** vs. ***State of Punjab and others etc***., AIR 1997 SC 1052 have held that socio-economic justice is required to be done to the weaker sections under Articles 38, 39 (b) and 46 of the Constitution of India and particularly to scheduled castes and scheduled tribes and to prevent them from social injustice and prevention of all forms of exploitation. Their Lordships have held as under:

> **"[10] It is now settled policy of the Government as enjoined under Art. 46 of the Constitution and the Directive Principles, particularly Arts. 38 and 39(b) and the Preamble of the Consitution that economic and social justice requires to be done to the weaker sections of the society, in particular to the Scheduled Castes and Scheduled Tribes and to prevent them from social injustice and prevention of all forms of exploitation. In the light of that constitutional objective of economic empowerment, the Government have rightly taken the policy to assign the lease to the either to a Co-operative Society composed of the Scheduled Castes or individual members of the Scheduled Tribes members, as the case may be, in accordance with their policy then in vogue at the rate of Rs. 20/- per acre or 90 times the land revenue, whichever is less. Under these circumstances, the appellants having been inducted into posession reclaimed the land and remained in possession after the expiry of the lease, the Government is required to regularise their possession and assign the lands in their possession in accordance with its policy. The appellants, therefore, are directed to make necessary application within four weeks from today to the competent authority and the authorities are directed to regularise their possession imposing necessary conditions for their continuance in possession and enjoyment of the same in the light of the constitutional objective of rendering them socio-economic justice, putting restrictions on sub-letting or selling; all the relevant conditions in that behalf may be imposed so that they remain in possession and enjoy the same to improve their social and economic status as enjoined under the Constitution. The authorities also are directed to dispose of the applications, within a period of two months from the date of the receipt of the same. The appellants shall remain in possession until the regularisation is done and shall enjoy the lands without any sub-letting or alienation thereof."**

58. Their Lordships of the Hon'ble Supreme Court in ***Velamuri Venkata Sivaprasad (Dead) by Lrs***. Vs. ***Kothuri Venkateswarlu (Dead) by Lrs. and others***, (2000) 2 SCC 139 have held that socio economic legislation should be interpreted with the widest possible connotation and in the matter of interpretation of statutes specially relating to womenfolk, due weightage should be given to the constitutional requirement of equality of status. Thus, the Hindu Succession Act, 1956 should be interpreted accordingly. Their Lordships have further held that equality of status permeates the basic structure of the Constitution and negates gender bias. Their Lordships have held as under:

> **"[12] Undisputably, the Hindu Succession Act, 1956 in particular Section 14 has introduced far reaching changes having due regard to**

the role and place of womanhood in the country on the basis of the prevailing socio-economic perspective. It is now a well-settled principle of law that legislations having socio-economic perspective ought to be interpreted with widest possible connotation as otherwise, the intent of the legislature would stand frustrated. Recognition of Rights and protection thereof thus ought to be given its full play for which the particular legislation has been introduced in the Statute Book. Gender bias is being debated throughout the globe and the basic structure of the Constitution permeates quality of status and thus negates gender bias. Gender equality is one of the basic principles of our Constitution. The endeavour of the law court should thus be to give due weightage to the requirement of the Constitution in the matter of interpretation of statutes wherein specially the women folk would otherwise be involved. The legislation of 1956 therefore, ought to receive an interpretation which would be in consonance with the wishes and desires of framers of our Constitution. We ourselves have given this Constitution to us and as such it is a bounden duty and an obligation to honour the mandate of the Constitution in every sphere and interpretation which would go in consonance therewith ought to be had without any departure therefrom. Tulasamma's case, obviously having this in mind decided the issue and attributed the widest possible connotation to the words used in Section 14(1) of the Act of 1956. The decision in Tulasamma's case (AIR 1977 SC 1944) from time to time came up for consideration before this Court and the same stands accepted without any variation as noted herein before. One of the latest decisions where Tulasamma's case has been considered, is the decision of this Court in the case of Raghubir Singh v. Gulab Singh (1998) 6 SCC 314 (324) : (1998 AIR SCW 2393 : AIR 1998 SC 2401) wherein the Dr. Justice A. S. Anand, Chief Justice speaking for the Bench in paragraphs 24 and 26 of the Report observed:-

"24. Accordingly, we hold that the right to maintenance of a Hindu female flows from the social and temporal relationship between the husband and the wife and that right in the case of a widow is "a pre-existing right", which existed under the Shastric Hindu Law long before the passing of the 1937 or the 1946 Acts. Those Acts merely recognised the position as was existing under the Shastric Hindu Law and gave it a "statutory" backing. Where a Hindu widow is in possession of the property of her husband, she has a right to be maintained out of it and she is entitled to retain the possession of that property in lieu of her right to maintenance.

26. It is by force of Section 14(1) of the Act, that the widow's limited interest gets automatically enlarged into an absolute right notwithstanding any restriction placed under the document or the instrument. So far as sub-section (2) of Section 14 is concerned, it applies to instruments, decrees, awards, gifts etc., which create an independent or a new title in favour of the female for the first time. It has no application to cases where the instrument/document either declares or recognises or confirms her share in the property or her "pre-existing right to maintenance" out of that property. As held in Tulasamma case sub-section (2) of Section 14 is in the nature of a

proviso and has a field of its own, without interfering with the operation of Section 14(1) of the Act."

[34] It is pertinent to note here that the courts ought always to adopt a construction of the statute which will ensure to the benefit of the society and eschew such a construction which may adversely affect the society. Morality and law cannot but be equated with each other; what is legal is moral and as such morality cannot be differentiated from the law. One School of thought recorded that while it is true that what is legal is moral but the converse is not true. We however, do not dilate on this issue excepting reiterating what is stated herein before in this judgment.

59. Article 51-A (e) of the Constitution of India also commands to protect the women in order to renounce practices derogatory to the dignity of women.

60. Their Lordships of the Hon'ble Supreme Court in ***State of Kerala and another*** vs. ***Cahndramohanan***, (2004) 3 SCC 429 have held as under:

"[3] The question which has been raised at the Bar is not free from doubt. The Constitution provides for declarations of certain castes and tribes as Scheduled Castes and Scheduled Tribes in terms of Articles 341 and 342 of the Constitution of India. Article 342 reads as under:

"342. Scheduled Tribes:- (1) The President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts or of groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union Territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under Clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

[4] The object of the said provision is to provide right for the purpose of grant of protection to the Scheduled Tribes having regard to the economic and educationally backwardness wherefrom they suffer. For the aforementioned purpose only the President of India has been authorised to issue the notification to parts or groups within the Tribes. It is not in dispute that the Constitution (Scheduled Tribes) Order, 1950 made in terms of the aforementioned provisions is exhaustive. The question which is required to be posed at the outset is what is the Tribes………"

61. The tribal belts have modernized with the passage of time. They profess Hindu rites and customs. They do not follow different Gods. Their culture may be different but customs must conform to the constitutional philosophy.

62. Their Lordships of the Hon'ble Supreme Court in ***Dayaram*** vs. ***Sudhir Batham and others***, (2012) 1 SCC 333 have held that to declare the law carries with it the power and within limits, the duty to make law when none exists. Directions issued in the exercise of judicial power can fashion modalities out of the existing executive apparatus, to

ensure that eligible citizens entitled to affirmative action alone derive benefits of such affirmative action. The judicial power was exercised to interpret the Constitution as a "living document" and enforce fundamental rights in an area where the will of the elected legislatures have not expressed themselves. Their Lordships have held as under:

> **"17. The directions issued in Madhuri Patil were towards furtherance of the constitutional rights of scheduled castes/scheduled tribes. As the rights in favour of the scheduled castes and scheduled tribes are a part of legitimate and constitutionally accepted affirmative action, the directions given by this Court to ensure that only genuine members of the scheduled castes or scheduled tribes were afforded or extended the benefits, are necessarily inherent to the enforcement of fundamental rights. In giving such directions, this court neither re-wrote the Constitution nor resorted to `judicial legislation'. The Judicial Power was exercised to interpret the Constitution as a `living document' and enforce fundamental rights in an area where the will of the elected legislatures have not expressed themselves.**
>
> **18. Benjamin Cardozo in his inimitable style said that the power, to declare the law carries with it the power and within limits the duty, to make law when none exists. (Nature of the Judicial Process, page 124). Directions issued in the exercise of Judicial Power can fashion modalities out of existing executive apparatus, to ensure that eligible citizens entitled to affirmative action alone derive benefits of such affirmative action. The directions issued in Madhuri Patil are intrinsic to the fulfillment of fundamental rights of backward classes of citizens and are also intended to preclude denial of fundamental rights to such persons who are truly entitled to affirmative action benefits."**

63. The upshot of the appreciation of the evidence and the law discussed hereinabove is that daughters in the tribal areas in the State of Himachal Pradesh shall inherit the property in accordance with the Hindu Succession Act, 1956 and not as per customs and usages in order to prevent the women from social injustice and prevention of all forms of exploitation. The laws must evolve with the times if societies are to progress. It is made clear by way of abundant precaution that the observations made hereinabove only pertain to right to inherit the property by the daughters under the Hindu Succession Act, 1956 and not any other privileges enjoined by the tribal in the tribal areas.

64. All the substantial questions of law are answered accordingly.

65. Learned First Appellate Court has correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgment and decree passed by the first appellate court.

66. In view of the analysis and discussion made hereinabove there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Court on its own motion Ref:- Ghazala Abdullah …Petitioner.
Versus
State of H.P. & others …Respondents.

CWPIL No. 8 of 2015
Date of Order: 23.06.2015

Constitution of India, 1950- Article 226- Complaints were received in the Court that authorities are not taking action against the person who are violating the directions issued by the Court- trees are being cut on the pretext that permission had been obtained from the authorities to cut the trees- respondent directed to appear before the Court to explain the situation and the respondent commanded to take action strictly as per law.

Present: Mr. Aman Sood, Advocate, as Amicus Curiae.
Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Vikram Thakur, Deputy Advocate Generals, for the respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Mr. Anup Rattan, learned Additional Advocate General, stated at the Bar that the name of respondent No. 8 has wrongly been reflected in the array of respondents as it should be 'Municipal Council, Dharamshala through its Executive Officer, Dharamshala, District Kangra'. His statement is taken on record. Accordingly, name of respondent No. 8 be read as 'Municipal Council, Dharamshala through its Executive Officer, Dharamshala, District Kangra' instead of 'Chairman, Municipal Council, Kangra at Dharamshala'. Registry is directed to carry out necessary correction in the cause title.

2. Respondents No. 1 to 4 and 6 have filed the fresh compliance/status reports. We have gone through the same and are of the view that the same are not in tune with the directions made by this Court. Thus, we record our dissatisfaction.

3. The Registry has also received complaints alongwith CD, perusal of which do disclose that the authorities are not taking actions against the persons who are violating the directions issued by this Court, as warranted under law and who are also involved in the commission of offences punishable under penal laws and other laws applicable. It is also mentioned in one of the complaints that granting of permission to the land owners to cut the trees from the land owned by them has been stayed by this Court vide order, dated 05.06.2015, but the trees are being cut under the pretext that they have already obtained the permission from the authorities to cut the trees, and when the matter was reported to the authorities, they did not bother to take any action by saying that these persons were within their rights to cut the trees.

4. It is astonishing how the authorities can make such a statement. Respondents No. 4 to 6, 8 and the SHO concerned are directed to appear before this Court on the next date and to explain the position. In the meantime, all the sanctions granted earlier, i.e. prior to 05.06.2015, which are yet to be executed, are stayed.

5. We wonder why the authorities have not drawn any action under the penal laws against the person(s) who have violated the directions issued by this Court read with other provisions of law applicable. All the respondents are commanded to draw action(s) strictly as per the mandate of law.

6. Registry is directed to furnish copy of all the communications alongwith CD to the learned Amicus Curiae and learned Advocate General during the course of the day enabling them to file response/status report.

7. Respondents No. 1 and 2 are also directed to file latest status report relating to Jakhoo forest before the next date.

8. List on **6th July, 2015.** Copy **dasti.**

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

Cr.MMO No. 117 of 2014
Order Reserved on 20th May 2015
Date of Order 23rd June, 2015

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1. Sanjeev Kumar son of Shri Jagdish Singh resident of village Fatehpur (Mehral) P.O. Nangran Tehsil and District Una H.P.
2. Shri Jagdish Singh son of Shri Sohan Singh resident of village Fatehpur (Mehral) P.O. Nangran, Tehsil and District Una HP
3. Smt. Darshna Devi wife of Shri Jagdish Singh resident of village Fatehpur (Mehral) P.O. Nangran Tehsil and District Una HP
4. Shri Sandeep alias Vicky son of Shri Jagdish Chand resident of village Fatehpur (Mehral) P.O. Nangran Tehsil and District Una HP ….Petitioners

Versus

1. State of H.P. through Principal Secretary (Home) to the Government of Himachal Pradesh Shimla-171002
2. Smt. Nirmala Devi wife of Shri Sanjeev Kumar son of Shri Jagdish Singh resident of village Fatehpur (Mehral) P.O. Nangran Tehsil and District Una H.P. now residing with her uncle Sh. Kamal Singh son of Shri Dalel Singh resident of village Agampur Tehsil Anandpur Sahib District Ropar Punjab ….Non-petitioners

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Code of Criminal Procedure, 1973- Section 482- Petitioners sought quashing of FIR on the ground that private complaint was filed before Sub Divisional Judicial Magistrate Aanadpur Sahib in which all the accused were acquitted- wife had left matrimonial home in the month of May, 2003 and FIR was lodged after more than 10 years- no specific date and time regarding the demand of dowry were given- record showed that ACJM had given liberty to the complainant to file fresh complaint under provision of law before competent Court having jurisdiction and this judgment has attained finality- hence, fresh complaint filed by the complainant pursuant to the direction of the Court cannot be said to be barred by law.

(Para-6 and 8)

Cases referred:

Monica Kumar (Dr.) and another vs. State of U.P. and others, (2008)8 SCC 781
Basudev Bhoi vs. Bipadabhanjan Puhan and another, 1997(2) Crimes 331 (Orissa High Court)
Union of India vs. Major General Shri Kant Sharma and another, JT 2015 (4) SC 576
Commissioner of Income Tax and others vs.Chhabil Dass Agarwal, JT 2013 (11) SC 387

L. Chander Kumar vs. Union of India (Constitutional Bench of India), (1997)3 SCC 261

For the Petitioners: Mr. Onkar Jairath, Advocate.
For Non-petitioner No.1: Mr. J.S. Rena, Assistant Advocate General.
For Non-petitioner No.2: Ms. Anjali Soni Verma, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 Cr.P.C. read with Article 227 of the Constitution of India for quashing FIR No. 85 of 2013 dated 7.8.2013 registered against the petitioners under Sections 406, 498-A and 120-B IPC at P.S. Kot-Kehlur Tehsil Shri Naina Devi Ji District Bilaspur (H.P.). It is pleaded that private complaint No. 119 of 2007 titled Nirmala Devi vs. Sanjeev Kumar was filed before Sub Divisional Judicial Magistrate Anandpur Sahib under Sections 406, 498-A read with Section 120-B IPC which was decided on dated 22.12.2012 and learned Sub Divisional Judicial Magistrate Anandpur Sahib acquitted all accused persons qua offence punishable under Sections 406, 498-A read with Section 120-B IPC by way of giving them benefit of doubt. It is pleaded that as per Constitution of India accused persons cannot be tried twice for the same offence. It is further pleaded that Smt. Nirmala Devi left her matrimonial house in the month of May 2003 and application under Section 156(3) Cr.P.C. for registration of FIR was filed on dated 3.8.2013 after more than ten years and on this ground FIR is liable to be quashed. It is also pleaded that there is no specific date and time mentioned as to when Rs.1 lac (Rupees one lac only) was demanded by petitioners from Smt. Nirmala Devi as dowry and further pleaded that list of dowry articles filed is also false. It is pleaded that no article of dowry was entrusted to petitioners. It is pleaded that as of today articles of dowry took away by Smt. Nirmala Devi in presence of Pardhan Gram Panchayat and other members. It is pleaded that divorce petition already stood filed by petitioner No.1. Prayer for acceptance of petition filed under Section 482 Cr.P.C. sought with further prayer to quash FIR No. 85 of 2013 dated 7.8.2013 registered in Police Station Kot-Kehloor District Bilaspur (H.P.).

2. Per contra reply filed on behalf of the State of H.P. pleaded therein that Sanjeev is husband of Nirmala Devi and Jagdish Singh is father-in-law of Nirmala Devi and Smt. Darshna Devi is mother-in-law of Nirmala Devi and Sandeep @ Vickey is brother-in-law of Nirmala Devi. It is pleaded that Nirmala Devi was married with Sanjeev Kumar in the year 2002 and one male child was born. It is pleaded that prior to the birth of male child Smt. Nirmala Devi was residing at her parental house. It is pleaded that Smt. Nirmala Devi filed private complaint under Sections 406, 498-A and 120-B IPC before Sub Divisional Judicial Magistrate Anandpur Sahib. It is pleaded that Sub Divisional Judicial Magistrate Aanadpur Sahib decided the case on dated 22.12.2012 with a direction that Nirmala Devi would be at liberty to file fresh complaint under the provisions of law before the competent Court having jurisdiction. It is pleaded that in compliance of direction of learned Sub Divisional Judicial Magistrate Aanadpur Sahib announced in IPC complaint No. 119 of 2007 titled Nirmala Devi vs. Sanjeev Kumar fresh complaint before learned Judicial Magistrate 1st Class Bilaspur under Sections 406, 498-A and 120-B IPC filed and thereafter learned Judicial Magistrate 1st Class Bilaspur sent the complaint under Section 156(3) Cr.P.C. for investigation. It is pleaded that during investigation it was established that after sometime of marriage all petitioners started maltreating and harassing and misbehaving Smt. Nirmala Devi physically as well as mentally and also demanded Rs.1 lac (Rupees one lac only). It is further pleaded that petitioner No.1 and petitioner No. 3 also beaten Smt.Nirmala Devi and Nirmala Devi

was forced to leave her matrimonial house. It is pleaded that cruelty is continuing offence against the married women and there is no question of limitation. It is pleaded that learned Sub Divisional Judicial Magistrate Aanadpur Sahib while announcing the judgment in IPC complaint No. 119 of 2007 has given the liberty to complainant to file fresh complaint under the provisions of law before competent Court of law having jurisdiction. It is pleaded that during investigation criminal offences under Sections 406, 498-A and 120-B IPC are established and challan was prepared by SHO of P.S. Kot Kehlur. It is pleaded that FIR was registered in P.S. Kot Kehlur as per directions of learned Judicial Magistrate 1st Class Bilaspur issued under Section 156(3) of Code of Criminal Procedure. Prayer for dismissal of petition filed under Section 482 IPC read with Article 227 of Constitution of India sought.

3. Per contra separate reply filed on behalf of Smt. Nirmala Devi wife of co-petitioner No.1 Sanjeev Kumar pleaded therein that petitioners have not approached the Court with clean hands and suppressed the material facts. It is pleaded that learned Sub Divisional Judicial Magistrate Aanadpur Sahib had given the liberty to Nirmala Devi to file fresh complaint under provisions of law before competent Court having jurisdiction. It is pleaded that Smt. Nirmala Devi had also filed proceedings under Section 125 Cr.P.C. regarding maintenance allowance but co-petitioner No.1 Sanjeev Kumar did not pay any maintenance allowance to Smt. Nirmala Devi. It is pleaded that Smt. Nirmala Devi has filed fresh complaint strictly as per compliance of directions issued by Sub Divisional Judicial Magistrate Aanadpur Sahib in case No. 119 of 2007 titled Nirmala Devi vs. Sanjeev Kumar decided on dated 22.12.2012. It is pleaded that Smt. Nirmala Devi has filed an application under Section 156(3) of Code of Criminal Procedure before learned Judicial Magistrate 1st Class Bilaspur seeking direction to SHO P.S. Kot Kehlur to register criminal case under Sections 406, 498-A and 120-B IPC. It is pleaded that learned Judicial Magistrate 1st Class Bilaspur had perused the facts mentioned in the complaint and thereafter after perusal of entire complaint had directed the SHO P.S. Kot Kehlur to register the FIR and investigate the matter. It is pleaded that in compliance to the directions of learned Judicial Magistrate 1st Class Bilaspur SHO P.S. Kot Kehlur had registered the case under Sections 406, 498-A and 120-B IPC vide FIR No. 85 of 2013 dated 7.8.2013. It is pleaded that offence under Sections 406, 498-A is continuous criminal case against married women. Prayer for dismissal of petition filed under Section 482 Cr.P.C. read with Article 227 of Constitution of India sought.

4. Court heard learned counsel appearing for the petitioners and learned Assistant Advocate General appearing on behalf of non-petitioner No.1 and learned counsel appearing on behalf of non-petitioner No.2 at length and also perused the entire record carefully.

5. Following points arise for determination in present case:-

1. Whether petition filed under Section 482 Cr.P.C. read with Article 227 of Constitution of India is liable to be accepted in view of availability of alternative efficacious statutory remedy?
2. Final Order.

<u>Reasons for findings on Point No.1.</u>

6. Submission of learned Advocate appearing on behalf of petitioners that earlier also private criminal complaint was filed under Sections 406, 498-A read with Section 120-B IPC before Sub Divisional Judicial Magistrate Aanadpur Sahib and accused persons were acquitted by Sub Divisional Judicial Magistrate Aanadpur Sahib and again fresh FIR could not be registered is rejected being devoid of any force for the reasons hereinafter

mentioned. Court has perused the judgment passed by learned Sub Divisional Judicial Magistrate Aanadpur Sahib in private complaint No. 119 of 2007 titled Nirmala Devi vs. Sanjeev kumar and learned Sub Divisional Judicial Magistrate Aanadpur Sahib has given the liberty to complainant Nirmala Devi to file fresh complaint under the provisions of law before competent Court having jurisdiction. There is no evidence on record in order to prove that judgment passed by learned Sub Divisional Judicial Magistrate Aanadpur Sahib in private complaint No. 119 of 2007 was set aside by competent authority of law. Judgment passed by learned Sub Divisional Judicial Magistrate Aanadpur Sahib dated 22.12.2012 has attained the stage of finality. In judgment Sub Divisional Judicial Magistrate Aanadpur Sahib has given the liberty to complainant Nirmala Devi to file fresh complaint under the provisions of law before competent Court. It is well settled law that judgment should not be read in isolation but should be read as a whole. The liberty granted to Smt. Nirmala Devi to file fresh complaint under the provisions of law before competent Court of law is not challenged by petitioners before higher authorities. Hence it is held that fresh complaint was filed by Smt. Nirmala Devi in compliance to the directions of Sub Divisional Judicial Magistrate Aanadpur Sahib given in judgment passed in private complaint No. 119 of 2007 titled Nirmala Devi vs. Sanjeev Kumar decided on 22.12.2012.

7. Another submission of learned Advocate appearing on behalf of the petitioners that FIR No. 85 of 2013 dated 7.8.2013 registered in P.S. Kot Kehlur is contrary to law is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that FIR No. 85 of 2013 dated 7.8.2013 was registered against the petitioners under Sections 406, 498-A and 120-B IPC in compliance to the directions issued by learned Judicial Magistrate 1st Class Bilaspur under Section 156(3) of Code of Criminal Procedure. It is held that investigation was started in present case as per directions of learned Judicial Magistrate 1st Class Bilaspur issued under Section 156(3) Cr.P.C. It is well settled law that where investigation is started at the instance and as per reference sent by Magistrate under Section 156(3) Cr.P.C. then police officials to whom the reference is sent has no discretion but to register the FIR and initiate investigation in accordance with law and thereafter to submit the report to the Judicial Magistrate under Section 173 Cr.P.C.

8. Another submission of learned Advocate appearing on behalf of the petitioners that criminal Court cannot take cognizance under Section 468 of Code of Criminal Procedure 1973 is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that on dated 22.12.2012 Sub Divisional Judicial Magistrate Aanadpur Sahib had granted liberty to Nirmala Devi to file fresh complaint under the provisions of law before competent Court of law. It is held that limitation would start w.e.f. 22.12.2012 granted by Sub Divisional Judicial Magistrate Aanadpur Sahib to file fresh complaint. It is held that offences under Sections 498-A IPC and 406 IPC are criminal warrant cases. It is held that alternative remedy to the petitioners to plead their case for discharge under Section 239 of Code of Criminal Procedure 1973 before learned trial Court is available in present case and learned trial Court after hearing the petitioners and State would pass the order under Section 239 of Cr.P.C. strictly in accordance with law in present case. It is further held that another alternative remedy to file revision under Section 397 of Code of Criminal Procedure is also available to the petitioners against the order passed by learned trial Court under Section 239 Cr.P.C. It was held in case reported in ***(2008)8 SCC 781 titled Monica Kumar (Dr.) and another vs. State of U.P. and others*** that inherent jurisdiction under Section 482 Cr.P.C. has to be exercised carefully and with caution. It was held in case reported in ***1997(2) Crimes 331 (Orissa High Court) titled Basudev Bhoi vs. Bipadabhanjan Puhan and another*** that inherent power under Section 482 Cr.P.C. should be exercised when no other alternative remedy is available to the litigant. It was held that power under Section 482 Cr.P.C. should be exercised sparingly. It was held in case

reported in ***JT 2015 (4) SC 576 titled Union of India vs. Major General Shri Kant Sharma and another*** that if alternative statutory remedy is available then power under Articles 226 and 227 of Constitution of India should not be invoked. ***(See: JT 2013 (11) SC 387 titled Commissioner of Income Tax and others vs.Chhabil Dass Agarwal. See: (1997)3 SCC 261 titled L. Chander Kumar vs. Union of India (Constitutional Bench of India)*** Point No. 1 is decided against the petitioners.

Point No. 2 (Final Order)

9. In view of above stated facts petition filed under Section 482 Cr.P.C. read with Article 227 of Constitution of India is dismissed. However petitioners shall be at liberty to raise the plea before learned trial Court under Section 239 of Code of Criminal Procedure 1973 that petitioners could not be prosecuted for the same criminal offence more than once as mentioned under Article 20(2) of Constitution of India and thereafter learned trial Court after hearing prosecution and accused persons will decide the plea in accordance with law. Observations made in this order will not effect the merits of case in any manner and will be strictly confine for the disposal of petition filed under Section 482 of Code of Criminal Procedure 1973 read with Article 227 of Constitution of India. Petition is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

1. Cr. Appeal No. 113 of 2013.
2. Cr. Appeal No. 177 of 2013

Judgment reserved on: 25.5.2015
Date of Judgment: June 23 , 2015.

1. Cr.Appeal No.113 of 2013

Vijay Kumar @ Tantu son of Sh.Nater Singh. ..Appellant.
Vs.
State of H.P. ..Respondent.

For the appellant: Mr.Anoop Chitkara, Advocate.
For the respondent: Mr.Ashok Chaudhary, Mr.V.S.Chauhan, Addl. Advocate Generals with Mr. Vikram Thakur, Dy. Advocate General.

2. Cr. Appeal No.177 of 2013

Naresh Thakur ..Appellant.
Vs.
State of H.P. ..Respondent.

For the appellant: Mr. N.S.Chandel, Advocate.
For the respondent: Mr.Ashok Chaudhary, Mr.V.S.Chauhan, Addl. Advocate Generals and Mr.Vikram Thakur, Dy. Advocate General.

Indian Penal Code, 1860- Section 376(2)(g)- Prosecutrix had stayed with her boyfriend in a hotel- accused 'N' who was manager in the hotel entered into the room where prosecutrix was staying and gagged her mouth- he called co-accused 'V' who took the prosecutrix to adjoining room No. 27 where she was raped – prosecutrix had immediately given an affidavit before the Executive Magistrate stating that she was pressurized by the police officials to file complaint- she was examined medically and no rape was committed upon her- her boyfriend had specifically stated that no rape was committed by accused person- he had also filed an

affidavit to this effect- no injuries were detected on her person- case was filed earlier against the prosecutrix under Section 41(2) and 109 Cr.P.C.- all these circumstances create doubt regarding the prosecution version- held, that in these circumstances, accused were wrongly convicted by the Court. (Para-10 to 17)

Cases referred:

Anjlus Dungdung Vs. State of Jharkhand, 2005 (9) SCC 765
Nanhar Vs. State of Haryana 2010 (11) SCC 423
State (Delhi Administration) Vs. Gulzarilal Tandon, AIR 1979 SC 1382
Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622
Bhugdomal Gangaram and others Vs. State of Gujarat, AIR 1983 SC 906
State of UP Vs. Sukhbasi and others, AIR 1985 SC 1224
State of Punjab Vs. Gurmit Singh and others, AIR 1996 (2) titled SCC 384
State of Rajasthan Vs. N.K, 2000 (5) SCC 30
State of HP Vs. Lekh Raj and another, 2000 (1) SCC 247
Madan Gopal Kakkad Vs. Naval Dubey and another, 1992 (3) SCC 204

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Both appeals filed against same judgment and sentence passed by learned Additional Sessions Judge, Fast Track Court Solan in Session trial No. 18-FTC/7 of 2009 decided on dated 12.3.2013 titled State of HP Vs. Vijay Kumar and another. Hence both appeals are consolidated and disposed of vide same judgment in order to avoid conflict judgment.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on intervening night dated 30.11.2008 and 1.12.2008 at about 1.30 mid night accused persons have committed gang rape upon prosecutrix in Krishna hotel in room No.27. It is further alleged by prosecution that on intervening night of 30.11.2008 to 1.12.2008 dated 30.11.2008 prosecutrix had stayed in room No.28 with her boy friend PW12 Rajesh in Krishna hotel. It is further alleged by prosecution that co-accused Naresh Kumar who was manager of Krishna hotel entered into room where prosecutrix was staying during the night and thereafter gagged mouth of prosecutrix. It is further alleged by prosecution that thereafter co-accused Naresh Kumar called co-accused Vijay Kumar @ Tantu on mobile phone and thereafter co-accused Vijay Kumar @ Tantu came in the room of Krishna hotel where prosecutrix was staying and lifted prosecutrix forcibly from room No.28 and took prosecutrix to adjoining room No. 27.It is further alleged by prosecution that thereafter both accused persons un-dressed prosecutrix and thereafter co-accused Vijay Kumar @ Tantu committed sexual intercourse with prosecutrix without her consent. It is further alleged by prosecution that co-accused Naresh Kumar manager of Krishna hotel kept watching so that no one could enter inside room No.27.It is further alleged by prosecution that cell phone of prosecutrix was broken by co-accused Naresh Kumar who was manger of hotel. It is further alleged by prosecution that after committing sexual intercourse upon prosecutrix by co-accused Vijay Kumar @ Tantu both accused persons left the room of Krishna hotel. It is further alleged by prosecution that thereafter prosecutrix came back from room No.27 to room No.28 where her boy friend Rajesh was sleeping unconsciously due to effect of intoxication. It is further alleged by prosecution that thereafter prosecutrix threw water upon PW12 Rajesh with

bucket and thereafter PW12 Rajesh regained senses and thereafter prosecutrix narrated entire incident to her boy friend PW12 Rajesh. It is further alleged by prosecution that thereafter prosecutrix along with PW12 Rajesh came at reception room where co-accused Naresh Kumar was sitting as manager. It is further alleged by prosecution that thereafter application Ext PW10/A was filed in police station Sadar Solan and FIR Ext PW10/B was registered. It is further alleged by prosecution that thereafter prosecutrix was medically examined and medical examination of prosecutrix was conducted by medical board comprising PW18 Dr. Anju Madan and PW20 Dr. Amrish Kapoor. It is further alleged by prosecution that thereafter MLC of prosecutrix Ext PW18/B was obtained. It is further alleged by prosecution that underwear Ext P8, bra Ext P9, top Ext P10 and Jeans Ext P11 and sanitary pad Ext P12 of prosecutrix took into possession and same were sent for chemical examination to FSL Junga. It is further alleged by prosecution that prosecutrix located room No.27 and 28 of Krishna hotel and site plan was prepared. It is further alleged by prosecution that bed sheets of room No.27 and 28 also took into possession by investigating agency. It is further alleged by prosecution that MLC of co-accused Naresh Kumar also obtained. It is further alleged by prosecution that co-accused Naresh Kumar had entered into room No.28 through window of bath room. It is further alleged by prosecution that parcel containing bed sheets, pieces of broken glass, clothes of prosecutrix, blood sample of prosecutrix, vaginal swab and pubic hairs of prosecutrix were deposited in malkhana. It is further alleged by prosecution that thereafter report of Scientific officer FSL Junga Ext PW7/A was obtained. It is further alleged by prosecution that underwear of accused persons also took into possession and blood sample and semen were sent for chemical examination to FSL Junga. It is further alleged by prosecution that photographs of rooms were also obtained. Charge was framed against accused persons on dated 15th July 2010 under Section 376 (2)(G) IPC by learned Presiding Officer Fast Track Court Solan. Accused persons did not plead guilty and claimed trial.

3. Prosecution examined following oral witness and accused adduced following defence witness in support of defence.

Sr.No.	Name of Witness
PW1	Rakesh Kohli
PW2	Sushil Bansal
PW3	Pawan Kumar
PW4	Gulab Singh
PW5	Ram Lal
PW6	Muna
PW7	Ajay Sehgal
PW8	Dr.Subhash Thakur
PW9	Hardev
PW10	Govind Ram
PW11	Jagdish Chand
PW12	Rajesh Thakur
PW13	Chander Mohan
PW14	Sita Ram
PW15	Upasana
PW16	Dinesh Kumar
PW17	Prosecutrix
PW18	Dr.Anju Madan

PW19	Santosh Kumar
PW20	Dr.Amrish Kapoor
DW-1	Narain Singh
DW-2	Manoj Verma
DW-3	Raman Kumar
DW-4	Jai Gopal

4. Prosecution also produced following documentary evidence in support of its case:-

Sr.No.	Description:
Ex.PW1/A	Recovery memo
Ex.PW1/D	Recovery memo
Ex.P-1	Register
Ex.PW1/C	Certificate
Ex.PW2/A	Seizure Memo
Ex.P-6	Parcel
Ex.P-7	Glass (broken)
Ex.PW2/B	Seizure memo
Ex.PW3/A	Seizure memo
Ex.D-1	Affidavit of Rajesh Kumar
Ex.PW3/B	Seizure memo
Ex.D-2	Affidavit of Anu Rana
Ex.PW7/A	Report of FSL
Ex.PW8/A	Application for medical examination of co-accused Vijay Kumar.
Ex.PW8/B	MLC of Vijay
Ex.PW8/C	MLC of Naresh
Ex.PW8/D	Report of FSL, Junga
Ex.PW9/A	Certificate regarding functioning of Computer.
Ex.PW10/A	Application of prosecutrix
Ex.PW10/C	Endorsement of application
Ex.PW10/B	Copy of FIR No. 255/2008
Ex.PW 8D	Daily station diary
Ex.PW13/A	Copy of malkhana register
Ex.PW13/B	Copy of road certificate
Ex.PW18/B	MLC of prosecutrix
Ex.PW17/A	Signature of prosecutrix on MLC
Ex.P-8	Underwear
Ex.P-9	Bra
Ex.P-10	Top
Ex.PW-12	Sanitary pad
Ex.P-11	Jean
Ex.PW20/A	Opinion
Ex.PW20/B	Opinion

Ex.PW18/A	Application for medical examination of prosecutrix
Ex.PW19/A	Spot map
Ex.PW19/C	Seal impression
Ex.PW19/D	Statement of Rajesh Thakur
Ex.PW19/B1to B5	Photographs
Ex.PW19/B 6 to B 10	Negatives
Ex. D-3	Copy of case U/S 41-(2)-109Cr.P.C

5. Statements of accused persons were also recorded under Section 313 Cr PC. Accused persons have stated that they are innocent and they have been falsely implicated in the present case. Learned trial Court convicted both appellants under Section 376(2)(g) IPC and sentenced both accused persons to rigorous imprisonment for a period of ten years and to pay fine to the tune of Rs.10,000/- (Ten thousand) each. Learned trial Court further directed that in default of payment of fine appellants shall further undergo rigorous imprisonment for one year. Learned trial Court further directed that if fine amount realized same would be paid to prosecutrix as compensation.

6. Feeling aggrieved against the judgment and sentence passed by learned Additional Sessions Judge Fast Track Court Solan appellants filed present both appeals.

7. We have heard learned Advocate appearing on behalf of the appellants and learned Additional Advocate General appearing on behalf of respondent and also gone through the entire record carefully.

8. Point for determination before us is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice to appellants.

<u>9.ORAL EVIDENCE ADDUCED BY PROSECUTION:</u>

9.1 PW1 Rakesh Kohli has stated that he is owner of Krishna guest house situated near vegetable market Solan. He has stated that he remained associated in the investigation of case. He has stated that on dated 1.12.2008 he handed over one register of his guest house to Investigating Officer in the presence of witness Anu and Rajesh. He has stated that Ext PW1/A was prepared by police officials. He has stated that register is Ext P1. He has stated that entry regarding stay of Rajesh and prosecutrix in Krishna hotel on dated 30.11.2008 is Ext PW1/B which was filled by Rajesh. He has stated that on dated 30.11.2008 no other persons stayed in his hotel except Rajesh and prosecutrix. He has stated that co-accused Naresh Kumar was care taker of the hotel and at the time of incident co-accused Naresh Kumar was working in hotel. He has stated that thereafter co-accused Naresh Kumar left the job from hotel. He has stated that he issued certificate Ext PW1/C which bears his signature in red circle at point 'A'. He has stated that police officials also took into possession bed sheets from room Nos.27 and 28 and sealed the same in two different parcels. He has denied suggestion that memo Ext.PW1/B was not prepared at the spot. He has stated that total rooms in the guest house are 15. He has stated that he was not present in the night in hotel and he had no personal knowledge about case.

9.2 PW2 Sushil Bansal has stated that he was posted as HHG in police station Sadar Solan since 2008. He has stated that he remained associated in the investigation of

present case. He has stated that on dated 1.12.2008 he along with police officials was present at Krishna hotel bypass Solan. He has stated that police officials took one bed sheet from room No.28 and pieces of broken glass in his presence and in the presence of witness. He has stated that bed sheet and pieces of glass were put in separate cloth parcel and sealed with seal impression 'B' having seven seal impressions on each parcel. He has stated that memo Ext PW2/A was prepared. He has stated that owner of guest house was also present. He has stated that police officials also took into possession one bed sheet Ext.P3 from room No.27 of the guest house. He has stated that bed sheet was wrapped in white clothes and sealed with seal impression 'B'. He has stated that entry register of the guest house was also took into possession by police officials. He has stated that register is Ext P1. He has denied suggestion that no pieces of glass were present in the room of hotel. He has denied suggestion that no pieces of glass were took into possession by police officials. He has stated that he does not know that prosecutrix had informed police officials that nothing was happened with her.

9.3. PW3 Pawan Kumar has stated that he is owner of hotel situated at Sadhupul. He has stated that Rajesh is his younger brother. He has stated that on dated 3.12.2008 he was called at police station Sadar Solan. He has stated that his brother Rajesh was under the influence of liquor. He has stated that prosecutrix was also present there. He has stated that Rajesh and prosecutrix went to the office of Tehsildar Solan and their statements were recorded by Tehsildar at Solan. He has stated that nothing was took into possession by police officials in his presence. Witness was declared hostile. He has admitted that on dated 31.12.2010 Rajesh stayed with prosecutrix in Krishna hotel near bypass road Solan. He has stated that he had not filed any complaint to SP Solan. He has stated that no force was used by police officials to obtain signature of prosecutrix and Rajesh. He has denied suggestion that affidavits of Rajesh and prosecutrix were obtained by force and by way of exercising the influence by accused persons. He has denied suggestion that family of accused persons are influential persons and they have pressurized the prosecutrix and Rajesh to give affidavit to hush up the matter. He has stated that he did not enter in the office of Tehsildar Solan. He has stated that no FIR was registered against police officials. He has denied suggestion that he is deposing falsely at the instance of accused persons.

9.4 PW4 Gulab Singh has stated that he remained posted as Constable at police station Sadar Solan from 2007 to 2010. He has stated that on dated 23.3.2009 he remained associated in the investigation of present case. He has stated that he went through bypass road Solan to Krishna guest house situated near vegetable market Solan. He has stated that PW1 Rakesh Kohli had produced one certificate Ext PW1/C which was took into possession by Investigating Officer vide memo Ext PW1/D.

9.5 PW5 Ram Lal has stated that in the year 2008 he was posted as HHC at police station Sadar Solan. He has stated that on dated 30.11.2008 he was working in police station as MHC and also used to attend telephone calls. He has stated that on dated 1.12.2008 at about 4 AM one Alto car bearing registration No. HP 64-1311 came at police station and one boy and one girl alighted from the car and came to information room police station Sadar Solan. He has stated that he inquired from them about the reason for coming to police station and they disclosed that last night they stayed in Krishna hotel near bypass road Solan and during night time manager of Krishna hotel and another person had given beatings and misbehaved with them. He has stated that he provided pen and white paper to them. He has stated that girl filed written complaint on paper and produced before him. He has stated that prosecutrix had written in her complaint that she was raped in Krishna hotel. He has stated that he immediately informed Station House Officer and thereafter lady constable was called to police station Sadar Solan. He has denied suggestion that

prosecutrix was forced by police officials to file complaint against her wishes. He has denied suggestion that prosecutrix did not intent to file any complaint against accused persons.

9.6 PW6 Muna has stated that he is driver by profession. He has stated that he was driver of truck having registration No.HP-13B-0424. He has stated that Pawan was owner of the truck. He has stated that he along with Raju @ Rajesh were sitting in Tipper and were going to collect bricks to Surajpur. He has stated that Rajesh deboarded truck near Koti and went in Alto car and came towards Solan side. He has stated that he went to Krishna hotel and saw that Rajesh and prosecutrix was sitting in the room. He has stated that he inquired from Rajesh and prosecutrix whether they want to go to home but they refused. He has stated that thereafter he went towards Sadhupul and reached at Solan at 10.30 PM. He has stated that Alto car was parked near Krishna hotel.

9.7. PW7 Ajay Sehgal has stated that he was posted as Scientific Officer Biology and Serology Division State FSL Junga HP Shimla since 12.6.2008. He has stated that he is M.Sc in Botany. He has stated that 15 sealed parcels were received through Constable Dinesh Kumar. He has stated that seals on the parcel were intact and tallied with specimen seals. He has stated that he examined exhibits found in the parcels. He has stated that as per biological and serological examination in the laboratory the result of examination was as under. (1) Blood and semen was not detected on exhibit-1 (Pubic hair Anu Kumari), exhibit 5e (Brassiere Anu Kumari), Exhibit-7(Pubic hair Vijay Kumar), exhibit-11a (Vest Naresh Kumar) exhibit-12 (Pubic hair Naresh Kumar), exhibit-15 (Slides Naresh Kumar) and exhibit-16 (Slides, Vijay Kumar.) (2) Human blood was found in exhibit-2 (Blood sample Anu Kumari) exibit-3 (Blood sample Anu Kumari), exibit-10 (Blood sample Vijay Kumar) and exhibit-14 (Blood sample Naresh Kumar). (3) Blood was detected in traces on exhibit-4 (Vaginal smear slides Anu Kumari) but it was insufficient for further examination human semen was found on the exhibit. (4) Blood was not detected on exhibit-5a (Pants Anu kumari), exhibit-8a (Underwear of Vijay kumar), exhibit 8b (T-shirt Vijay Kumar), exhibit 11-b (Underwear Naresh Kumar) and exhibit-19 (Bed Sheet) but human semen was not found on the exhibits. (5) Human blood was found on exhibit-5b (Upper/hood Anu Kumari) and exhibit-5c (Underwear Anu Kumari) but semen was not detected on the exhibits. (6) Blood was detected in traces on exhibit-5d (Pad Anu Kumari and exhibit-20 (Bed sheet) but it was insufficient for further examination. Semen was not detected on the exhibits. The report Ex.PW7/A (Two leaves) bear his signature in red circle A with stamp of scientific officer. He has stated that blood was detected in traces upon pad and vaginal smear slide which was not sufficient for further examination. He has stated that he could not state definitely whether human blood which was detected was blood of menstruation period or not.

9.8. PW8 Dr. Subhash Thakur has stated that he was posted as Medical Officer Regional Hospital Solan in the year 2008. He has stated that on the request of police officials he examined co-accused Vijay Kumar @ Tantu and co-accused Naresh Kumar. He has stated that co-accused Vijay Kumar @ Tantu was normal built male. He has stated that on examination of external genitalia pubic hairs were present and scortum and penis were well developed. He has stated that he handed over MLC, two sealed sample of pubic hair and samples obtained upon slides to police officials. He has stated that co-accused Vijay Kumar @ Tantu was normal built male and he was capable of performing sexual intercourse. He has stated that MLC Ext PW8/B was issued by him. He has stated that he also examined co-accused Naresh Kumar and he was capable of performing sexual intercourse. He has stated that MLC Ext.PW8/B bears his signature. He has admitted that no human blood or semen was detected on pubic hair examined by them. He has admitted that in young age generally boys have night falls and semen comes out.

9.9. PW9 HC Hardev has stated that in the year 2008 he remained posted as MHC Police Station Solan. He has stated that on the direction of Station House Officer he recorded FIR in the computer and also issued CIPA certificate regarding functioning of computer. He has stated that certificate Ext PW9/A bears his signature in red circle 'A'. He has stated that application was not given in writing to SHO in his presence. He has stated that SHO had given him one application to fill it in the computer.

9.10 PW10 Inspector Govind Ram has stated that he remained posted as SHO police station Sadar Solan. He has stated that HHC Ram Lal informed him telephonically to come to police station and thereafter he came to police station Solan. He has stated that one girl and one boy were present at police station. He has stated that prosecutrix handed over complaint Ext PW10/A and on the basis of complaint FIR Ext.PW10/B was recorded in the computer at police station Solan by MHC Hardev Singh. He has stated that after registration of FIR investigation was handed over to ASI Santosh Kumar. He has denied suggestion that prosecutrix requested him not to lodge complaint against accused persons. He has denied suggestion that prosecutrix was forced to sign complaint without her consent.

9.11. PW11 Jagdish Chand has stated that he remained posted as SHO police station Sadar Solan. He has stated that after completion of investigation he prepared challan.

9.12. PW12 Rajesh Thakur has stated that he is owner of guest house at Sadhupul and he was also owner and driver of truck bearing registration No.HP-13-0403. He has stated that prosecutrix is known to him because prosecutrix used to visit to his guest house along with her family members. He has stated that he also used to visit at the house of prosecutrix at Kandaghat. He has stated that prosecutrix was working at Chandigarh and he also used to visit at the house of prosecutrix at Chandigarh. He has stated that he wanted to marry with prosecutrix. He has stated that he along with prosecutrix proceeded to Solan from Parwanoo. He has stated that prosecutrix met him in the evening at Parwanoo. He has stated that number of car of the prosecutrix was HP-64-1311. He has stated that he and prosecutrix consumed meal and wine at Dharampur. He has stated that in the way his driver Manish @ Munna met him. He has stated that prosecutrix was not feeling well and she was vomiting and thereafter he took a room in Krishna hotel. He has stated that thereafter they slept in the night in the room of Krishna hotel. He has stated that police officials came in the night at about 2.30 and inquired about him and thereafter police officials started beatings him. He has stated that he was kept in separate room by police officials. He has stated that he tried to talk with prosecutrix but police officials did not allow him to talk with prosecutrix. He has stated that co-accused Vijay Kumar @ Tantu and co-accused Naresh Kumar have not committed anything with prosecutrix and accused persons have been falsely implicated in the present case. Witness was declared hostile. He has admitted that he waited prosecutrix at Parwanoo. He has stated that prosecutrix came to Parwanoo in the evening in Alto car and thereafter he and prosecutrix proceeded to Solan in a car having registration No. HP-64-1311. He has stated that he had not married with prosecutrix till date. He has stated that prosecutrix is not his girl friend as of today. He has admitted that he and prosecutrix asked manager of Krishna hotel at Solan about dinner and manager of Krishna hotel told him that dinner would not be prepared in hotel. He has denied suggestion that co-accused Vijay Kumar @ Tantu came to Krishna hotel in his room with dinner and one bottle of liquor. He has denied suggestion that he consumed dinner in hotel. He has denied suggestion that he had taken many pegs of liquor. He has admitted that he along with prosecutrix slept in the room of Krishna hotel. He has denied suggestion that at about 2 PM prosecutrix had thrown water upon him to wake him. He has denied suggestion that co-accused Naresh Kumar had tried to rape prosecutrix. He has denied suggestion that co-accused Vijay Kumar @ Tantu took prosecutrix in the adjoining room of

hotel and committed rape with prosecutrix without her consent. He has denied suggestion that prosecutrix had filed written complaint to police. He has stated that he did not file any complaint regarding beatings to him against police officials. He has stated that he did not receive any injury. He has stated that he does not know whether medical examination of prosecutrix was conducted or not. He has denied suggestion that prosecutrix was working as receptionist in Indian Palace Hotel Mani Mazra since 2/3 years. He has denied suggestion that at about 11 PM after consuming dinner he went to sleep in the room of Krishna hotel. He has denied suggestion that at about 1.30 AM co-accused Naresh Kumar manager of Krishna hotel entered into the room through window of bathroom. He has denied suggestion that co-accused Naresh Kumar gagged mouth of prosecutrix. He has denied suggestion that prosecutrix also told him that she took glass of water from the table and tried to save her but co-accused Naresh Kumar had snatched the glass and thrown on the floor of hotel. He has denied suggestion that he was under the influence of liquor and he did not wake up. He has denied suggestion that co-accused Naresh Kumar contacted another co-accused Vijay Kumar @ Tantu on mobile phone. He has denied suggestion that thereafter after 4/5 minutes co-accused Vijay Kumar @ Tantu came in the room of hotel. He has denied suggestion that prosecutrix told him that co-accused Vijay Kumar @ Tantu immediately lifted the prosecutrix and took her to adjoining room. He has denied suggestion that prosecutrix told him that thereafter co-accused Vijay Kumar @ Tantu removed Jeen of prosecutrix immediately after putting her on bed. He has denied suggestion that prosecutrix told him that accused persons gagged her mouth when prosecutrix tried to raise hue and cry and when accused persons raped her. He has denied suggestion that co-accused Vijay Kumar @ Tantu committed rape with prosecutrix and after committing rape co-accused Vijay Kumar fled from the spot. He has denied suggestion that he resiled from his earlier statement in order to save accused persons.

9.13 PW13 Chander Mohan has stated that he remained posted as MHC Malkhana Incharge. He has stated that on dated 1.12.2008 ASI Santosh Kumar deposited three cloth parcels sealed with seal impression 'B'. He has stated that he recorded entry in malkhana register and was kept in safe custody. He has stated that malkhana register is Ext.PW13/A. He has stated that sealing and recovery of articles were not effected in his presence.

9.14. PW14 Constable Sita Ram has stated that in the year 2008 he was posted as Constable at police station Sadar Solan. He has stated that on dated 1.12.2008 Medical officer Civil Hospital Solan handed over him 12 parcels along with sample of seal. He has stated that on the same day he handed over case property to MHC malkhana Incharge. He has stated that case property remained intact in his possession. He has denied suggestion that no parcel was handed over to him. He has stated that in his presence no sealing was done and no recovery was effected.

9.15. PW15 LC Upasana has stated that in the year 2008 he remained posted as LC at police post City Solan. He has stated that on dated 1.12.2008 he was deputed to collect the samples. He has stated that medical examination of prosecutrix was conducted at Civil Hospital Solan. He has stated that he deposited case property with MHC police station Sadar Solan. He has stated that case property remained intact in his custody. He has denied suggestion that no sealing was done in his presence. He has stated that parcels were not prepared and recovered in his presence. He has denied suggestion that no parcels were handed over to him.

9.16. PW16 HC Dinesh Kumar has stated that in the year 2008 he was posted as Constable at police station Sadar Solan. He has stated that on dated 3.12.2008 MHC handed over him case property 20 parcels in a sealed condition along with sample of seal 'B'.

He has stated that he deposited case property in the office FSL Junga. He has stated that case property remained intact in his custody.

9.17. PW17 prosecutrix has stated that she was working as receptionist in Indian Palace Hotel at Panchkula. She has stated that on dated 1.12.2008 she had travelled by car having registration No. HP-64-1311 which belongs to her mother and proceeded towards Kandaghat where her mother was residing. She has stated that car was driven by Rajesh who was her friend at the relevant time. She has stated that she reached at Krishna resort at about 9.30 PM. She has stated that Rajesh her boy friend had booked room in the resort and entry to this effect was recorded in resort register. She has stated that she had stayed with her boy friend Rajesh in night in the room of resort. She has stated that driver of Rajesh namely Munna who was truck driver came to her room and he stayed in the room for about 10 minutes. She has stated that thereafter she consumed dinner which was procured from outside as dinner was not available in the resort. She has stated that after consuming dinner Munna left the room. She has stated that she slept in the room of resort. She has stated that room was bolted from inside and window of bath room was kept open. She has stated that co-accused Naresh Kumar entered inside the room of resort from window of bath room. She has stated that after entering into room co-accused Naresh Kumar gagged her mouth and asked her to move to next room. She has stated that she refused to do so. She has stated that thereafter co-accused Naresh Kumar called another co-accused Vijay Kumar @ Tantu. She has stated that co-accused Vijay Kumar came in the room after 20/25 minutes and thereafter co-accused Vijay Kumar lifted her in his lap and took her into next adjoining room. She has stated that she was wearing Jeans and Top at the relevant time. She has stated that despite of her protest both accused un-dressed her clothes. She has stated that thereafter rape was committed by co-accused Vijay Kumar @ Tantu and another co-accused Naresh Kumar had gone outside the room. She has stated that co-accused Vijay Kumar @ Tantu told to co-accused Naresh Kumar that no one should come inside room. She has stated that her cell phone was broken by co-accused Naresh Kumar. She has stated that incident took place at about 2 PM and thereafter both accused persons left and thereafter she came back in previous room where her boy friend Rajesh was sleeping in unconscious condition. She has stated that she threw water upon her boy friend Rajesh and he came to senses and thereafter she narrated entire incident to him. She has stated that thereafter she along with her boy friend Rajesh went to reception room where co-accused Naresh Kumar manager of the hotel was sitting. She has stated that thereafter she along with her boy friend Rajesh went to police station Sadar Solan and FIR Ext PW10/B was registered. She has stated that thereafter police officials took her to RH Solan where she was medically examined by Medical Officer. She has stated that she handed over her Jeans, Top, underwear and Bra to Medical officer which were sealed. She has stated that thereafter she was took to resort by police officials and thereafter bed sheet and broken pieces of glass were took into possession by police officials vide seizure memo Ext PW2/A. She has admitted that Rajesh was her boy friend. She has admitted that her boy friend Rajesh had physical relations with her. She has stated that she had performed sexual intercourse with her boy friend Rajesh for 2/3 times. She has admitted that her boy friend Rajesh also visited at her residential house at Chandigarh. She has admitted that she was arrested along with other girls namely Pooja Baghele, Harwinder Gill, Sapna, Lucky Thakur, Priyanka, Mamta and Rajeev in a case under Section 41(2) and 109 Cr.PC. She has admitted that above named girls were dancing in the hotel out of which one was her sister. She has stated that the name of her sister is Priya @ Anju. She has stated that she was arrested by police officials and thereafter she was released on bail. She has admitted that she was undergoing menstruation period when alleged incident took place. She has stated that she does not know whether she was wearing sanitary napkin pad at the time of menstruation period or not. She has denied suggestion that she had sexual intercourse with her boy friend Rajesh

on the alleged date of incident. She has denied suggestion that her boy friend Rajesh had consumed only two pegs and he was in senses. She has denied suggestion that on the alleged date of incident police officials took her and her boy friend Rajesh to police Station. She has denied suggestion that she has falsely implicated accused persons in present case. She has stated that she was not married. She has stated that co-accused Naresh Kumar did not commit rape with her. She has stated that she was asked to enter into compromise with accused persons subject to payment of Rs.1,00,000/- (One lac). She has stated that money was not paid to her. She has denied suggestion that just to grab money from accused persons false case was instituted by her.

9.18. PW18 Dr.Anju Madan has stated that PW18 was posted as Medical Officer in Regional Hospital Solan in the year 2008. Medical officer has stated that police filed application Ext PW18/A for conducting medical examination of prosecutrix who was brought by police of alleged history of sexual assault in Krishna hotel by a manager of Krishna hotel where she was staying with her boy friend Rajesh who was unconscious at that time. Medical officer has stated that board of two members of doctors was formed. Medical officer has stated that patient was found normal. Medical officer has stated that the height of patient was 5 feet. Medical officer has stated that pulse rate of the prosecutrix was 80 minutes and BP 100/80 mm. Medical officer has stated that breast of the prosecutrix was well developed. Medical officer has stated that pubic hairs were present. Medical officer has stated that there was no mark of injury in the form of abrasion or contusion on the part of body including external genitalia. Medical officer has stated that there was no bleeding from the valva. Medical officer has stated that there was smelling of discharge with white colour. Medical officer has stated that there was no injury or bleeding in the vagina of prosecutrix. Medical Officer has stated that hymen was torn at 3 0'clock position. Medical officer has stated that there was no stains of semen or blood on the Jeans. Medical officer has stated that prosecutrix has menstruation four days ago. Medical officer has stated that there was no semen stains on the external genitalia. Medical officer has stated that MLC Ext PW18/B was issued. Medical officer has stated that after receiving FSL report blood was detected in traces and human semen was also detected upon vaginal slides of prosecutrix. Medical officer has stated that underwear Ext P8, bra Ext P9, top Ext P10, Jeans Ext P11 and Sanitary Pad Ext P12 are the same which were took into possession at the time of examination of prosecutrix. Medical officer has stated that victim was habitual of sexual intercourse. Medical officer has stated that no semen stain was found on the external genital part of the victim. Medical Officer has stated that there was no mark of violence on victim body and there was no injury on the person of victim. He has stated that only by DNA test it could be found that semen were of any particular person.

9.19 PW19 ASI Santosh Kumar has stated that he remained posted as Investigating Officer in police station Solan w.e.f. 2007 to 2009. He has stated that on dated 1.12.2008 after registration of FIR investigation of present case was handed over to him by SHO Police Station Solan and he along with police officials went to Krishna hotel. He has stated that manager of the hotel took him to the room in which prosecutrix had stayed. He has stated that manager of the hotel also took him to the room where rape was committed by co-accused Vijay Kumar @ Tantu upon the prosecutrix. He has stated that both rooms were checked and locked and key was took into possession. He has stated that manager of Krishna hotel had joined investigation and search of co-accused Vijay Kumar @ Tantu was carried out and he was spotted at village Kuthar. He has stated that he could identify manager of the hotel and co-accused Vijay Kumar @ Tantu. He has stated that both accused persons were brought to police station and application was filed for medical examination of prosecutrix and accused persons and thereafter MLC was obtained. He has stated that thereafter prosecutrix was brought to the spot and spot was inspected in the presence of

prosecutrix and spot map Ext PW19/A was prepared at the instance of prosecutrix. He has stated that photographs Ext PW19/B1 to Ext PW19/B5 were snapped by him. He has stated that negatives are Ext PW19/B6 to Ext PW19/B10. He has stated that thereafter bed sheet of room No.28 and broken pieces of glass were took into possession and the same were sealed in parcel. He has stated that bed sheet of room No.27 also obtained and sealed in a parcel. He has stated that underwear Ext P8, bra Ext P9, Top Ext P10 and sanitary pad Ext P12 are the same which were took into possession by medical officer at the time of medical examination of prosecutrix. He has stated that bed sheet Ext P5 is the same which was took into possession by him from room No.28. He has denied suggestion that he visited Krishna hotel in connection with raid after receiving information that immoral trafficking was going in Krishna hotel. He has denied suggestion that prosecutrix and her boy friend Rajesh were apprehended and they were brought to police station. He has denied suggestion that under the direction of politician accused persons were falsely implicated in the present case. He has denied suggestion that despite affidavit given by prosecutrix and her boy friend Rajesh accused persons were falsely implicated in the present case. He has stated that broken glasses were not sent to FSL Junga for obtaining finger print. He has admitted that prosecutrix was staying in the room of Krishna hotel with her boy friend Rajesh. He has stated that no semen of accused persons were took into possession by Medical officer for comparison with recovered semen. He has stated that co-accused Naresh Kumar was care taker of hotel. He has stated that there was no evidence that co-accused Naresh Kumar had given beatings to prosecutrix and there was no evidence of pulling hairs of prosecutrix. He has stated that allegation of rape was not levelled by the prosecutrix against co-accused Naresh Kumar. He has stated that affidavits were produced before him by prosecutrix and Rajesh. He has stated that it did not come in his investigation that prosecutrix was offered Rs.1,00,000/- (One lac). He has stated that prosecutrix and her boy friend were not available after handing over of affidavits and both had gone missing thereafter. He has denied suggestion that false case was filed against accused persons.

9.20. PW20 Dr.Amrish Kapoor has stated that in the year 2009 he was posted as Gynecologist in Zonal Hospital Solan. He has stated that he found blood traces and also found human semen in the vaginal slide of prosecutrix. He has stated that definite opinion was not given because DNA test of semen and DNA test of blood of accused persons was not supplied for comparison. He has stated that intercourse was committed upon prosecutrix on the basis of traces of human semen in the vaginal slide of prosecutrix. He has stated that there was no mark of injury on the body of prosecutrix. He has stated that there was no injury upon genital area of prosecutrix or upon other parts of prosecutrix body. He has stated that there was no resistance on the part of prosecutrix while performing sexual intercourse.

9.21. DW1 Narain Singh has stated that he was posted as Naib Tehsildar-cum-Executive Magistrate Solan w.e.f. June 2008 to April 2011. He has stated that prosecutrix came to him for attestation of affidavit executed by prosecutrix in connection with false implication of co-accused Vijay Kumar @ Tantu and co-accused Naresh Kumar. He has stated that he asked prosecutrix specifically before attestation of affidavit Ext D2 whether she had executed and signed the affidavit without any threat, coercion or pressure. He has stated that prosecutrix was identified by local Advocate Sh. Manoj Verma. He has stated that after fully satisfying himself he attested affidavit Ext D2 as Executive Magistrate. He has stated that similarly Rajesh also appeared before him and he verified the contents mentioned in the affidavit by explaining the statement made in affidavit Ext D1. He has stated that Rajesh appeared before him and he was identified by local Advocate Sh. Manoj Verma. He has stated that after fully satisfying himself he attested affidavit which bears his

signature. He has stated that prosecutrix and Rajesh have orally stated that wrong FIR under Section 376 IPC was registered.

9.22. DW2 Manoj Verma has stated that he is practicing as Advocate at District Court Solan since September 2002. He has stated that prosecutrix met him on 1.12.2008 in the premises of Tehsildar at Solan. He has stated that mother of prosecutrix was his client and he was familiar with the prosecutrix. He has stated that prosecutrix had executed affidavit Ext D2 and signed the same at point A to D in his presence. He has stated that prosecutrix also signed in the register. He has stated that he also signed as identifier. He has stated that he inquired from prosecutrix whether she had executed the affidavit without any coercion, pressure or threat from any person. He has stated that thereafter prosecutrix told him that she had executed affidavit without any threat, coercion or pressure. He has stated that similarly Rajesh had also executed affidavit Ext D1. He has stated that thereafter prosecutrix and Rajesh appeared before Executive Magistrate for attestation of affidavit. He has stated that thereafter Executive Magistrate before attesting the affidavit asked the prosecutrix and Rajesh whether they have executed the affidavit without any coercion, force, threat or pressure. He has stated that after questioning deponent and satisfying himself Executive Magistrate attested the affidavit.

9.23. DW3 Raman Kumar MHC police station Dharampur District Solan HP has stated that he has brought document Ext D3 comprising three pages and the same is true as per original record.

9.24. DW4 Jai Gopal Sub Inspector CID Unit Solan HP has stated that he remained posted as Investigating Officer at Dharampur w.e.f. 2008 to May 2010. He has stated that he had visited Pine View Hotel Dharampur from where accused No. 1 to 7 mentioned in Ext D3 were recovered and they were booked under Section 41(2) and 109 Cr.PC. He has stated that he had investigated the case. He has stated that girls were in semi nude condition at the time of recovery from hotel. He has stated that girls were six in number. He has stated that one Rajiv Kumar was also found in the hotel where 30/35 persons were sitting in hotel who were watching girls in half naked condition at about 9.45 PM. He has stated that girls were called by some gang leader and they were directed to expose themselves in semi nude condition. He has stated that SIU officials disclosed to him that gang leader had already absconded from the hotel in a vehicle having registration No.PB-30-B-0027. He has stated that prosecutrix was impleaded as co-accused No.4 in document Ext D3. He has stated that after investigation accused persons were produced before Executive Magistrate Solan.

(A). Affidavit given by major prosecutrix on dated 1.12.2008 Ext D2 before Executive Magistrate District Solan placed on record is fatal to prosecution.

10. It is the case of prosecution that on intervening night of 30.11.2008 and 1.12.2008 prosecutrix along with her boy friend Rajesh came in vehicle having registration No.HP-64-1311 and stayed in room No. 28 of Krishna hotel situated at bypass road vegetable market Solan HP. It is further case of prosecution that on intervening night of 30.11.2008 and 1.12.2008 between 1.30 AM to 2.30 AM co-accused Naresh Kumar who was officiating manager of Krishna hotel entered into room No.28 through window of bath room and thereafter co-accused Naresh Kumar gagged mouth of prosecutrix due to which prosecutrix got up and tried to save her life and she lifted glass lying on the table but the same was snatched by co-accused Naresh Kumar forcibly and thrown on the floor of hotel. It is further case of prosecution that Rajesh boy friend of prosecutrix was under intoxication. It is further case of prosecution that thereafter co-accused Naresh Kumar telephonically called co-accused Vijay Kumar @ Tantu who reached in the room in short time and thereafter he lifted prosecutrix and took her to adjoining room No.27 and thereafter committed rape upon

prosecutrix. It is also proved on record that thereafter at 5.30 AM on dated 1.12.2008 prosecutrix filed FIR No. 255 of 2008 against accused persons under Section 376(2) read with Section 34 IPC. It is also proved on record that thereafter prosecutrix on dated 1.12.2008 had given affidavit Ext D2 before Executive Magistrate Solan. There is recital in affidavit Ext D2 placed on record that on dated 30.11.2008 prosecutrix along with her boy friend Rajesh came from Chandigarh to Solan and stayed at Krishna hotel Solan. There is further recital in affidavit that Rajesh boy friend of prosecutrix telephoned Vijay Kumar who brought dinner and thereafter he left the hotel. There is recital in affidavit that in the morning police officials came in the hotel and forcibly obtained signature of prosecutrix upon papers. There is further recital in affidavit that prosecutrix was pressurized by police officials to file complaint against accused persons. There is further recital in affidavit Ext D2 placed on record given by prosecutrix that medical examination of prosecutrix was got conducted forcibly. There is further recital in affidavit that no incident of rape took place. There is further recital in affidavit that accused persons did not commit any rape with prosecutrix. Affidavit is duly verified by prosecutrix and duly attested by Executive Magistrate Solan HP. Executive Magistrate Solan HP has also given certificate in the reverse page of affidavit Ext D2 that contents of affidavit were explained to prosecutrix and she had admitted the contents of the affidavit as correct. Prosecutrix has admitted when she appeared in witness box that affidavit Ext D2 bears her signature and admitted that she had signed the affidavit. Prosecutrix has specifically stated that she entered into compromise with accused persons subject to payment of Rs.1,00,000/- (One lac). Prosecutrix has stated that money was not paid to her. It is well settled law that in rape cases direct evidence is not available and testimony of the victim in the case of sexual assault is vital. It is well settled law that sole testimony of prosecutrix is sufficient to convict the accused if same is trustworthy, reliable and inspires confidence of Court. It is well settled law that for compelling reason the Court can look corroborative evidence. It is well settled law that prosecutrix in rape case is not accomplish and therefore rule requiring corroboration of accomplish evidence does not apply to the testimony of prosecutrix. It is well settled law that corroboration of evidence of an adult prosecutrix in sex offence case would be insisted only if the evidence of prosecutrix is seen infirmed and not trustworthy and rendered the testimony of prosecution un-worthy of credit. It is well settled law that rule requiring corroboration is not rule of law but rule of prudence. It is well settled law that when the evidence of prosecutrix is self contradictory Courts are under legal obligation to see corroborative evidence. It is proved on record in present case that affidavit Ext D2 was relied by prosecution and when the challan was filed before trial Court then prosecution in the list of documentary evidence had also relied upon affidavit Ext D2 given by prosecutrix before Executive Magistrate Solan (HP). Even affidavit Ext D2 was took into possession by prosecution during investigation stage vide seizure memo Ext PW3/B placed on record. Affidavit Ext D2 given by prosecutrix before Executive Magistrate was part of challan filed by prosecution against accused persons. It is well settled law that affidavit means a statement sworn before a person having authority to administer on oath. Under Section 296 Cr.PC. affidavit can be given relating to proof of fact. It is well settled law that affidavit can be attested by (1) Judge (2) Judicial Magistrate (3) Executive Magistrate (4) Oath Commissioner (5) Notary appointed under Notary Act 1952. It is held that in view of contradictory facts given by prosecutrix on the same date i.e. 1.12.2008 in FIR and in affidavit Ext D2 placed on record it is not expedient in the ends of justice to rely upon contradictory testimony of prosecutrix. Hence it is held that contradictory testimony of prosecutrix is fatal to the prosecution.

(B).Testimony of boy friend of prosecutrix namely PW12 Rajesh is also fatal to prosecution.

11. It is the case of prosecution that during intervening night of 30.11.2008 and 1.12.2008 prosecutrix and her boy friend Rajesh stayed in Krishna hotel and thereafter

between 1.30 AM and 2 AM co-accused Naresh Kumar entered into room of prosecutrix and thereafter co-accused Naresh Kumar called co-accused Vijay Kumar @ Tantu and thereafter co-accused Vijay Kumar lifted prosecutrix from room No.28 and took prosecutrix to room No.27 and committed offence of rape. PW12 Rajesh when he appeared in witness box has specifically stated that co-accused Naresh Kumar and co-accused Vijay Kumar @ Tantu did not commit any criminal offence of rape with prosecutrix. PW12 Rajesh boy friend of prosecutrix has specifically stated that both accused persons have been falsely implicated in the present case by police officials. PW12 Rajesh has specifically stated in positive manner that during the night period at about 2.30 PM police officials came in hotel and beaten him and kept him in a separate room. PW12 Rajesh has specifically stated in positive manner that he tried to talk with prosecutrix but police officials did not allow him to talk with prosecutrix. PW12 Rajesh boy friend of prosecutrix who was present in room No.28 of Krishna hotel during night period did not support the prosecution story as alleged by prosecution. PW12 Rajesh boy friend of prosecutrix has specifically stated in positive manner that he was not in intoxicated condition on intervening night of 30.11.2008 and 1.12.2008. Hence it is held that testimony of PW12 Rajesh is fatal to the prosecution.

(C).Affidavit Ext D1 given by PW12 Rajesh boy friend of prosecutrix is also fatal to prosecution.

12. We have carefully perused affidavit Ext D1 given by Rajesh Thakur placed on record. Affidavit Ext D1 is also relied by the prosecution because prosecution took into possession affidavit Ext D1 during investigation process vide seizure memo Ext PW3/A placed on record. Even prosecution has also relied upon affidavit Ext D1 when prosecution filed challan and in the list of documents filed along with challan prosecution had relied upon affidavit Ext D1 placed on record given by Rajesh Thakur. We have carefully perused the contents of affidavit Ext D1 placed on record. There is recital in affidavit Ext D1 placed on record that police officials have beaten deponent and also broken mobile phone of the deponent. There is further recital in affidavit that accused persons have not committed any sexual offence with prosecutrix. Affidavit Ext D1 placed on record is duly verified in accordance with law and duly attested by Executive Magistrate Solan. A certificate has also been given by Executive Magistrate Solan that contents of affidavit were read over and explained to deponent and deponent had admitted the contents of the affidavit as correct. Hence it is held that affidavit Ext D1 given by Rajesh boy friend of prosecutrix placed on record is also fatal to the prosecution.

(D). Testimony of DW1 Narayan Singh Tehsildar is also fatal to prosecution.

13 We have carefully perused the testimony of DW1 Narayan Singh Tehsildar. DW1 Narayan Singh has specifically stated in positive manner that prosecutrix and her boy friend Rajesh personally appeared before him and filed affidavits Ext D1 and D2. DW1 Narayan Singh has specifically stated that he explained the contents of affidavit Ext D1 and D2 to the deponents and thereafter deponents have admitted the contents of the affidavit as correct before him and thereafter he attested the affidavit. Testimony of DW1 Narayan Singh Tehsildar is also trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of DW1 Narayan Singh. There is no evidence on record that DW1 Narayan Singh Tehsildar has hostile animus against prosecutrix prior to the incident. Hence it is held that testimony of DW1 Narayan Singh Tehsildar Nagrota Bagwan is fatal to prosecution.

(E). Non-resistance on the part of prosecutrix is also fatal to the prosecution.

14. It is the case of prosecution that prosecutrix was major at the time of incident. PW18 Dr.Anju Madan has specifically stated that there was no abrasion or contusion upon the body of prosecutrix including external genitalia. PW18 Dr. Anju Madan

has specifically stated that there was no bleeding from valva and Medical Officer has specifically stated in positive manner that she did not observe any injury or bleeding in the vagina of prosecutrix. PW18 Dr. Anju Madan has specifically stated that hymen was torn at 3 O'clock position. PW18 Dr. Anju Madan has specifically stated that she did not observe any semen stains on external genitalia of prosecutrix. Hence it is held that above stated testimony of Medical Officer is fatal to prosecution.

(F). Testimony of PW20 Dr. Amrish Kapoor is also fatal to prosecution.

15. PW20 Dr. Amrish Kapoor has specifically stated when he appeared in witness box that DNA test of semen of accused persons and DNA test of blood of accused persons were not supplied by investigating agency for comparison and for connection of accused persons in criminal offence. There is no evidence on record in order to prove that DNA test of semen and DNA test of blood of accused persons were found upon vagina of prosecutrix or upon any other part of prosecutrix or upon the clothes of prosecutrix in order to connect accused persons with the commission of criminal offence of sexual assault. It is held that testimony of PW20 Dr.Amrish Kapoor is also fatal to prosecution.

(G). Report of FSL Junga Ext PW7/A is not helpful to the prosecution.

16. We have carefully perused the report of FSL Junga Ext PW7/A placed on record. As per chemical analyst report Ext PW7/A placed on record blood and semen was not detected upon pubic hair and bra of prosecutrix and upon pubic hair, vest and slides of accused persons. As per chemical analyst report blood was detected in traces of vaginal smear slides of prosecutrix but same was insufficient for further examination. As per chemical analyst report human semen was found on vaginal slides of prosecutrix but prosecution did not obtain semen of accused persons and did not sent semen of accused persons to chemical examiner for comparison in order to connect accused persons with human semen found upon vaginal slides of prosecutrix. Even blood found upon pad and bed sheet was insufficient for further examination and semen was not detected on the pad and bed sheet. In the absence of comparison of semen of accused persons with human semen found in vaginal smear slides of prosecutrix it is not expedient in the ends of justice to convict accused persons.

(H) Earlier case filed against prosecutrix under Section 41(2) and 109 Cr.PC is also fatal to prosecution.

17. It is proved on record that case under Section 41(2) and 109 Cr.PC was filed against prosecutrix in the Court of Sub Divisional Magistrate Solan HP prior to incident and same has created doubt in the mind of Court qua testimony of prosecutrix. It was held in case reported in 2005 (9) SCC 765 titled Anjlus Dungdung Vs. State of Jharkhand that suspicion however strong cannot take place of proof. It was held in case reported in 2010 (11) SCC 423 titled Nanhar Vs. State of Haryana that prosecution must stand or fall on its own leg and it cannot derive any strength from the weakness of the defence. It was held in case reported in AIR 1979 SC 1382 titled State (Delhi Administration) Vs. Gulzarilal Tandon that moral conviction however strong or genuine cannot amount to legal conviction sustainable in law. Also See: AIR 1984 SC 1622 titled Sharad Birdhichand Sarda Vs. State of Maharashtra, See AIR 1983 SC 906 titled Bhugdomal Gangaram and others Vs. State of Gujarat, See AIR 1985 SC 1224 titled State of UP Vs. Sukhbasi and others. It is well settled law that testimony of prosecutrix must be appreciated in the back ground of entire case and trial Court must be alive to its responsibility and should be sensitive while dealing with cases involving sexual molestation. See AIR 1996 (2) titled SCC 384 titled State of Punjab Vs. Gurmit Singh and others, See 2000 (5) SCC 30 titled State of Rajasthan Vs. N.K, See 2000 (1) SCC 247 titled State of HP Vs. Lekh Raj and another, See 1992 (3) SCC 204 titled Madan Gopal Kakkad Vs. Naval Dubey and another.

18. In view of above stated facts it is held that learned trial Court had not properly appreciated oral as well as documentary evidence placed on record. Criminal Appeal No. 113 of 2013 titled Vijay Kumar Vs. State of HP and Criminal Appeal No. 177 of 2013 titled Naresh Thakur Vs. State of HP are accepted and judgment and sentence passed by learned trial Court are set aside. Both appellants namely Vijay Kumar @ Tantu and Naresh Thakur are acquitted qua criminal offence punishable under Section 376 (2)(g) IPC by way of giving them benefit of doubt. Certified copy of judgment be placed in Criminal Appeal No. 177 of 2013 titled Naresh Thakur Vs. State of HP. Record of learned trial Court along with certified copy of judgment be sent back forthwith. Registrar Judicial will issue release warrant in favour of appellants forthwith in accordance with law if appellants are not required in any other criminal case. Criminal Appeal No. 113 of 2013 titled Vijay Kumar @ Tantu Vs. State of HP and Criminal Appeal No. 177 of 2013 titled Naresh Thakur Vs. State of HP are disposed of. Pending application if any also stands disposed of.

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

Ashok Kapoor …..Petitioner/Defendant.
Versus
Murtu Devi …..Respondent/Plaintiff.

CMPMO No.52 of 2014.
Judgment reserved on : 18.06.2015.
Date of decision: 24.06.2015.

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff sought a relief of injunction pleading that 'D' was owner to the extent of ½ share- successor of the 'D' got the suit land recorded in his exclusive possession in connivance with the revenue staff- he was threatening to raise construction without getting the suit land partitioned- defendant pleaded that he was exclusive owner of the suit land- he had started construction in the month of February, 2012 and had spent more than Rs.7 lakh- lower Courts had recorded a finding that plaintiff is owner to the extent of ¼ share, whereas defendant is owner to the extent of ½ share- a transfer by the co-owner makes the transferee a co-owner- such transferee is entitled to all the rights and obligation which the other co-owners have- a co-owner has right to enter upon the common property and to take possession of the whole subject to the equal rights of other co-owners- he is not entitled to injunction for restraining other co-owners from exceeding his rights in common property absolutely unless the act of co-owner amounts to ouster- mere making of construction or improvement in the common property does not amount to ouster- if the act of the co-owner amounts to diminution in the value of the property then a co-owner can seek an injunction to prevent the diminution- a co-owner out of possession can seek an injunction to prevent an act, which is detrimental to his interest- plaintiff has to establish that the act complained of would cause some injury which would affect his position and enjoyment- defendant had claimed a right to raise construction over the suit land - he had claimed that he is in peaceful and uninterrupted possession of the suit land which amounts to ouster- therefore, in these circumstances, injunction was rightly granted. (Para-9 to 40)

Cases referred:

Kennedy versus De Trafford, 1897 AC 180
Sukh Dev versus Parsi and others AIR 1940 Lahore 473

Chhedi Lal and another versus Chhotey Lal AIR (38) 1951 Allahabad 199
Sant Ram Nagina Ram versus Daya Ram Nagina Ram AIR 1961 Punjab 528
Jose Caetano Vaz versus Julia Leocadia Lucretia Fernandes AIR 1969 Goa 90
Sachindra Nath Sarkar and others versus Binapani Basu and others AIR 1976 Calcutta 277
Gouri and others versus Dr. C.H. Ibrahim and another AIR 1980 Kerala 94
Bhartu versus Ram Sarup 1981 PLJ 204
Rukmani and others versus H.N. Thirumalai Chettiar AIR 1985 Madras 283
Prakash Chand Sachdeva versus The State and another AIR 1994 SC 1436
Prakash S.Akotkar and others vs. Mansoorkha Gulabkha and others AIR 1996 Bombay 36
Bachan Singh versus Swaran Singh AIR 2001 Punjab and Haryana 112
Tanusree Basu and others versus Ishani Prasad Basu and others (2008) 4 SCC 791
Jai Singh and others versus Gurmej Singh 2009 (1) SLJ (SC) 714,
Parduman Singh and another versus Narain Singh and another 1991 (2) SLC 215
Nagesh Kumar versus Kewal Krishan AIR 2000 HP 116
Shiv Chand versus Manghru and others, 2007 (1) Latest HLJ (H.P.) 413,
Payar Singh versus Narayan Dass and others 2010 (3) Shim. LC 205
Kalawati and another versus Sudhir Chand and others 2011 Law Suit (HP) 692
Brij Lal versus Puran Chand, 2011 (1) Him. L.R. 80
Jagdish Ram versus Vishwamitter and others Latest HLJ 2012(HP) 1427
Munshi Lal versus Rajiv Vaidya 2013 (2) Him.L.R. 1172
Prabhu Nath and another versus Sushma 2014 (2) Shim. LC 1003
Joginder Singh & others versus Suresh Kumar and others AIR 2015 HP 18

For the Petitioner : Mr.Rajneesh K.Lal, Advocate.
For the Respondent : Mr.B.S.Attri, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This petition under Article 227 of the Constitution of India is directed against the order passed by the learned District Judge, Kullu, on 21.11.2013 whereby he affirmed the order dated 22.05.2013 passed by the learned Civil Judge (Junior Division), Manali, District Kullu, and allowed the application filed under Order 39 Rule 1 and 2 CPC for grant of injunction filed by the applicant and at the same time dismissed the application preferred under Order 39 Rule 4 CPC.

2. The brief facts of the case are that the respondent-plaintiff filed a suit for declaration and injunction restraining the petitioner/defendant from raising any sort of construction over the suit land comprised in Khasra Nos. 877 and 878, Khatauni No.10 of Khata No.10, measuring 0-04-49 hect. and land measuring 0-02-85 hect. comprised in Khasra No.876 contained in Khatauni No.168 of Khata No.107, situated at Muhal Parsha Phati Shaleen Kothi, Manali, tehsil Manali, District Kullu. It was alleged that the suit land was previously owned and possessed by Dinu Ram to the extent of ½ share and S/Sh. Chetu and Dhalu, both in equal shares to the extent of ½ share. It was alleged that the petitioner was successor of Dinu and he in connivance with the revenue officials wrongly got the suit land entered in his exclusive possession. It was stated that suit land was joint and possessed by the respondent to the extent of 1/4 share but under the guise of wrong revenue entries, the petitioner without getting the suit land partitioned had started raising construction over the suit land in June, 2012, while he had no right to raise the said

construction till the partition was effected because this was the most valuable portion of the suit land on the National Highway.

3. The petitioner opposed the application by filing the reply wherein it was alleged that the application was not maintainable. It was also alleged that the respondent was not joint owner in possession of the suit land and claimed exclusive possession. It was also alleged that the petitioner started raising construction in February, 2012 and had spent more than Rs.7 lacs on the construction thereof. The petitioner denied the possession of the respondent over the suit land and further claimed the revenue entries to be correct.

4. The learned trial Court after perusing the revenue records which reflected Dinu, Chetu and Dhalu to be the owners of the suit land came to the conclusion that the respondent herein was co-owner of the suit land being daughter of Dhalu.

5. Aggrieved by the order passed by the learned trial Court, the petitioner preferred an appeal before the learned District Judge, Kullu, who endorsed the findings of the learned trial Court and dismissed the appeal.

6. It is against these orders that the present petition has been filed before this Court on the ground that the orders passed by the learned Courts below are factually and legally incorrect and, therefore, not sustainable in the eyes of law. It is further contended that since the petitioner is in exclusive occupation of the land in dispute right from the year 1992 when he purchased the same from Raj Kumar and half share from Keshav Ram, then there was no question of holding the respondent to be a co-owner and granting injunction. Lastly, it is contended that the learned Courts below have granted a blank stay on the entire suit land which is in exclusive possession of the petitioner and said orders cannot go on indefinitely because no suit for partition till date has been filed by the respondent which clearly reflects on her conduct.

7. I have heard learned counsel for the parties and have gone through the records of the case. Shri Lal, learned counsel for the petitioner, has placed strong reliance on the copy of jamabandi for the year 2000-01 to contend that the petitioner is in exclusive possession of Khasra No.876 and, therefore, no injunction could have been granted by the learned Courts below.

8. I have perused the copy of jamabandi which, no doubt, shows the petitioner to be in exclusive possession of the suit land over Khasra No.876, but the question is that would that give him a right to use it exclusively, particularly, when the respondent/plaintiff claims herself to be the co-sharer of the suit land. Infact, it has been specifically observed by the learned lower appellate Court that there is no dispute that the suit land is joint between the parties. It has further been observed that the respondent/plaintiff is co-sharer to the extent of $1/4^{th}$ share, whereas, petitioner/defendant is co-sharer to the extent of ½ share. These findings have been recorded after taking into consideration the pleadings of the parties as also on the basis of the jamabandi available on the record. The respondent/plaintiff has specifically pointed out that the petitioner/defendant is going to raise construction over the best and valuable portion of the suit land which is adjacent to the National Highway. Since, the parties are, prima facie, proved to be the co-owners of the suit land, the question which, therefore, falls for consideration is as to whether the petitioner can be allowed to do an act over the joint land which may cause substantial loss or injury to the other co-sharers.

9. Property held in common, by two or more persons, whatever be its nature or origin, is said to be joint property and the owners thereof joint owners. Joint property envisages a community of interest (ownership) and a commonality of possession vested in

the entire body of owners called co-sharers/joint owners. This body of owners is joint, both in possession and in ownership of the property and every co-sharer shall be owner in possession of every inch of the joint estate. Inherent in his status as a co-sharer/joint owner and flowing from his status as a joint owner or a co-sharer of the joint property is the right to assert ownership with respect to every part and parcel of the joint property. The status as a co-sharer would be preceded by a tangible act of conferring proprietary status, whether by way of membership of a co-parcenary or by devolution of interest, pursuant to inheritance or by assignment of property by sale etc.

10. A co-sharer asserts joint title and possession even, where other co-sharers/joint owners are in separate possession of different parcels of land and as a natural consequences, a co-sharer in possession of a specific area of joint property possesses the property for and on behalf of all other co-sharers/joint owners. Co-sharers may and often do for the purpose of better management of the joint estate hold separate possession of parcels of joint land. This separation of possession, without a corresponding intent, to sever the joint status of the community of joint owners does not confer a right upon a co-sharer in separate possession to assert his separate ownership. A joint owner, therefore, would be owner of a specific share in the entire joint property but would not be entitled to claim separate ownership of any specific and particular portion of the joint property till such time, as the property remains joint.

11. A joint owner/co-owner, just as an individual owner, has an inherent right to alienate the joint property, limited to the extent and the nature of his share holding. Upon transfer of his share or a part thereof, a co-sharer transfer only such rights as vest in him as a joint owner, namely, his specified share or a part thereof in the community of joint owners with commonality of possession. A vendee from such a joint owner or a co-sharer would, therefore, receive the property so transferred, with all the rights and liabilities that vested in his vendor, namely, a right to assert a community of interest (ownership) and a commonality of possession in the entire joint estate and alongwith the entire body of joint/co-owners. This conclusion draws sustenance from Section 44 of the Transfer of Property Act which reads as under:

> "44. Transfer by one co-owner. – Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred."

12. The legal relationship between co-owners is not regulated by any statute. It is governed by judicial decisions, and the principles laid down by judicial decisions are based on the principle of equity, justice and good conscience.

13. In ***Kennedy*** *versus* ***De Trafford**, **1897 AC 180*** it was held by the House of Lords that there was no fiduciary relation between tenants in common of real estate as such; nor could one tenant in common of real estate by leaving the management of the property in the hands of his co-tenant impose upon him an obligation of a fiduciary character.

14. The statute (4 Ann. c. 16, Section 27) has long been repealed; but the principle under lying it has been adopted as a part of the common law of England in Britain as well as in countries which have adopted the English common law.

15. In India also the principle of the English common law on the point has been adopted by the Judges on grounds of justice, equity and good conscience.

16. It is well settled that a co-owner merely as a co-owner is not an agent for the other co-owners: [“See Abu Shahid v. Abdul Hoque, 1940 1 ILR (Cal) 110. But he may become an agent for the others by a contract, express or implied.

17. In ***Sukh Dev*** *versus* ***Parsi and others AIR 1940 Lahore 473***, a Division Bench of Lahore High Court held that a co-sharer, who is in exclusive possession of any portion of a joint Khata can transfer that portion subject to adjustment of the rights of the other co-sharers therein at the time of partition and that the other co-sharers’ rights will be sufficiently safeguarded if they are granted a decree by giving them a declaration that the possession of the transferees in the land in dispute will be that of a co-sharer(s), subject to adjustment at the time of partition. It is apt to reproduce the following observations:-

> “The sole point for decision is whether a cosharer in a joint holding, who is in exclusive possession of a certain plot of land, has a right to sell the same, and if so whether the transferee has a right to remain in possession of such a plot until partition. It is not disputed on behalf of the respondent that the defendants could sell their share (or any fraction thereof) in the holding; but it is contended that no cosharer is entitled to sell any specific plot as he is not the sole owner thereof. In support of this contention the learned counsel relied chiefly on three rulings of the Allahabad High Court, viz. AIR 1920 All 111, AIR 1928 All 59 and AIR 1935 All 771.
>
> The facts of the present cases seem to be however distinguishable as the defendants in selling the plots did not assert that they were exclusive owners thereof. The learned Judge in Chambers has remarked in his judgment that there was an assertion of exclusive title by the defendants in the present suits by sale of specific plots. But this does not appear to be correct. No sale deeds were executed; and it appears from the mutations that the defendants merely purported to transfer their interest in these plots as cosharers. As cosharers they had a right to remain in possession of these plots till partition subject to adjustment at the time of partition and they seem to have transferred the same right to the vendees. This is indicated by the fact that the sale is shown in the column of cultivation and not in the column of proprietorship according to the rules governing mutation proceedings. Moreover, the defendants have made it clear in their written statements also that they only claim to hold the plots sold “until partition subject to the rights of the other cosharers and subject to adjustment at partition. If the defendants merely transferred the plots subject to the rights of the other cosharers and subject to adjustment at the time of partition,” it is difficult to see how the rights of the other cosharers can be prejudiced in any way. It is well settled that if a cosharer is in established possession of any portion of an undivided holding, not exceeding his own share, he cannot be disturbed in his possession until partition (see AIR 1938 Lah 465 and the other rulings cited therein).
>
> As a result, it has been held that a cosharer who is in such possession of any portion of a joint khata, can transfer that portion subject to adjustment of the rights of the other cosharers therein at the time of partition (see AIR 1925 Lah 518, AIR 1929 Lah 168 and AIR 1939 Oudh 243. This view seems to be consistent with the principle embodied in S. 44, T.P. Act, regarding transfers of their ‘interest’ in joint property by cosharers. The

> learned counsel for the respondent urged that the defendants in these cases were not in possession for a very long time. It appears however that they were in possession for some years at least before the sales and there seems to be no good ground for holding that they could not transfer the plots unless their possession extended to 12 years or more as suggested by the learned counsel. The defendants did not claim to have acquired any adverse title. All that they claimed was that they were entitled to remain in undisturbed possession till partition. They were certainly in possession for some years before the sales as stated above and the learned counsel for the respondent has not been able to show that the other cosharers had any right to disturb their possession until partition."

18. A Full Bench of the Allahabad High Court in ***Chhedi Lal and another*** *versus* ***Chhotey Lal AIR (38) 1951 Allahabad 199*** observed that while a co-sharer is entitled to object to another co-sharer exclusively appropriating the land to himself to the detriment of the other co-sharer, the question as to what relief should be granted was considered in light of all earlier decisions and it was held as follows:-

> "25. As a result of the foregoing discussion, it appears to us that the question of the right of co-sharers in respect of joint land should be kept separate and distinct from the question as to what relief should be granted to a co-sharer, whose right in respect of joint land has been invaded by the other co-sharers-either by exclusively appropriating and cultivating land or by raising constructions thereon. The conflict in some of the decisions has apparently risen from the confusion of the two distinct matters. While therefore a co-sharer is entitled to object to another co-sharer exclusively appropriating land to himself to the detriment of other co-sharers, the question as to what relief should be granted to the plaintiff in the event of the invasion of his rights will depend upon the circumstances of each case. The right to the relief for 'demolition and injunction will be granted or withheld by the Court according as the circumstances established in the case justify. The Court may feel persuaded to grant both the reliefs if the evidence establishes that the plaintiff cannot be adequately compensated at the time of the partition and that greater injury will result to him by the refusal of the relief than by granting it. On the contrary if material and substantial injury will be caused to the defendant by the granting of the relief, the Court will no doubt be exercising proper discretion in withholding such relief. As has been pointed out in some of the cases, each case will be decided upon its own peculiar facts and it will be left to the Court to exercise its discretion upon proof of circumstances showing which side the balance of convenience lies. That the Court in the exercise of its discretion will be guided by considerations of justice, equity and good conscience cannot be overlooked and it is not possible for the Court to lay down an inflexible rule as to the circumstances in which the relief for demolition and injunction should be granted or refused."

19. The interse rights and liabilities of the co-sharers were a subject matter of a Division Bench decision of the Punjab and Haryana High Court in ***Sant Ram Nagina Ram*** *versus* ***Daya Ram Nagina Ram AIR 1961 Punjab 528*** and the following propositions inter alia were settled:-

> "1. A co-owner has an interest in the whole property and also in every parcel of it.

2. Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

3. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

4. The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of either as, when a co-owner openly asserts his own title and denies that of the other.

5. Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

6. Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

7. Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to dispute the arrangement without the consent of others except by filing a suit for partition."

20. In ***Jose Caetano Vaz*** *versus* ***Julia Leocadia Lucretia Fernandes AIR 1969 Goa 90***, it was held as under:-

"6. The upshot of the above discussion is that a co-owner, though in possession of the joint property, has no right to change the user of that property without the consent of the other co-owners, and that if the aggrieved co-owner comes to the Court with due promptness for restraining the defendant from raising a building on the joint property the Court can very legitimately decree prohibitory injunction, and if in the meantime any structure has been raised a decree for mandatory injunction can also be granted."

21. In ***Sachindra Nath Sarkar and others*** *versus* ***Binapani Basu and others AIR 1976 Calcutta 277***, the Calcutta High Court after taking into consideration the earlier judgments summed up the position of law as follows:-

"18. Consistent with the decisions of this Court, the position in law is as follows:--

(a) the co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property, absolutely and simply be cause he is a co-owner.

(b) before an injunction can be issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury which materially would affect his position or his enjoyment or accustomed user of the joint property would be inconvenienced or interfered with.

(c) the question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and in exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience."

22. In ***Gouri and others*** *versus* ***Dr. C.H. Ibrahim and another AIR 1980 Kerala 94***, on general principle it was laid down that if several owners are in possession of

an undivided property, none of them has a right to appropriate to his exclusive use any portion of the property as that will effect a compulsory partition in his own favour according to his choice. It is pertinent to note the observation of the Court at para 11 extracted hereunder:-

> "11. The law is that the right of a co-owner to raise construction or to make other improvement on the common property really depends on the consent, express or implied, or on the sufferance of the other co-owners. And when one co-owner commences to build without seeking the consent of the others and in spite of the protest to the construction, the possession, of the co-owner raising the construction at once becomes wrongful and the work will have to be stopped by an order of injunction. The wrongful possession or an ouster by a co-owner is itself an injury to the other co-owners and the latter would not he required to prove any other injury to them in order to sustain action for injunction. (See: Mitra's Co-ownership and Partition -- Fifth Edition pp. 127 & 128)."

23. The proposition as settled by the Division Bench of the Punjab and Haryana High Court in ***Sant Ram's case*** (supra) was affirmed by a Full Bench decision of the Punjab and Haryana High Court in ***Bhartu*** *versus* ***Ram Sarup 1981 PLJ 204***.

24. In ***Rukmani and others*** *versus* ***H.N. Thirumalai Chettiar AIR 1985 Madras 283***, a Division Bench of the Madras High Court held that a co-sharer cannot be allowed to cause prejudice to the other co-sharer by putting up a substantial construction during the pendency of the suit for partition filed by the co-sharer. It was held:-

> "The respondent, being a co-sharer, cannot be allowed to cause prejudice to the other co-sharers by putting up a substantial construction during the pendency of a suit for partition filed by the co-sharers."

25. In ***Prakash Chand Sachdeva*** *versus* ***The State and another AIR 1994 SC 1436***, the Hon'ble Supreme Court held:-

> "3….when claim or title are not in dispute and the parties on their own showing are co-owners and there is no partition, one cannot be permitted to act forcibly and unlawfully and ask the other to act in accordance with law….".

26. In ***Prakash S.Akotkar and others*** *versus* ***Mansoorkha Gulabkha and others AIR 1996 Bombay 36***, a learned single Judge of the Bombay High Court held that a co-owner in possession of the property is for and on behalf of other co-owners and the co-owners out of possession were not in possession cannot claim injunction against other co-sharers. The other co-sharer cannot claim injunction so as to exclude the other co-owners from exercising their rights as co-owners. It is apt to reproduce paras 4 and 5 of the report which reads thus:-

> "4. Here, nature of injunction sought is of importance. The plaintiff sought injunction against all the defendants from interfering with his exclusive possession. It should be noted that these defendants include not only the first defendant who executed the agreement to sell but also the three other sons of Noor Jahan. It goes without saying that these sons have since alienated the property to defendants 5 and 6. Even assuming that even if the plaintiff who was put in possession by the first defendant on the execution of agreement to sell, the question in the context is as to the character of possession which the first defendant could have conveyed, for the character of possession has nexus with the prima facie case pleaded by the plaintiff.

Ordinarily, a co-owner has equal right and interest in the whole property along with other co-owners. Every co-owner has right of enjoyment and possession equal to that of the other co-owners and he has interest even in every infinitesimal portion of the property. In other words, the title and possession of a co-owner is co-extensive with the interest of other co-owners. Being co-owner the first defendant cannot have any right to represent the title and possession of other co-owners. The learned counsel for their 1st respondent relied on AIR 1971 Madh Pra 23 (Tikam Chand Lunia v. Rahim Khan Ishak Khan) to contend that he is entitled to maintain the application for injunction in such circumstances. Even assuming that the first defendant has validly executed the agreement to sell, that agreement to sell cannot create any interest in the property, it can only create all obligation annexed to the ownership of the property. Therefore, the right of the respondent, if at all, is to enforce the agreement to sell. The photo copy of the plaint placed before me by Mr. Khapre, learned counsel for appellants, shows that the plaintiff seeks enforcement of the agreement to sell against all the six defendants. This certainly would mean that the plaintiff admits the title not only of the first defendant, but admits the title of defendants 2 to 4 - the brothers of 1st respondent - as well as that of the alienees defendants 5 and 6 in favour of whom defendants 1 to 4 have since executed a sale-deed. Necessarily it should follow that the plaintiff has no hostile claim except a prayer to enforce specifically the agreement to sell. Even the decision relied on by the learned counsel for respondents, AIR 1971 Madh Pra 23, cited supra, does not say that a stranger who obtained an agreement to sell from one of the co-sharers is in the same position of a co-owner. The learned counsel then relied on 1984 Mah LJ 915 (Nandkumar v. Laxmibai). There it is held, a person in possession under S. 53-A of Transfer of Property Act is entitled to maintain an application for injunction under O. 39, R. 1. There can be no dispute as to the said proposition. In the context, even if it is assumed that the plaintiff is in possession that possession can only be of a co-owner. The learned counsel also relied on a decision in AIR 1960 Ker 27 (Joseph v. John). All that is held in the said decision is that when a co-owner transfers the entire property as owner to a stranger the possession of such stranger will become hostile to that of the non-alienating co-owner. In this connection it is necessary to refer to a later decision of the apex court as to the character of possession of a co-owner in possession. In the decision in Karbalai Begum v. Mohd. Sayeed AIR 1981 sc 77: 1980 All LJ 902 the Supreme Court observed, the legal position of a co-owner in possession would be that of a constructive trustee on behalf of the other co-sharer who is not in possession and that right of the co-sharer would be deemed to be protected by the trustee. Then a person in such a position cannot prima facie without anything more unilaterally change the character of his possession so as to confer a better title to his assignee, much less on one in favour of whom he has executed only an agreement to sell. Here the agreement to sell itself was in 1994. There is no case that the first defendant-the son of Noor Jahan - was ever in hostile possession. In such circumstances, the learned counsel for respondents cannot build up an argument on the basis of such possession claiming that an alienee can maintain an application under Order XXXIX, Rule 1 against the non-alienating co-owner. The learned counsel for the 1st respondent further relied on AIR 1958 Cal 614 (Paresh Nath Biswas v. Kamal Krishna Choudhary). All that is held in that decision is, upon

transfer to a stranger of an undivided house by a co-owner, the co-owner cannot claim joint possession along with other co-owners under Section 44 of the Transfer of Property Act. It is further held that upon a transfer to a stranger of an undivided share of a family dwelling-house by a co-sharers can maintain a suit for injunction for restraining the stranger transferee from exercising any act of joint possession in respect of the share transferred. This decision cannot help the respondents.

5. As noticed, the character of possession of the plaintiff in the circumstances can only be that of a co-owner even if the possession passed under agreement to sell. The Division Bench of Punjab High Court in the case of Sant Ram Nagina Ram v. Daya Ram Nagina Ram, AIR 1961 Punj 528 has considered the whole question as to the rights and liabilities of co-owners and also the condition under which one could presume ouster. It is held therein that a co-owner has an interest in the whole property and also in every parcel of it; and that possession of the joint property by one co-owner is, in the eye of law, possession of all even if all but one are actually out of possession. Then it proceeds to hold that this condition will prevail unless ouster is proved. With due regard to the aforesaid facts and circumstances, particularly the fact that defendants 1 to 4 are governed by Mohammaden Law, there can be no doubt that their interest is that of co-owners. The first defendants has no right prima facie to bind the interest of defendants 2 to 4. Having found so, the aliences of the defendants 1 to 4 who are defendants 5 and 6 must be deemed to have stepped into shoes of at least defendants 2 to 4 though prima facie the rights of first defendant annexed with the obligation under the agreement to sell. Having found the character of possession as co-owner, as indicated above, the only question that arises for determination is, whether a co-owner, in possession is entitled to an injunction of this nature against the other co-owners. Once it is found that the possession of co-owner is for the on behalf of other co-owner is for and on behalf of other co-owners, the other co-owner cannot claim injunction of this nature so as to exclude the other co-owners from exercising their right as co-owners. Therefore the respondents/plaintiffs have no prima facie case. Consequently on this short ground, the order of the Civil Judge, Sr. Dn., is liable to be set aside. The order is therefore set aside the the instant appeal is allowed. It needs hardly he mentioned that the observations made in this order are only for the purposes of disposal of the claim of the respondents under Order XXXIX, Rules 1 and 2, Code of Civil Procedure."

27. In ***Bachan Singh*** *versus* ***Swaran Singh AIR 2001 Punjab and Haryana 112***, a Division Bench of the Punjab and Haryana High Court on consideration of judicial pronouncements on the rights and liabilities of the co-sharers and their right to raise constructions to the exclusion of the others was of the following opinion:-

"(i) a co-owner who is not in possession of any part of the property is not entitled to seek an injunction against another co-owner who has been in exclusive possession of the common property unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of co-owner out of possession.

(ii) Mere making of construction or improvement of, in, the common property does not amount to ouster.

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which is detrimental to his interest."

28. In ***Tanusree Basu and others*** *versus* ***Ishani Prasad Basu and others (2008) 4 SCC 791***, the Hon'ble Supreme Court was dealing with the cases of co-sharers and it was held that a co-owner in exclusive possession of the joint property would be entitled to an injunction and it was held as under:-

> "13. There cannot be any doubt or dispute as a general proposition of law that possession of one co-owner would be treated to be possession of all. This, however, in a case of this nature would not mean that where three flats have been allotted jointly to the parties, each one of them cannot be in occupation of one co-owner separately.
>
> 14. We have noticed hereinbefore that the plaintiffs-appellants themselves in no uncertain terms admitted that by reason of mutual adjustment the parties had been in separate possession of three flats, viz., flat Nos. 201, 202 and 301. If they were in possession of the separate flats, plaintiffs as co-owners could not otherwise have made any attempt to dispossess the first respondent by putting a padlock. The padlock, according to the first respondent, as noticed hereinbefore, was put by the plaintiffs-appellants immediately after the appeal preferred by them in the High Court was dismissed.
>
> 15. The padlock was directed to be removed by the learned Civil Judge by an order dated 21.11.2006. We do not find any illegality therein.
>
> 16. It is now a well-settled principle of law that Order 39, Rule 1 of the Code of Civil Procedure (Code) is not the sole repository of the power of the court to grant injunction. Section 151 of the Code confers power upon the court to grant injunction if the matter is not covered by Rules 1 and 2 of Order 39 of the Code. (See Manohar Lal Chopra v. Seth Hiralal AIR 1962 SC 527 and India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd. (2007) 5 SCC 510).
>
> 17. Strong reliance has been placed by Mr. Banerjee on a judgment of Bombay High Court in Bhaguji Bayaji Pokale & Ors. v. Kantilal Baban Gunjawate [1998 (3) CCC 377 (Bom.)] wherein it was held: (AIR p.117, para 8).
>
> > "8[7]. With regard to second substantial question of law, i.e. the co-owner cannot claim an order of injunction against another co-owner with regard to the property owned jointly, the learned Counsel for the appellants had relied upon the Apex Court's judgment reported in Mohammad Baqar v. Naim-un-Nisa Bibi AIR 1956 SC 548 The Apex Court has very categorically held in para No. 7 as under:
> >
> > "7.......The parties to the action are co-sharers, and as under the law, possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is a denial of their right to their

knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period."

It was observed : (AIR p.117, para 10)

"10….Similarly, the legal position that the co-owner or co-sharer of the property can never claim ownership by adverse possession of the other share. This is also a well settled law."

18. We are concerned in this case with a question whether if a co-owner was in specific possession of the joint property, he could be dispossessed therefrom without the intervention of the court. In this case, the first respondent is not claiming title of adverse possession. The said decision has, therefore, no application to the fact of the present case.

19. Reliance has also been placed by Mr. Banerjee on Abu Shahid v. Abdul Hoque Dobhash AIR 1940 Cal 363, Hemanta Kumar Banerjee and others v. Satish Chandra Banerjee and others AIR 1941 Cal 635 and Jahuri Sah and others v. Dwarika Prasad Jhunjhunwala AIR 1967 SC 109.

20. In Abu Shahid (supra), the question which arose for consideration was in regard to plea of ouster vis-a-vis rendition of accounts. We are not concerned with such a question in this case.

21. In Hemanta Kumar Banerjee (supra), the question which arose for consideration was as to whether the rule against partition amongst co-sharers is an elastic one. Again, we are not concerned with such a question here.

22. In Jahuri Sah (supra), this Court opined: (AIR p.112, para 12)

"12. What we have to consider then is whether the contract for payment of compensation is not enforceable. It is no doubt true that under the law every co-owner of undivided property is entitled to enjoy the whole of the property and is not liable to pay compensation to the other co-owners who have not chosen to enjoy the property. It is also true that liability to pay compensation arises against a co-owner who deliberately excludes the other co-owners from the enjoyment of the property. It does not, however, follow that the liability to pay compensation arises only in such a case and no other. Co-owners are legally competent to come to any kind of arrangement for the enjoyment of their undivided property and are free to lay down any terms concerning the enjoyment of the property. There is no principle of law which would exclude them from providing in the agreement that those of them as are in actual occupation and enjoyment of the property shall pay to the other co-owners compensation"

These observations do not assist the case of the appellants. If parties by mutual agreement entered into possession of separate flats, no co-sharer should be permitted to act in breach thereof."

29. In ***Jai Singh and others*** *versus* **Gurmej Singh 2009 (1) SLJ (SC) 714**, the Hon'ble Supreme Court was seized of a matter involving interse rights and liabilities of a co-sharer and it upheld the principles as laid down in ***Bhartu's case*** (supra).

Before proceeding further and after having noticed the judgments of various Courts, let me now make a note of the position of law as laid down by this Court.

30. In ***Parduman Singh and another*** *versus* ***Narain Singh and another 1991 (2) SLC 215***, it was held that a co-sharer has no right to make construction over the land in dispute which is joint interse the parties to the disadvantage of the opposite party and it is not proper for the Court to allow the continuation and completion of the construction on the condition that it would be demolished if it is ultimately found that the party raising the construction had no right or had exceeded his right in raising the construction.

31. In ***Nagesh Kumar*** *versus* ***Kewal Krishan AIR 2000 HP 116***, this Court after relying upon ***Parduman Singh's case*** (supra), held as follows:-

> "16. A co-sharer is entitled to claim Injunction when another co-sharer threatens to exclusively appropriate joint land to himself to the detriment of other co-shares by constructing a structure thereon.
>
> 17. In view of the above, the plaintiff has made out a case for grant of temporary injunction as prayed for by him and as was granted by the learned Senior Sub-Judge.
>
> 18. In a cause when a co-sharer has sued for permanent prohibitory Injunction restraining the other co-sharer from raising any construction over the land jointly owned by them, it Is not just and proper to permit the co-sharer against when the relief of injunction has been claimed, to continue/ complete construction of a house/structure on such land.
>
> 19. The Apex Court while dealing with a similar situation in Harish Chander Verma v. Kayastha Pathshala Trust, 1988 (1) JT (SC) 625 has held as follows :
>
>> "I.....In appeal against the decree for permanent injunction the High Court by the impugned order has permitted the defendant-respondent herein to raise construction subject to the condition that In the event of the decree being affirmed the construction shall have to be pulled down.
>>
>> 2. Apart from the convenience the parties and equity arising in the facts of the case, a larger principle is involved in the matter. On the face of a decree for permanent injunction is it appropriate for the appellate Court to allow it to be nullified before the appeal is disposed of. We are of the view that the answer has to be in the negative."
>
> 20. Similar view has been taken by this Court in Parduman Singh v. Narain Singh, 1991 (2) Sim LC 215."

32. In ***Shiv Chand*** *versus* ***Manghru and others, 2007 (1) Latest HLJ (H.P.) 413***, this Court has held as follows:-

> "7. The view taken by the first appellate Court that one of the persons in joint possession can raise construction on a portion of the joint property provided the area sought to be covered does not exceed his share, is contrary to the proposition of law. The law is very clear that a person in joint possession of immovable property cannot change the nature of the suit property unless the property is partitioned or the other persons in joint possession consent to such change in the nature of the property....
>
> 8. Coming to the next question, the view taken by the learned first appellate Court is again erroneous. Persons in settled joint possession of immovable

property are supposed to respect the right to joint possession of each other in the same fashion and manner as the owners in joint possession. Therefore, the view taken by the learned first appellate Court that both the parties being encroachers, either of them can change the nature of the property without partition or without consent of the other is contrary to well settled proposition and principles of law. Hence, this question is also answered in favour of the plaintiff-appellant."

33. In ***Payar Singh*** *versus* ***Narayan Dass and others 2010 (3) Shim. LC 205***, after taking note of ***Nagesh Kumar and Parduman Singh's cases***, this Court held as follows:-

"12.The respondents in the written statement have specifically pleaded that parties are in separate possession under family arrangement. The petitioner has also constructed his house on the joint land. It is not the stand of the petitioner that respondents are raising construction on an area which is more than their share. The case of the respondents is that petitioner has constructed his house on a better portion of the land. The under construction house of the respondents is away from the National Highway 21 whereas the house of the petitioner abuts N.H. 21. The respondents have placed on record on the file of revision photographs of under construction house of the respondents. The photographs indicate sufficient gap between the already constructed house of petitioner and under construction house of the respondents over which even slab has been placed. It is the case of the respondents in written statement that they are in separate possession of the land in family arrangement. This fact has not been denied by filing replication. The respondents are claiming possession over the suit land under family arrangement i.e. with the consent of the petitioner over which they are raising construction. The respondents have thus established prima facie case, balance of convenience, irreparable loss in their favour. In these circumstances, no fault can be found with the impugned judgment. In revision the scope is limited as held in The Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar, Hyderabad and another Vs. Ajit Prasad Tarway, Manager (Purchase and Stores) Hindustan Aeronautics Ltd. Balanagar, Hyderabad, AIR 1973 SC 76. The suit is for permanent prohibitory and mandatory injunction. The rights of the parties will be decided in the suit. It has not been established that the view taken by the learned District Judge does not emerge from the material on record."

34. In ***Kalawati and another*** *versus* ***Sudhir Chand and others 2011 Law Suit (HP) 692 (CMPMO No.193 of 2010)*** decided on 13.04.2011, after taking into consideration the ratio of the judgment in ***Bachan Singh's case*** (supra), this Court held as follows:-

"8.**K**eeping in view the fact that substantial construction had been raised even before the suit had been filed and defendants have collected huge amount of material on the spot, in my view no irreparable harm and injury will be caused to the Plaintiffs in case such construction is allowed to go on. On the other hand, if the Defendants are permitted to continue to raise the construction, the interest of the Plaintiffs can be protected by making it clear that the construction raised shall be subject to the final decision of the suit and in case the suit is decreed in favour of the Plaintiffs then Defendants will either demolish the portion in excess of their share or shall

hand over the same to the Plaintiffs without asking for any compensation for building costs."

35. In ***Brij Lal*** *versus* ***Puran Chand, 2011 (1) Him. L.R. 80,*** it has been held as under:-

"8. The partition proceedings are pending before the competent authority. Though the defendant as DW-1 has made reference about some family partition, however, he has neither given any date nor month or year when the family partition took place. He has admitted that the suit land measuring 11-12 bighas was joint of the parties. In his written statement, he has claimed not only that he was in exclusive possession, but also exclusive title to suit land to the exclusion of plaintiff and other co-sharers. Since the land in question has not been partitioned, the defendant could not be permitted to raise any construction thereon without working out any arrangement or with consent of the co-owners. If he wanted to raise any construction, he ought to have sought consent of the other co-owners since the land was joint. The learned District Judge has rightly relied upon Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram, AIR 1961, Punjab, 528 and the judgment rendered by this Court in Prithi Singh Vs. Bachitar Singh, 1969 DLT 583 while dismissing the appeal."

36. In ***Amin Chand and another; Chet Ram*** *versus* ***Chet Ram and others; Amin Chand and others*** in ***Civil Revision No.153 and 161 of 2005*** decided on 07.04.2010, after making note of the judgments in ***Bachan Singh and Nagesh Kumar's cases*** (supra), it was held as under:-

"12. It is true that in case the land is jointly owned and possessed by the plaintiff and other co-sharers and has not been partitioned, the plaintiff would have been held entitled to the grant of injunction in his favour restraining the defendants from changing the nature of the suit land or raising any construction till partition. However, that can be so in case the land had been sold by some other person than the plaintiff himself who did not place any restriction in the sale deed on the powers of defendant No.1 to raise construction till partition or made a reference as to which particular portion of the land, whether abutting the State Highway or on the backside, has been sold to defendant No.1. The sale deed in question is dated 26.6.1995 executed by the plaintiff in favour of defendant No.1 and a perusal of the same shows that it has been clearly mentioned that four biswas of land has been sold to defendant No.1 who shall be entitled to use it in any manner he likes and the possession has also been delivered to him. In case the plaintiff wanted to put some restrictions on the powers of defendant No.1 to raise construction or he had an idea that defendant No.1 may not encroach the whole land abutting the State Highway out of the total share of the plaintiff and other co-owners, he could have placed a restriction upon the powers of the defendant to raise construction over this particular portion of the land. It may be that the plaintiff represented to the defendant and showed him the land abutting the State Highway and once the defendant had purchased the land and the possession had been given to him of four biswas of land out of the total land and no restriction had been placed as to his powers to raise construction till partition. There is no specification as to whether the land abuts the State Highway or otherwise. In equity, the plaintiff cannot be held entitled to file the suit for an injunction and claim the relief of temporary injunction till the matter is settled by a civil court. In

equity, the plaintiff is not entitled to temporary injunction in his favour till the question is decided by the civil court as to which of the parties was in possession or which particular portion of the land was sold to defendant No.1 and which land was given in possession to defendant No.1 in pursuance of the sale deed effected by the plaintiff. All these questions are left open to be decided by the civil court but for the present, in equity, the plaintiff cannot be said to be entitled to the relief of an injunction in his favour. This is particularly so when the defendant has pleaded that he has raised construction over the suit land by spending Rs.1.00 lac, as pleaded in the written statement. The defendant shall not encroach or cover more land than what construction has been raised by him already, which he will be entitled to complete till the disposal of the suit. However, the construction being so raised by the defendant shall be subject to the rights of other co-sharers on partition and in case the defendant raises any construction beyond his share or that portion falls to the share of another co-sharer on partition, defendant No.1 will have to demolish this construction which shall be raised by him at his own risk. This will be subject to adjustment at the time of partition to which either of the parties are entitled to apply and get the appropriate relief."

37. In ***Jagdish Ram*** *versus* ***Vishwamitter and others Latest HLJ 2012(HP) 1427***, this Court held that the possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession. Mere occupation of larger portion or even of entire joint property does not amount to ouster as the possession of one is deemed to be on behalf of all. The remedy of a co-owner who is out of possession and not in possession is by way of suit for partition or for actual joint possession.

38. In ***Munshi Lal*** *versus* ***Rajiv Vaidya 2013 (2) Him.L.R. 1172***, this Court held as follows:-

"13. The petitioner at the most is a co-sharer. He cannot change the nature of the suit land without the consent of other co-sharers and without partitioning the suit land. The petitioner at this stage has failed to identify his possession on specific 0-14-09 bigha land out of the suit land. The two courts below after appreciation of material on record have granted interim injunction in favour of respondent. It cannot be said that decisions taken by the two courts below are without jurisdiction or suffer from error of law, which require correction by way of petition under Article 227 of Constitution of India. There is no merit in the petition."

39. I myself in ***Prabhu Nath and another*** *versus* ***Sushma 2014 (2) Shim. LC 1003*** after taking into consideration the ratio of judgments in ***Nagesh Kumar, Shiv Chand and Brij Lal's cases*** (supra) held as under:-

"3. Admittedly the parties are co-owners and it is settled that every co-owner has every right over each inch of land. The possession of one co-sharer is possession of all, and therefore, the co-sharer cannot change the nature of the suit land to the detriment of another co-owner unless the land is partitioned or can do so with the consent of other co-sharers. This view has been consistently followed in a number of judgments by this Court."

40. In ***Joginder Singh & others*** *versus* ***Suresh Kumar and others AIR 2015 HP 18,*** after taking into consideration the judgments in ***Nagesh Kumar and Bachan Singh's cases***, it was held:-

"19. The defendant admittedly has raised the construction up to 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."

41. The exposition of law as enunciated in the various judgments referred above including those of this High Court, insofar as the rights and liabilities of the co-owners is concerned, gives rise to the following propositions:-

1. A co-owner has an interest in the whole property and also in every parcel of it.

2. Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

3. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

4. The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of either as, when a co-owner openly asserts his own title and denies that of the other.

5. Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

6. Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

7. Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to dispute the arrangement without the consent of others except by filing a suit for partition.

8. The remedy of a co-owner not in possession, or not in possession of a share of the joint property, is by way of a suit for partition or for actual joint possession, but not for ejectment. Same is the case where a co-owner sets up an exclusive title in himself.

9.Where a portion of the joint property is, by common consent of the co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent user by a co-owner, if he does so, he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to show that special damage has been suffered.

42. It can further be safely concluded that co-owners hold property by several and distinct titles but by unity of possession. Actual physical possession is not indispensable, the requirement being of the right to possession of the common property.

43. As a corollary to the aforesaid right, any co-owner, in the absence of any agreement to the contrary, has a right to enter upon the common property and take possession of the whole, subject to the equal right of the other co-owners with whose right of possession he has no right to interfere.

44. A co-owner's possession of the common property is not prima facie adverse against another co-owner, because such possession is considered as one on behalf of all the co-owners, except when there is clear proof of ouster or assertion of a hostile title.

45. As each co-owner is entitled to possess every bit of the common property and is not restricted to enjoyment according to his share so long as he does not deny to the other co-owners an equal right of possession and enjoyment of the common property, he is under no obligation either to account for or to pay compensation to such co-sharers. The matter is different if there is objection from the other co-sharers and no amicable arrangement is arrived at. That would equally be the case where there is ouster or denial of the title of the other co-owners and an assertion of a hostile title in himself.

46. On consideration of the various judicial pronouncements and on the basis of the dominant view taken in these decisions on the rights and liabilities of the co-sharers and their rights to raise construction to the exclusion of others, the following principles can conveniently be laid down:-

i) a co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property absolutely and simply because he is a co-owner unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of the co-owner out of possession.

ii) Mere making of construction or improvement of, in, the common property does not amount to ouster.

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which is detrimental to his interest.

(v) before an injunction is issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury which materially would affect his position or his enjoyment or an accustomed user of the joint property would be inconvenienced or interfered with.

(vi) the question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and in exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience.

47. The discretion of the Court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff:-

(i) existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction;

(ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's right or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and

(iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted.

In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the Court with clean hands.

48. A perusal of the order passed by the learned trial Court as also the appellate Court would go to show that both the Courts below have taken into consideration not only the pleadings, but also the law on the subject and thereafter granted the injunction. This Court while exercising powers under Article 227 of the Constitution of India will not normally interfere with the discretion of the Courts below and substitute its own discretion except where the discretion has been shown to have been exercised by the Courts below in an arbitrary, capricious or in a perverse manner or where the Court had ignored the settled principles of law regulating grant or refusal of the interlocutory injunction. This Court will also not re-assess the material and seek to reach a conclusion different from the one reached by the Courts below, if the one reached by the Courts below was reasonably possible on the material placed before it. Further, this Court would not normally be justified in interfering with the exercise of discretion solely on the ground that if it had considered the matter at the trial stage, it would have come to a contrary conclusion. If the discretion has been exercised by the learned Courts below reasonably and in a judicious manner, then this Court would not take a different view and interfere with the discretion exercised by the Courts below.

49. Reverting to the facts, it would be seen that the petitioner on the sheer strength of his possession has claimed a right to raise construction over the suit land and has infact even added a flavour of adverse possession by claiming that he is in peaceful and uninterrupted possession of the suit land. The tone and tenor of the reply filed to the application under Order 39 Rule 1 and 2 CPC, coupled with the contents of the application separately preferred by the petitioner under Order 39 Rule 4 CPC does indicate that the petitioner is virtually claiming ouster of the respondent, who admittedly is a co-owner of the property. His exercise of rights is inconsistent with the rights of other co-owner. The petitioner has denied the rights of the other co-owner. Once it is so, then the petitioner cannot claim a right to raise construction without the consent of the other co-sharer nor does he have any right to put up any portion of the joint holding to such a use which is detrimental to the interest of the other co-sharer or may amount to change of user of the property or ouster of the other co-sharer from that portion.

50. Having said so, I find no merit in this petition and the same is dismissed with costs assessed at Rs.25,000/-.

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

Sh. Balwant Singh ....Revisionist

versus

Smt. Sheela Devi & another. ....Non-revisionists.

Cr. Revision No. 165 of 2015
Decided on: 24.6.2015.

Code of Criminal Procedure, 1973- Section 401- Compromise was entered between the parties- in view of compromise revisionist ordered to pay amount of Rs. 50,000/- as full and final settlement and the sentence of imprisonment imposed by trial Court as affirmed by appellate Court set aside.

For revisionist : Mr. B.R. Sharma, Advocate.
For the non-revisionistNo.1: Mr. Bhim Raj Sharma, Advocate.
For the non-revisionistNo.2.: Mr. J.S. Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Mr. Bhim Raj Sharma Advocate appears and waives service of notice on behalf of respondent No.1 and learned Assistant Advocate General waives service of notice on behalf of respondent No.2. Learned Advocate appearing on behalf of the revisionist submitted before the Court that a compromise has been executed inter-se the parties and present revision petition be disposed of as per the compromise executed inter-se the parties. Statements of the parties recorded. Court is satisfied that a lawful compromise inter-se the parties has been executed. In view of the compromise executed inter-se the parties it is ordered that revisionist Sh. Balwant Singh will pay compensation amount to the tune of Rs. 50,000/- (Rupees fifty thousand) as full and final settlement inter-se the parties. Sentence of imprisonment imposed by learned trial Court and affirmed by learned first appellate Court are set aside. Learned Advocates appearing on behalf of the parties submitted before the Court that Rs. 33,200/- (Rupees thirty three thousand and two hundred) paid by way of cash by Sh. Balwant Singh to Smt. Sheela Devi and an amount of Rs. 16,800/- (Rupees sixteen thousand and eight hundred) already stood deposited before the learned trial Court. Smt. Sheela Devi will be legally entitled to withdraw the amount of Rs. 16,800/- deposited before the learned trial Court. Statements of the parties recorded today will form part and parcel of this order. Judgment and sentence passed by learned trial Court and affirmed by learned appellate Court are modified to this extent only. In addition to this Sh. Balwant Singh will deposit 15% compounding fee before learned trial Court within one month. Thereafter learned trial Court will transmit compounding fee amount to the Legal Services Authorities. Revision petition is disposed. Pending applications are also disposed of.

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

Dr. Devkanya wife of Sh. Rahul Lodhta ….Petitioner
Versus
State of H.P. ….Non-petitioner

Cr.MP(M) No. 594 of 2015
Order Reserved on 5th June 2015
Date of Order 24th June, 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was lodged against the petitioner for the commission of offences punishable under Sections 341, 504, 506 of IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- petitioner had joined investigation- no recovery is to be effected from the petitioner- petitioner being female is entitled to special provision of bail - therefore, bail granted to the petitioner. (Para-7)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702

For the Petitioner: Mr. Rajiv Rai, Advocate.
For the Non-petitioner: Mr. J.S.Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with FIR No. 174 of 2015 dated 12.5.2015 registered under Sections 341, 504, 506 IPC at P.S. Dhalli Shimla.

2. It is pleaded that petitioner has purchased the flat from Rajesh Kumar Sektu and Rajesh Kumar has filed a false complaint against the petitioner. It is pleaded that Rajesh Kumar Sektu complainant had sold the flat to the petitioner without completion report from Municipal Corporation. It is further pleaded that after selling the flat to petitioner Rajesh Kumar Sektu had constructed one more storey illegally without approval from Municipal Corporation. It is pleaded that petitioner has also filed the complaint against Rajesh Kumar Sektu in the Municipal Corporation against the unauthorized construction. It is pleaded that FIR has been filed by petitioner Rajesh Kumar Sektu just to keep the petitioner mum relating to illegal construction raised by Rajesh Kumar Sektu. It is further pleaded that petitioner would join the investigation of the case whenever and wherever required by police and petitioner shall abide by terms and conditions imposed by the Court. Prayer for acceptance of anticipatory bail application is sought.

3. Per contra police report filed. As per police report FIR No. 174 of 2015 dated 12.5.2015 registered against the petitioner under Sections 341, 504 and 506 IPC in P.S. Dhalli Shimla. There is recital in police report that complainant Rajesh Kumar Sektu had sold the flat to petitioner Smt. Dev Kanya. There is further recital in police report that petitioner Dev Kanya used to quarrel with Rajesh Kumar Sektu and his wife Reeta and also used abusive language against Rajesh Kumar Sektu and also threatened Rajesh Kumar to kill him. There is further recital in police report that there is dispute between Rajesh Kumar Sektu and petitioner namely Dev Kanya relating to parking of vehicle. There is further recital in police report that on dated 12.5.2005 at about 6.30 PM Dev Kanya wrongly parked her vehicle and blocked the path and abused Rajesh Kumar Sektu and his wife. There is further recital in police report that after registration of case matter was investigated by Investigating Officer and site plan was prepared and photographs obtained and statements of witnesses recorded under Section 161 Cr.P.C. There is further recital in police report that petitioner has joined the investigation of case and no recovery is to be effected from the petitioner.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Assistant Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether anticipatory bail application filed under Section 438 Cr.P.C. by petitioner is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that any condition imposed by Court will be binding upon the petitioner and petitioner is female and on this ground anticipatory bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. There is special provision of bail to female. As per police report petitioner has joined the investigation of case and no recovery is to be effected from the petitioner. There is no recital in police report that custodial interrogation of petitioner is required. Court is of the opinion that if anticipatory bail is granted to the petitioner then investigation of present case will not be hampered. Court is of the opinion that if anticipatory bail is granted then interest of State and general public will not be hampered.

8. Submission of learned Assistant Advocate General appearing on behalf of non-petitioner that if bail is granted to petitioner then petitioner will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional anticipatory bail will be granted to petitioner and if petitioner will flout the terms and conditions of anticipatory bail order then prosecution will be at liberty to file application for cancellation of bail strictly in accordance with law. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final Order)

9. In view of my findings on point No.1 bail application filed by petitioner under Section 438 Cr.P.C. is allowed and interim order dated 22.5.2015 is made absolute on following terms and conditions. (i) That petitioner will join the investigation of case as and when required by Investigating Agency in accordance with law. (ii) That petitioner shall join proceedings of trial of case regularly till conclusion of trial. (iii) That petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iv) That the petitioner will not leave India without the prior permission of the Court. (v) That petitioner will give her residential address in written manner to the Investigating Officer and Court. (vi) That petitioner will not commit similar offence qua which she is accused. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 438 of Code of Criminal Procedure stands disposed of.

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

CWPs No. 3012, 3013 and 3014/ 2015.
Date of decision: 24.6.2015.

CWP No. 3012/2015.
Micromax Informatics Ltd. ..... Petitioner.
Versus
State of HP and others ....Respondents

CWP No. 3013/2015.
Micromax Informatics Ltd. ..... Petitioner.
Versus
State of HP and others ....Respondents

CWP No. 3014/2015.
Micromax Informatics Ltd. ..... Petitioner.
Versus
State of HP and others ....Respondents

Constitution of India, 1950- Article 226- Show cause notice was issued to the petitioner asking them to show cause as to why action be not taken for not paying proper VAT on mobile chargers- petitioners have efficacious and alternative remedy under Section 48 of the Act- petitioners have to appear before the authority and to file reply- it would be open for the petitioners to take all the grounds which have been taken before the High Court – a show cause notice cannot be quashed by the Writ Court- hence, Writ Petition dismissed as not maintainable. (Para-6 to 23)

Cases referred:

Oryx Fisheries Private Limited v. UOI (2010) 13 SCC 427
CCE, Bangalore V. Brindavan Beverages (P) Ltd. 2007, (213) ELT 487 (S.C.),
Malabar Industries Co. Ltd. V. Commissioner of Income Tax, Kerala State (2000) 2 SCC 718
Keshardeo Chamaria V. Radha Kissen Chamaria and others AIR 1953 SC 23
M/s D.L.F. Housing and Construction Company (O) Ltd., New Delhi V. Sarup Singh and others, 1969 (3) SCC 807
Narayan Sonagi Sagne V. Seshrao Vithoba and others, AIR 1948 Nag 258
Motibhai Jesingbhai Patel V. Ranchodbhai Shambhubhai Patel 1934 (LIX) ILR 430
Kristamma Naidu and others versus Chapa Naidu and others (1894) ILR 17 Mad 410
HPCL versus Dibahar Singh (2014) 9 SCC 78
Asst. Commissioner Income Tax Rajkot V. Saurashtra Kutch Stock Exchange Ltd. (2008) 14 SCC 171
Commissioner of Income Tax, Bhopal Versus G.M. Mittal Stainless Steel (P) Ltd. (2003) 11 SCC 441
CIT V. Max India Ltd. (2007) 15 SCC 401
Rukmini Amma Saradamma V. Kallyani Sulochana and others (1993) 1 SCC 499
Sri Raja Lakshmi Dyeing Works and others Versus Rangaswamy Chettair (1980) 4 SCC 259
Dattonpant Gopalvarao Devakate Versus Vithalrao Marutirao Janagaval (1975) 2 SCC 246
Amir Hassan Khan versus Sheo Baksh Singh (1884) ILR 11 P.C. 6
Major S.S. Khanna V. Brig. F.J. Dhillon (1964) 4 SCR 409
General Industrial Society Ltd. V. Collector of Central Excise 1993 (68) ELT 839 (Tri.- Del)

State of Punjab and others versus Nokia India Pvt. Ltd., Civil Appeal No. 11486 – 14487 of 2014, dated 17.12.2014 (Supreme Court)
State of Punjab vs. Nokia India Pvt. Ltd., AIR 2015 SC 106
Union of India and others versus Major General Shri Kant Sharma and another 2015 AIR SCW 2497
Union of India and Anr. v. Kunisetty Satyanarayana, 2007 AIR SCW 607
Special Director and another v. Mohd. Ghulam Ghouse and another, 2004 AIR SCW 416.

For the petitioner(s): M/s Surij Ghosh and Rahul Mahajan, Advocates.
For the respondent(s): Mr. Shrawan Dogra, Advocate General with Mr.Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The petitioners, by the medium of these writ petitions, have questioned the show-cause notice(s) dated 13.5.2015, Annexure P1, issued in terms of Section 46 of the Himachal Pradesh Value Added Tax Act, 2005, for short "the Act", by respondent No.2 in all the writ petitions, on the grounds taken in the writ petitions.

2. The writ petitioners have questioned the show-cause notice(s) dated 13.5.2015, the foundation of which is similar and the petitioners have also taken the similar grounds to question these notices in all the writ petitions, thus we deem it proper to determine all these writ petitions by this common judgment.

3. Respondent No. 2 has invoked the powers, authority and the jurisdiction as per the mandate of Section 46 (1) of the Act, and has asked the petitioners to show-cause. The contents of show-cause notices in all the writ petitions are same, except the assessment years. It is apt to reproduce one of the show-cause notices herein:

"BEFORE DR. SUNIL KUMAR, DY. EXCISE AND TAXATION COMMISSIONER, FLYING SQUAD, SOUTH ZONE, PARWANOO

FORM-XXXX

{See rule 80(1)}

Notice under section 46 of the Himachal Pradesh Value Added Tax Act, 2005

To

M/s Micromax Informatics Ltd.,
Plot No.234-HPSIDC,
Industrial Area Baddi,
TIN-02020500697.

Whereas:-

(a) You are a dealer registered under the Himachal Pradesh Value Added Tax Act, 2005;

(b) The assessment for the year 2010-11 which has been disposed of by the AETC-cum-

> ***Assessing Authority, Solan, district Solan vide order dated 19.12.2014 therein,***
>
> ***(c) In order to satisfy myself as to legality and propriety of the aforesaid, the aforesaid order was called for and it has been found that you have underpaid VAT on mobile chargers.***
>
> ***2. In view of the aforesaid, the said order appears not to be legal and proper and as such the same requires to be revised under sub-section (1) of section 46 of the Act.***
>
> ***3. Now, therefore, in exercise of powers conferred upon me under section 46(1) of the Himachal Pradesh Value Added Tax Act, 2005, it is proposed to take action in the matter and to pass appropriate consequential orders in relation to the said order. Before, however, the requisite order under section 46(1) is passed, you are hereby afforded the opportunity of being heard and directed to attend in person or by a duly authorized agent in my office located at the HIG-1-A, Sector-1A, Parwanoo on 21.05.2015 at 11.30 A.M and there to prefer any objection, which you may wish to prefer in this behalf as to why the appropriate order under section 46 of the aforesaid Act should not be passed.***
>
> ***4. In the event of your failure to comply with this notice, I shall proceed to pass the order as aforesaid without further reference to you.***
>
> ***(Dr. Sunil Kumar)***
> ***Dy. Excise & Taxation Commissioner***
> ***Flying Squad, South Zone, Parwanoo.***
>
> ***Copy to the AETC-cum-Assessing Authority, Solan with direction to depute an official who is familiar with the case to appear before the undersigned at the above given time and date alongwith entire record of the case.***
>
> ***(Dr. Sunil Kumar)***
> ***Dy. Excise & Taxation Commissioner,***
> ***Flying Squad, South Zone, Parwanoo."***

4. Respondent No. 2 has stated in the notice(s) that the order dated 19.12.2014, for the assessment year 2010-11 in CWP No. 3012/2015, dated 8.1.2015 for the assessment year 2011-12 in CWP No. 3013/2015 and the order dated 8.1.2015 in CWP No. 3014/2015, for the assessment year 2012-13, appear not to be legal and proper and as such the same require to be revised under sub-section (1) of section 46 of the Act. In this

backdrop, the petitioners have been asked to show-cause why the proposed action be not drawn.

5. It is moot question-whether the show-cause notices can be questioned by the medium of these writ petitions and whether the writ petitions are maintainable?

6. The petitioners have questioned the said notice(s) mainly on the following grounds:

(i) That respondent No.2 has recorded the final findings in the impugned notices, thus nothing remains to be determined,

(ii) That it is violative of principles of natural justice,

(iii) That the petitioners have no efficacious, alternative remedy available,

(iv) That respondent No. 2 has acted illegally and arbitrarily and is not having power and jurisdiction,

(v) That the ratio laid down by the apex Court in case titled ***State of Punjab vs. Nokia India Pvt. Ltd. reported in AIR 2015 SC 1068*** is not applicable.

7. The petitioners, in the respective writ petitions, have given details in support of the said grounds and in support of their submissions, the learned counsel for the petitioners have also relied upon the decisions in case titled Oryx Fisheries Private Limited v. UOI (2010) 13 SCC 427, *CCE, Bangalore V. Brindavan Beverages (P) Ltd. 2007, (213) ELT 487 (S.C.),Malabar Industries Co. Ltd. V. Commissioner of Income Tax, Kerala State (2000) 2 SCC 718, Keshardeo Chamaria V. Radha Kissen Chamaria and others AIR 1953 SC 23,M/s D.L.F. Housing and Construction Company (O) Ltd., New Delhi V. Sarup Singh and others, 1969 (3) SCC 807,Narayan Sonagi Sagne V. Seshrao Vithoba and others, AIR 1948 Nag 258,Motibhai Jesingbhai Patel V. Ranchodbhai Shambhubhai Patel 1934 (LIX) ILR 430,Kristamma Naidu and others versus Chapa Naidu and others (1894) ILR 17 Mad 410,HPCL versus Dibahar Singh (2014) 9 SCC 78,Asst. Commissioner Income Tax Rajkot V. Saurashtra Kutch Stock Exchange Ltd. (2008) 14 SCC 171,Commissioner of Income Tax, Bhopal Versus G.M. Mittal Stainless Steel (P) Ltd. (2003) 11 SCC 441,CIT V. Max India Ltd. (2007) 15 SCC 401,Rukmini Amma Saradamma V. Kallyani Sulochana and others (1993) 1 SCC 499,Sri Raja Lakshmi Dyeing Works and others Versus Rangaswamy Chettair (1980) 4 SCC 259,Dattonpant Gopalvarao Devakate Versus Vithalrao Marutirao Janagaval (1975) 2 SCC 246,Amir Hassan Khan versus Sheo Baksh Singh (1884) ILR 11 P.C. 6,Major S.S. Khanna V. Brig. F.J. Dhillon (1964) 4 SCR 409, General Industrial Society Ltd. V. Collector of Central Excise 1993 (68) ELT 839 (Tri.- Del) and State of Punjab and others versus Nokia India Pvt. Ltd., Civil Appeal No. 11486 – 14487 of 2014, dated 17.12.2014 (Supreme Court).*

8. Respondent No.2 has invoked the jurisdiction under Section 46 of the of the Act. It is apt to reproduce Section 46 (1) of the Act herein:

> ***"46. Revision.- (1) The Commissioner may, of his own motion, call for the record of any proceedings which are pending before, or have been disposed of by, any Authority subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such proceedings or order made therein and, on finding the proceedings or the orders prejudicial to the interest of revenue, may pass such order in relation thereto as he may think fit:***

> ***Provided that the powers under this sub-section shall be exercisable only within a period of five years from the date on which such order was communicated".***

9. Respondent No. 2 has not made any decision in terms of Section 46(3) of the Act, only the petitioners have been asked to show-cause. In case they satisfy respondent No. 2, show-cause notices can be dropped and in case the order goes against the petitioners, they have remedy available under Section 48 of the Act. It is profitable to reproduce Section 48 of the Act herein.

> ***"48. Revision to High Court. - (1) Any person aggrieved by an order made by the tribunal under sub-section (2) of section 45 or under sub-section (3) of section 46, may, within 90 days of the communication of such order, apply to the High Court of Himachal Pradesh for revision of such order if it involves any question of law arising out of erroneous decision of law or failure to decide a question of law.***
>
> ***(2) The application for revision under sub-section (1) shall precisely state the question of law involved in the order, and it shall be competent for the High Court to formulate the question of law.***
>
> ***(3) Where an application under this section is pending, the High Court may, or on application, in this behalf, stay recovery of any disputed amount of tax, penalty or interest payable or refund of any amount due under the order sought to be revised:***
>
> ***Provided that no order for stay of recovery of such disputed amount shall remain in force for more than 30 days unless the applicant furnishes adequate security to the satisfaction of the Assessing Authority concerned."***

10. Thus, the petitioners have efficacious remedy available, as per the mandate of Section 48 of the Act.

11. It is beaten law of the land that when the efficacious remedy is available, the writ petition is not maintainable.

12. This Court in batch of writ petitions, the lead case of which is ***CWP No. 4779 of 2014*** titled ***M/s Indian Technomac Company Ltd. versus State of H.P. & others*** decided on 4.8.2014, held that the petitions are not maintainable. It is apt to reproduce paras 11 to 14, 16 and 18 of the said judgment herein:

> "11. Now, the question which arises for determination is – when an Act provides mechanism to have remedy(ies), can a writ lie in the given circumstances? The answer is in the negative for the following reasons. It is well settled principle of law that High Courts have imposed rule of self limitation in entertaining the writ petition in terms of writ jurisdiction when alternative remedy is available. High Court must not interfere if there is adequate efficacious alternative remedy available and the practice of approaching the High Court,

without availing the remedy(ies) provided, must be deprecated, unless express case is made out.

12. The Apex Court in **Union of India and another vs. Guwahati Carbon Limited, (2012) 11 SCC 651,** while dealing with the similar question, has observed in paragraphs 8, 9, 10, 11, 14 and 15 as under:

> *"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta, AIR 1979 SC 1250. In the said decision, this Court was pleased to observe that: (SCC p.88, para 23)*
>
> "23. ……. when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner and all the -other forums and modes of seeking remedy are excluded."

9. A Bench of three learned Judges of as Court, in Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433, held: (SCC p.440, para 11)

"11……The Act provides for a complete-machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where right or liability is created by a statute which gives a special remedy for 1 enforcing it, the remedy provided by that statute must be availed…."

10. In other words, existence of an adequate alternate remedy is a factor to be considered by the writ court before exercising its writ jurisdiction (See Rashid Ahmed v. Municipal Board, Kairana, 1950 SCR 566).

11. In Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1, this Court held:

"15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of the Fundamental Rights or where there has been a violation of the principle of natural justices or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged……"

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14. Having said so, we have gone through the orders passed by the Tribunal. The only determination made by the Tribunal is with regard to the assessable value of the commodity in question by excluding the freight/ transportation charges and the insurance charges from the assessable value of the commodity in question. Since what was done by the Tribunal is the determination of the assessable value of the commodity in question for the purpose of the levy of duty under the Act, in our opinion, the assessee ought to have carried the matter by way of an appeal before this Court under Section 35L of the Central Excise Act, 1944.

15. In our opinion, the assessee ought not to have filed a writ petition before the High Court questioning the correctness or otherwise of the orders passed by the Tribunal. The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under Article 226 of the Constitution. Therefore, the learned Single Judge was justified in observing that since the assessee has a remedy in the form of a right of appeal under the statute, that remedy must be exhausted first. The order passed by the learned Single Judge, in our opinion, ought not to have been interfered with by the Division Bench of the High Court in the appeal filed by the respondent/ assessee."

13. The Apex Court in **Nivedita Sharma vs. Cellular Operators Association of India and others, (2011) 14 SCC 337,** after discussing its various earlier decisions, held that the High Court had committed error in entertaining the writ petition without noticing and referring to the relevant provisions of law applicable in that case, which contained statutory remedy of appeal and accordingly set aside the order of the High Court in terms of which the writ petition was entertained. It is apt to reproduce paragraphs 24 and 25 hereunder:

"24. Section 19 provides for remedy of appeal against an order made by the State Commission in exercise of its powers under sub-clause (i) of Clause (a) of Section 17. If Sections 11, 17 and 21 of the 1986 Act which relate to the jurisdiction of the District Forum, the State Commission and the National Commission, there does not appear any plausible reason to interpret the same in a manner which would frustrate the object of legislation.

25. What has surprised us is that the High Court has not even referred to Sections 17 and 19 of the 1986 Act and the law laid down in various judgments of this Court and yet it has declared that the directions given by the State Commission are without jurisdiction and that too by overlooking the availability of statutory remedy of appeal to the respondents."

14. The Apex Court in a recent decision in **Commissioner of Income Tax and others vs. Chhabil Dass Agarwal, (2014) 1**

SCC 603, has discussed the law, on the subject, right from the year 1859 till the date of judgment i.e. 8th August, 2013. We deem it proper to reproduce paragraphs 12, 13, 15, 16 and 17 hereunder:

"12. The Constitution Benches of this Court in K.S. Rashid and Sons vs. Income Tax Investigation Commission, AIR 1954 SC 207; Sangram Singh vs. Election Tribunal, AIR 1955 SC 425; Union of India vs. T.R. Varma, AIR 1957 SC 882; State of U.P. vs. Mohd. Nooh, AIR 1958 SC 86 and K.S. Venkataraman and Co. (P) Ltd. vs. State of Madras, AIR 1966 SC 1089, have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. (See: N.T. Veluswami Thevar vs. G. Raja Nainar, AIR 1959 SC 422; Municipal Council, Khurai vs. Kamal Kumar, (1965) 2 SCR 653; Siliguri Municipality vs. Amalendu Das, (1984) 2 SCC 436; S.T. Muthusami vs. K. Natarajan, (1988) 1 SCC 572; Rajasthan SRTC vs. Krishna Kant, (1995) 5 SCC 75; Kerala SEB vs. Kurien E. Kalathil, (2000) 6 SCC 293; A. Venkatasubbiah Naidu vs. S. Chellappan, (2000) 7 SCC 695; L.L. Sudhakar Reddy vs. State of A.P., (2001) 6 SCC 634; Shri Sant Sadguru Janardan Swami (Moingiri Maharaj); Sahakari Dugdha Utpadak Sanstha vs. State of Maharashtra, (2001) 8 SCC 509; Pratap Singh vs. State of Haryana, (2002) 7 SCC 484 and GKN Driveshafts (India) Ltd. vs. ITO, (2003) 1 SCC 72).

13. In Nivedita Sharma vs. Cellular Operators Assn. of India, (2011) 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows: (SCC pp.343-45 paras 12-14)

"12. In Thansingh Nathmal v. Supdt. of Taxes, AIR 1964 SC 1419 this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7).

'7. … The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not

permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.'

13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 this Court observed: (SCC pp. 440-41, para 11)

'11. … It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford, 141 ER 486 in the following passage: (ER p. 495)

"… There are three classes of cases in which a liability may be established founded upon a statute. … But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. … The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd., 1919 AC 368 and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd., 1935 AC 532 (PC) and Secy. of State v. Mask and Co., AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.'

14. In Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536 B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

'77. … So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.'" (See: G. Veerappa Pillai v. Raman & Raman Ltd., AIR 1952 SC 192; CCE v. Dunlop India Ltd., (1985) 1 SCC 260; Ramendra Kishore Biswas v. State of Tripura, (1999) 1 SCC 472; Shivgonda Anna Patil v. State of Maharashtra, (1999) 3 SCC 5; C.A. Abraham v. ITO, (1961) 2 SCR 765; Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433; H.B. Gandhi v. Gopi Nath and Sons, 1992 Supp (2) SCC 312; Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1; Tin Plate Co. of

India Ltd. v. State of Bihar, (1998) 8 SCC 272; Sheela Devi v. Jaspal Singh, (1999) 1 SCC 209 and Punjab National Bank v. O.C. Krishnan, (2001) 6 SCC 569)

14. In Union of India vs. Guwahati Carbon Ltd., (2012) 11 SCC 651, this Court has reiterated the aforesaid principle and observed: (SCC p.653, para 8)

"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta, (1979) 3 SCC 83. In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23).

'23. … when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded.'"

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15. Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case AIR 1964 SC 1419, Titagarh Paper Mills case 1983 SCC (Tax) 131 and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

16. In the instant case, the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In Ram and Shyam Co. vs. State of Haryana, (1985) 3 SCC 267 this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility.

17. In the instant case, neither has the writ petitioner assessee described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case. In light of the same, we are of the considered opinion that the Writ Court ought not to have entertained the Writ Petition filed by the assessee, wherein he has only questioned the correctness or otherwise of the notices issued under Section 148 of the Act, the re-assessment orders passed and the consequential demand notices issued thereon."

15….. …… …..

16. The sum and substance of the above discussion is that the writ petitioners-Company have remedies of appeal(s), before approaching the High Court by way of the writ petitions, for the redressal of their grievances. The petitioners ought to have exhausted the remedy of appeal before the Deputy Excise and Taxation Commissioner or Additional Excise and Taxation Commissioner or the Excise Commissioner, as the case may be, and if the petitioners were not successful in those appeal proceedings, another remedy available to them was to challenge the said order(s) by the medium of appeal before the Tribunal, and again, if they were unsuccessful, they could have availed the remedy of revision before the High Court in terms of Section 48 of the HP VAT Act, 2005. Keeping in view the above discussion, read with the fact that the dispute raised in these writ petitions relates to revenue/tax matters, it can safely be concluded that the petitioners have sufficient efficacious remedy(ies) available.

17… ….. …… ……. ……

18.Having said so, we are of the considered view that the writ petitioners have alternative efficacious remedy available and these writ petitions are not maintainable. Accordingly, the same merit to be dismissed in limine. However, it is made clear that the observations made herein shall not cause any prejudice to the petitioners in case they intend to file appeal(s) before the prescribed Authority and the period spent by the petitioners for prosecuting these writ petitions shall be excluded by the Appellate Authority while computing the period of limitation."

13. The said judgment was questioned before the apex Court and the apex Court has dismissed the SLP vide order dated 22.8.2014 in SLP (C) Nos.22626-22641 of 2014.

14. The petitioners have also stated that the judgment delivered by the apex Court in case titled ***State of Punjab vs. Nokia India Pvt. Ltd.,*** reported in ***AIR 2015 SC 106,*** is not applicable in the present case.

15. The learned counsel for the petitioners has tried to distinguish the said judgment in the given facts and circumstances of the case. It is for the petitioners to take all these grounds before respondent No.2 while filing reply to show-cause notices.

16. The petitioners have been asked to show-cause. Then how it is violative of the principles of natural justice and how it can be said that the writ petitioners have been condemned unheard. They have to carve out a case by the medium of reply and arguments before respondent No.2. In fact, they want to give a slip to the law and bye-pass the remedy available to them, which is not permissible.

17. This Court in case titled ***M/s Samsung India Electronics Pvt. Ltd. vs. State of H.P. and others (CWP No. 1596 of 2015),*** while dealing with the similar, as is raised in these writ petitions, held that the writ petition is not maintainable. It is apt to reproduce paras 1 and 17 of the said judgment herein:

> ***"1.By medium of this petition, the petitioner has called in question the show cause notice issued by respondent No. 4 on 22.12.2014 under section 16(8) of the Himachal Pradesh Value Added Tax Act, 2005 (for short, H.P. VAT Act, 2005). The petitioner has been asked to personally appear alongwith the relevant documents for the years 2010-2012 to 2014-2015 (up to 30.11.2014) for the reason that petitioner was paying VAT at the rate of 5% on the sale of cellphone chargers and other accessories instead of 13.75%. The petitioner is further aggrieved by the show cause notice dated 30.12.2014 issued under section 46 of the Act by respondent No. 3, which seeks to revise the assessment order dated 16.11.2012 for the year 2011-2012 on the ground that the assessment order is not legal and proper as the same needs to be revised on the grounds that tax on sale of battery charger was levied at 5% whereas the same should have been levied at 13.75% in view of the judgement of Hon'ble Supreme Court in State of Punjab vs. Nokia India Pvt. Ltd. AIR 2015 SC 1068.***
>
> ***2 to 16.... ....***
>
> ***18. Having said so, we are of the considered view that the writ petitioners have alternative efficacious remedy available and these writ petitions are not maintainable. Accordingly, the same merit to be dismissed in limine. However, it is made clear that the observations made herein shall not cause any prejudice to the petitioners in case they intend to file***

appeal(s) before the prescribed Authority and the period spent by the petitioners for prosecuting these writ petitions shall be excluded by the Appellate Authority while computing the period of limitation."

18. The apex Court in case titled ***Union of India and others versus Major General Shri Kant Sharma and another reported in 2015 AIR SCW 2497*** has also held that in the given circumstances, the writ petition is not maintainable. It is apt to reproduce paras 34, 37 and 38 of the said judgment herein:

> ***"34. The aforesaid decisions rendered by this Court can be summarised as follows:***
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> ***The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India.(Refer: L. Chandra and S.N. Mukherjee).***
>
> ***(ii)The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act.(Refer: Mafatlal Industries Ltd.).***
>
> ***(iii)When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: Nivedita Sharma).***
>
> ***(iv)The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: Nivedita Sharma).***
>
> ***35-36.... ....***
>
> ***37.Likelihood of anomalous situation***
>
> ***If the High Court entertains a petition under Article 226 of the Constitution of India against order passed by Armed Forces Tribunal under Section 14 or Section 15 of the Act bypassing the machinery of statute i.e. Sections 30 and 31 of the Act, there is likelihood of anomalous situation for the aggrieved person in praying for relief from this Court.***
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> ***Section 30 provides for an appeal to this Court subject to leave granted under Section 31 of the Act. By clause (2) of Article 136 of the Constitution of India, the appellate jurisdiction of this Court under Article 136 has been excluded in relation to any judgment, determination, sentence or order passed or made by any***

> ***court or Tribunal constituted by or under any law relating to the Armed Forces. If any person aggrieved by the order of the Tribunal, moves before the High Court under Article 226 and the High Court entertains the petition and passes a judgment or order, the person who may be aggrieved against both the orders passed by the Armed Forces Tribunal and the High Court, cannot challenge both the orders in one joint appeal. The aggrieved person may file leave to appeal under Article 136 of the Constitution against the judgment passed by the High Court but in view of the bar of jurisdiction by clause (2) of Article 136, this Court cannot entertain appeal against the order of the Armed Forces Tribunal. Once, the High Court entertains a petition under Article 226 of the Constitution against the order of Armed Forces Tribunal and decides the matter, the person who thus approached the High Court, will also be precluded from filing an appeal under Section 30 with leave to appeal under Section 31 of the Act against the order of the Armed Forces Tribunal as he cannot challenge the order passed by the High Court under Article 226 of the Constitution under Section 30 read with Section 31 of the Act. Thereby, there is a chance of anomalous situation. Therefore, it is always desirable for the High Court to act in terms of the law laid down by this Court as referred to above, which is binding on the High Court under Article 141 of the Constitution of India, allowing the aggrieved person to avail the remedy under Section 30 read with Section 31 Armed Forces Act.***
>
> ***38.The High Court (Delhi High Court) while entertaining the writ petition under Article 226 of the Constitution bypassed the machinery created under Sections 30 and 31 of Act. However, we find that Andhra Pradesh High Court and the Allahabad High Court had not entertained the petitions under Article 226 and directed the writ petitioners to seek resort under Sections 30 and 31 of the Act. Further, the law laid down by this Court, as referred to above, being binding on the High Court, we are of the view that Delhi High Court was not justified in entertaining the petition under Article 226 of the Constitution of India."***

19. The show-cause notice(s) is not a final order. It is for the petitioners to show-cause and take all the grounds, which are available as weapons in their armory.

20. The learned counsel for the petitioners argued that the requisite notification, in terms of sub-section 2 of Section 46 has not been issued. Thus, respondent No. 2, is not having power and jurisdiction to issue show-cause notice(s). The argument though attractive, is misconceived for the reasons that the petitioners can take these grounds before respondent No. 2, while replying the show-cause notice(s).

21. This Court has also held in ***CWP No. 1159 of 2014-F*** titled ***Sandeep Sethi versus State of H.P. and others***, that the show-cause notice cannot be questioned by the medium of the writ petition. The apex Court has also laid down the same principles of law in ***Union of India and Anr. v. Kunisetty Satyanarayana***, reported in 2007 AIR SCW 607 and ***Special Director and another v. Mohd. Ghulam Ghouse and another***, reported in 2004 AIR SCW 416.

22. While going through the writ petitions on hand, it appears that the petitioners have tried to give a slip to the law. The same issue has already been determined by this Court in ***M/s Technomac's*** and ***M/s Samsung's*** cases supra.

23. Having glance of the above discussion, the writ petitions deserve to be dismissed in *limine* and the same are dismissed as such. However, the dismissal of these writ petitions shall not cause any prejudice to the writ petitioners to appear and file reply to the show-cause notice(s) before respondent No2 and take all the grounds, which have been taken in the writ petitions on hand.

24. All the writ petitions stand dismissed, alongwith pending applications, if any.

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

Pankaj Sood & another ….Petitioners
versus
State of H.P. & others. ….Respondents.

Cr.MMO No. 76 of 2014
Decided on: 24.6.2015.

Code of Criminal Procedure, 1973- Section 482- Reply filed by State showed that cancellation report of FIR stood already filed before the trial Court; hence petitioner withdrew the petition with liberty to file a fresh petition on same cause of action.

For the petitioners : Mr. Amitesh Mishra and Ms. Ritu Chauhan, Advocates.
For the respondents: Mr. J.S. Rana, Assistant Advocate General, for respondent No.1 to 3.
Ms. Meera Devi, Advocate, for respondents No. 4 and 5.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Court perused the response filed by the State of Himachal Pradesh. There is positive recital in the response that cancellation report of FIR already stood filed before the learned trial Court. Learned Advocate appearing on behalf of the petitioners submitted before the Court that in view of the fact that cancellation report of FIR already stood filed before the learned trial Court petitioners do not want to continue present petition and same be dismissed as withdrawn with liberty to file fresh petition on the same cause of action as per exigencies of the subsequent circumstances. In view of the above stated facts petition is dismissed as withdrawn with liberty to file fresh petition on the same cause of action as per exigencies of compelling subsequent circumstances. Petition is disposed of. Pending applications also disposed of. Dasti copy.

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

State of H.P. through Secretary (IPH) to Govt. of H.P. and another ....Petitioners
Versus
Raj Kumar son of Shri Jaisi Ram ....Respondent

CWP No. 4541 of 2014
Order Reserved on 5th June 2015
Date of Order 24th June 2015

Constitution of India, 1950- Article 226- Respondent was working on daily wages basis as Beldar- his services were retrenched- he filed a petition before the Labour Court which was allowed- held, that while retrenching the employee, the principle of last come first go has to be applied- while giving re-employment preference has to be given to the retrenched employee- petitioner was not re-employed but his juniors were re-employed- thus, seniority was rightly granted to the respondent- reference can be made at any time and there is no limitation for making the reference. (Para-5 to 9)

Cases referred:
Ajit Singh and others vs. State of Punjab and others (Constitutional Bench), AIR 1999 SC 3471
Collector Land Acquisition Anantnag and another vs. Mst. Katji and ors, AIR 1987 SC 1353
Jasmer Singh vs. State of Haryana and others, (2015)4 SCC 458
Raghuvir vs. G.M. Haryana Roadways Hissar, (2014)10 SCC 301

For the Petitioners: Mr. M.L.Chauhan, Additional Advocate General.
For the Respondent: Mr. Naresh Kaul, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Article 226 of the Constitution of India against the award of learned Labour Court-cum-Industrial Tribunal passed in reference No. 456 of 2009 decided on dated 7.9.2013.

2. Brief facts of the case as pleaded are that respondent Raj Kumar was working on daily wages basis as Beldar in the office of Executive Engineer I&PH Division Dalhousie w.e.f. July 1995 and worked for 70 days in 1995, 172 days in 1996, 162 days in 1997, 200 days in 1998, 155 days in 1999 and 115 days in 2000. It is pleaded that all surplus workers were disengaged after complying the provisions of 25 (F) of H.P. Industrial Dispute Act. It is pleaded that concept last come first go was strictly complied with. It is further pleaded that respondent has challenged the retrenchment before learned Labour Court by way of filing claim petition and learned Labour Court set aside the retrenchment order of respondent and directed that respondent would be re-engaged forthwith and would be entitled to continuity and seniority for the service w.e.f. 21.8.2000 except back wages. It is pleaded that learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala further directed that case of the respondent would be considered for regularization of their service as per policy framed by Government of Himachal Pradesh from time to time. It is further pleaded that learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala further directed that if service of any person junior to the respondent

already stood regularized then respondent shall be entitled for regularization from the date/month of regularization of service of his junior.

3. Per contra reply filed by the respondent pleaded therein that respondent namely Raj Kumar was engaged as daily wages Beldar in the year 1987 and worked till 2000 and also worked for 240 days in certain years. It is pleaded that there was artificial break in service. It is pleaded that after dated 26.11.2000 fresh Beldars were employed by the petitioners. It is pleaded that learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala has passed the award strictly in accordance with law and proved facts and prayer for dismissal of writ petition sought.

4. Court heard learned Additional Advocate General appearing on behalf of the petitioners and learned Advocate appearing on behalf of the respondent and Court also perused the entire record carefully.

5. Submission of learned Additional Advocate General appearing for the petitioners that respondent had not completed 240 days of continuity in service in preceding 12 months and on this ground civil writ petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. As per Section 25(G) of Industrial Disputes Act 1948 procedure for retrenchment has been defined and as per Section 25(H) of the Industrial Disputes Act 1947 procedure for re-employment of retrenchment workmen has been defined. As per Section 25(G) of Industrial Disputes Act 1947 the employer shall ordinarily retrench the workman who was the last person to be employed in that category unless for the reasons to be recorded the employer retrenches any other workman. As per Section 25(H) of Industrial Disputes Act 1947 where any workman was retrenched and the employer proposes to employee any person the employer would give an opportunity to retrenched workers for re-employment who offers themselves for re-employment and preference would be given to retrenched workmen. In present case the facts proved that petitioners did not comply the provisions of Sections 25(G) and 25(H) of Industrial Dispute Act 1947. It is held that for compliance of provisions of Sections 25(G) and 25(H) of Industrial Disputes Act 1947 condition of continuity of service of 240 days is not mandatory. It is held that as per provisions of Section 25(G) and 25(H) of Industrial Disputes Act 1947 only the concept of last come first go would apply.

6. Another submission of learned Additional Advocate General that retrenchment of respondent was made strictly as per provisions of Sections 25(G) of Industrial Disputes Act 1947 and provision of 25(H) was also complied and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Although it is proved on record that retrenchment of respondent was strictly as per provision of Section 25(G) of Industrial Dispute Act 1947 but it is proved on record that petitioners did not comply the provisions of Section 25(H) of Industrial Disputes Act 1947 in case of re-employment of retrenched workmen. In present case it is proved on record that as per seniority list name of respondent falls at Sr. No. 399 and it is proved on record that petitioners had re-employed Biasa Devi and Hem Raj who fall at Sr. No. 414 and 435. No offer of reemployment was sent to the respondent who was at Sr. No. 399 in seniority list before the re-employment of Biasa Devi and Hem Raj.

7. Another submission of learned Additional Advocate General appearing on behalf of the petitioners that learned Labour Court has illegally granted the seniority to respondent is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that service of person junior to the respondent has already been regularized. It is held that respondent will be legally entitled for regularization from the date and month of regularization of service of the juniors. Even as per Article 14 of Constitution

of India junior persons cannot be given seniority if senior person is meritorious and qualified all conditions for regularization. In present case there is no evidence on record that respondent Raj Kumar is not meritorious person and there is no evidence on record that any disciplinary proceedings were initiated against Raj Kumar and there is no evidence on record that Raj Kumar was punished by disciplinary authority in accordance with law.

8. Another submission of learned Additional Advocate General appearing on behalf of the petitioners that seniority has been granted to the respondent without working in the department which is contrary to law and on this ground petition be allowed is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the award passed by learned Labour Court. Learned Labour Court has not given any monetary benefits to the respondent. Seniority has been granted by learned Labour Court except back wages. It was held in case reported in ***AIR 1999 SC 3471 titled Ajit Singh and others vs. State of Punjab and others (Constitutional Bench)*** that promotion and seniority is granted to employee under Article 16(1) of Constitution of India subject to ACR. There is no positive evidence of adverse entries in ACRs of respondent.

9. Another submission of learned Additional Advocate General appearing on behalf of the petitioners that claim petition was barred and respondent was retrenched w.e.f. 21.8.2000 and he filed OA No. 457 of 2000 before H.P. Administrative Tribunal against termination which was disposed of on dated 21.3.2002 and thereafter he raised the industrial dispute in the year 2007 after five years and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Petitioner did not place on record certified copy of OA No. 457 of 2000 for perusal. It is proved on record that reference No. 456 of 2009 was sent to learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala and same was instituted on dated 14.9.2009. It is held that as per Section 10 of Industrial Dispute Act 1947 the reference can be sent to learned Labour Court-cum-Industrial Tribunal "at any point of time" by the appropriate Government. There is no limitation for sending the reference to learned Labour Court as per Section 10 of Industrial Disputes Act 1947. It was held in case reported in ***AIR 1987 SC 1353 titled Collector Land Acquisition Anantnag and another vs. Mst. Katji and others*** that (1) Ordinarily a litigant does not stand to benefit by lodging matter late. (2) Refusing to condone delay can result meritorious matter thrown out at the very threshold and cause of justice defeated. It was held that if delay is condoned then highest that would happen would that case would be decided on merits after hearing the parties. (3) It was held that every day's delay must be explained does not mean that a pedantic approach should be made. It was further held that doctrine must be applied in a rational common sense. (4) It was held that when substantial justice and technical considerations are pitted against each other then cause of substantial justice deserves to be preferred. (5) It was held that there is no presumption that delay is occasioned deliberately or on account of culpable negligence or on account of mala fides. It was held that litigant does not stand to benefit by resorting to delay and in fact he runs a serious risk. (6) It was held that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. It was held in case reported in ***(2015)4 SCC 458 titled Jasmer Singh vs. State of Haryana and others*** that provisions of Article 137 of Limitation Act 1963 would not be applicable to Industrial Disputes Act 1947 and it was held that relief would not be denied to workman merely on ground of delay. It was held that no reference to Labour Court should be questioned on the ground of delay. It was further held that even in case where delay was condoned by Labour Court then Labour Court could mould the relief by declining the back wages to workman till he raised the demand regarding his illegal retrenchment, dismissal or termination. It was held in case reported in ***(2014)10 SCC 301 titled Raghuvir vs. G.M. Haryana Roadways Hissar*** that there is no limitation

for reference to Labour Court under Section 10 of Industrial Disputes Act 1947. It was held that words "At any time" mentioned in Section 10 of Industrial Disputes Act 1947 clearly define that law of limitation would not be applicable qua proceedings of reference under Section 10 of Industrial Disputes Act 1947. Operative part of Section 10 of Industrial Disputes Act 1947 is quoted in toto. Section 10 of Industrial Disputes Act 1947:-Reference of dispute to Boards, Courts or Tribunals-(1) Where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing. (a) Refer the dispute to a Board for promoting a settlement thereof. (b) Refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry.

10. In view of above stated facts it is held that award of learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala in reference No. 456 of 2009 decided on 7.9.2013 is in accordance with proved facts and is in accordance with law. It is further held that there is no illegality in award passed by learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala. Award passed by Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala (H.P.) dated 07-09-2013 titled Raj Kumar vs. Executive Engineer I&PH Division Dalhousie District Chamba (H.P.) is affirmed. Civil writ petition is dismissed. No order as to costs. All pending miscellaneous application(s) if any also stands disposed of.

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

Sumit Kumar son of Shri Yogendra Singh ….Plaintiff

Versus

Mrs. Sudesh Dogra wife of late Sh. Suresh Chander Dogra and another ….Defendants.

Civil Suit No. 67 of 2011
Judgment reserved on 20th May 2015
Date of Judgment 24th June 2015

Specific Relief Act, 1963- Section 20- Plaintiff sought specific performance of the contract- it was specifically mentioned in condition No. 4 of the agreement that case No. 38/2004 is pending before High Court of H.P and sale deed will be executed only if the said case is decided in favour of seller - no evidence was led to prove that case was decided in favour of the seller- since, decision of case is the pre-condition for the execution of the sale deed, therefore, plaintiff cannot be held entitled for the relief of specific performance – however, plaintiff held entitled for the refund of the amount paid by him along with interest.

(Para-10 and 13)

Cases referred:

Jiwan Dass Rawal vs. Narain Dass, AIR 1981 Delhi 291
Imtiaz Ali vs. Nasim Ahmed, AIR 1987 Delhi 36
Amulya Gopal Majumdar vs. United Industrial Bank Ltd. and others, AIR 1981 Calcutta 404
Indira Fruits and General Market Meerut vs. Bijendra Kumar Gupta and others, AIR 1995 Allahabad 316
Crest Hotel Ltd. and another vs. The Assistant Superintendent of Stamps and another, AIR 1994 Bombay 228
Vidyadhar vs. Mankikrao and another, AIR 1999 SC 1441
Iswar Bhai C. Patel @ Bachu Bhai Patel vs. Harihar Behera and another, 1999(1) S.L.J. 724

For the Plaintiff: Mr. Anuj Nag, Advocate.
For the Defendants: Mr. Gulzar Rathore, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Plaintiff Sumit Kumar filed suit for specific performance of contract dated 12.3.2007 pleaded therein that an agreement dated 12.3.2007 was executed between the plaintiff and co-defendant No.1. It is pleaded that at the time of execution of agreement plaintiff paid Rs.1 lac (Rupees one lac only) as an advance amount to co-defendant No.1. It is pleaded that in addition plaintiff also paid Rs.5 lacs (Rupees five lacs only) to co-defendant No.1. It is further pleaded that plaintiff has performed his part of contract and balance amount of Rs.39 lacs (Rupees thirty nine lacs only) was to be paid to co-defendant No. 1 at the time of execution of sale deed which was to be executed on or before 31.7.2011. It is pleaded that plaintiff is still ready and willing to perform his part of contract dated 12.3.2007. It is also pleaded that plaintiff requested co-defendant No. 1 to execute the sale deed as per terms of agreement and on dated 27.6.2011 plaintiff requested co-defendant No.1 to remain present at Shimla to execute the sale deed in favour of the plaintiff. It is pleaded that co-defendant No. 1 is under legal obligation to execute the sale deed in favour of the plaintiff on the basis of agreement dated 12.3.2007. It is pleaded that cause of action arisen on dated 12.3.2007 when agreement to sell flat No. 9 was executed between plaintiff and co-defendant No.1. It is pleaded that cause of action further arisen on dated 25.7.2011 when plaintiff submitted an application before the Sub Registrar Shimla and further pleaded that cause of action again arisen on dated 1.8.2011 when plaintiff issued legal notice to the co-defendant No.1 asking her to perform her part of agreement. It is also pleaded that further cause of action arisen in favour of plaintiff in first week of August 2011 when co-defendant No.1 refused to execute the sale deed in favour of the plaintiff. Plaintiff sought the following relief. (1) That decree for specific performance of contract on the basis of agreement dated 12.3.2007 be passed. (2) That defendants be directed to hand over the possession of flat to the plaintiff and to execute the sale deed. (3) That defendants or their representatives be restrained by way of passing decree of permanent prohibitory injunction not to interfere in any manner in the ownership and possession of plaintiff in flat. (4) That any decree as Court deem just and proper be also passed. (5) That in alternative decree for recovery of earnest money received along with interest of 12% per annum be passed in favour of plaintiff.

2. Per contra written statement filed on behalf of the co-defendant Sudesh Dogra pleaded therein that present suit is bad for non-joinder of necessary parties. It is pleaded that Ms. Urvashi Dogra is owner of the property in dispute. It is further pleaded that co-defendant No. 1 by way of family settlement transferred the property in dispute in the name of her daughter Ms. Urvashi Dogra who thereafter transferred the said property in the name of her sister Sunita Anand by way of gift. It is pleaded that however possession of premises remained with Ms. Urvashi Dogra. It is pleaded that both daughters are aware about the existence of agreement. It is pleaded that Ms. Urvashi Dogra and Sunita Anand are necessary parties. It is admitted that an agreement to sell was executed inter se the plaintiff and co-defendant No. 1 on dated 12.3.2007. It is pleaded that co-defendant No. 1 is not owner of flat in question and therefore she is not in a position to execute the sale deed. Prayer for dismissal of suit is sought.

3. Plaintiffs also filed replication and re-asserted the allegations mentioned in plaint.

4. On dated 4.5.2012 Ms. Urvashi Dogra was impleaded as co-defendant No. 2 in present suit. During the pendency of civil suit Ms. Sunita Anand filed application under Order 1 Rule 10 CPC read with Section 151 CPC for impleading her as co-defendant and same was registered as OMP No. 299 of 2012. Hon'ble High Court of H.P. on dated 27.12.2012 dismissed the application filed by Sunita Anand under Order 1 Rule 10 CPC read with Section 151 CPC. Co-defendant No. 2 did not file any separate written statement despite opportunity granted.

5. As per the pleadings of parties the following issues were framed on dated 23.5.2013:-

1. Whether plaintiff is entitled for a decree of specific performance of contract on the basis of agreement to sell dated 12.3.2007? OPP
2. Whether the suit is bad for non-joinder of parties? ……OPD
3. Whether the suit in the present form is not maintainable? …..OPD
4. Whether the agreement sought to be enforced is not enforceable in view of the suit filed by Smt. Sunita Anand? ……OPD
5. Relief.

6. Oral evidence examined by parties:-

Sr.No.	Name of witness
PW1	Shri Sumit Kumar
PW2	Shri M.R.Bhardwaj
PW3	Rajinder Singh
DW1	Ms. Urvashi Dogra

7. Documentary evidence produced by parties:-

Exhibit	Description of document
Ext.PW1/A	Agreement to sell dated 12.3.2007
Ext.PW1/B	Letter issued to Sub Registrar-cum-Tehsildar District Shimla (H.P.) dated 25.7.2011 by Sumit Kumar.
Ext.PW1/C	Affidavit given by Sumit Kumar.
Ext.PW1/D	Legal notice given by plaintiff to Ms.Sudesh Dogra
Ext.PW1/E	Postal receipt
Admitted plaint of CS No. 26/1of 2011 titled Ms.Sunita Anand vs. Ms.Urvashi Dogra.	
Written statement filed by Ms. Urvashi Dogra and others in CS No. 26/1 of 2011 titled Ms.Sunita Anand vs. Ms.Urvashi Dogra and others.	

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

<u>9. Testimonies of oral evidence adduced by the parties:-</u>

9.1 PW1 Sumit Kumar has stated that defendants are known to him. He has stated that he intended to purchase the flat at Shimla. He has stated that agreement Ext.PW1/A dated 12.3.2007 was executed which bears his signatures and also bears

signatures of co-defendant No. 1 and witnesses Rajvir Singh and Rajender Kumar. He has stated that after execution of agreement Ext.PW1/A defendant disclosed that there were some tenants in flats and some time was required for their vacation. He has stated that thereafter co-defendant told that some family dispute had occurred and she was not in a position to execute the sale deed and further stated that co-defendant No. 1 sought some time for execution of sale deed and thereafter date 31.7.2011 was fixed for execution of sale deed. He has stated that co-defendant No. 1 agreed that she would sell the flat in question for consideration amount of Rs.45 lacs (Rupees forty five lacs only). He has stated that he paid Rs.1 lac (Rupees one lac only) as advance. He has stated that he had also paid an amount of Rs.5 lacs (Rupees five lacs only) as part payment of sale consideration amount. He has stated that thereafter he contacted co-defendant No.1 in July 2011 and co-defendant No.1 told him to reach Shimla on dated 25.7.2011. He has stated that thereafter he reached Shimla and again contacted co-defendant No.1 who told him to reach in office of Sub Registrar Shimla on dated 25.7.2011. He has stated that thereafter he reached in office of Sub Registrar Shimla on dated 25.7.2011 in the morning at 10 AM along with balance sale consideration amount but defendant No.1 did not come to execute the sale deed. He has stated that thereafter he contacted co-defendant No.1 by way of mobile but mobile of co-defendant No. 1 was switched off. He has stated that thereafter he filed an application before Sub Registrar to mark his presence in office and further stated that in addition he also executed an affidavit in token of his presence in the office of Sub Registrar Shimla on dated 25.7.2011 Ext.PW1/C. He has stated that thereafter he came back to Delhi and served a legal notice through his Advocate upon co-defendant No.1 and postal receipt is Ext.PW1/E. He has stated that co-defendant No. 1 did not respond to legal notice and further stated that he was and is always willing to perform his part of agreement. He has stated that co-defendant No. 1 did not comply the terms and conditions of agreement and his suit be decreed as prayed for. He has denied suggestion that he did not pay the remaining amount of sale consideration of Rs.39 lacs (Rupees thirty nine lacs only). He has denied suggestion that he was not ready and willing to perform his part of agreement. He has stated that he does not know that flat in dispute was gifted to Ms. Sunita Anand. He has denied suggestion that he did not serve any notice upon co-defendant No.1. He has denied suggestion that he could not arrange sale consideration amount. He has stated that he was not aware that market value of flat in question is about Rs.65 lacs (Rupees sixty five lacs only).

9.2 PW2 M.R. Bhardwaj SDM Theog has stated that he has brought the summoned record. He has stated that on dated 25.7.2011 he was posted as Tehsildar in urban Shimla. He has stated that on dated 25.7.2011 plaintiff Sumit Kumar appeared before him and marked his presence and plaintiff also filed an application Ext.PW1/B.

9.3 PW3 Rajinder Singh has stated that plaintiff is known to him and co-defendant No.1 Sudesh Dogra is also known to him. He has stated that agreement Ext.PW1/A was executed in his presence and he is marginal witness of agreement. He has stated that parties have signed the agreement in his presence. He has stated that other marginal witness has signed the agreement in his presence. He has stated that agreement Ext.PW1/A was executed at Shimla on dated 12.3.2007 and a sum of Rs.1 lac (Rupees one lac only) was paid by the plaintiff to co-defendant No.1 at the time of execution of agreement Ext.PW1/A as earnest money. He has denied suggestion that he did not come to Shimla and he has also denied suggestion that he had signed agreement Ext.PW1/A at Noida. He has stated that agreement was relating to sale of flat by co-defendant No.1 in favour of the plaintiff.

9.4 DW1 Ms. Urvashi Dogra has stated that she is owner of flat in question. She has stated that agreement was executed by plaintiff and by her mother in the year 2007.

She has stated that agreement was for consideration amount of Rs.45 lacs (Rupees forty five lacs only). She has stated that total amount of Rs.6 lacs (Rupees six lacs only) paid by plaintiff and remaining amount of Rs.39 lacs (Rupees thirty nine lacs only) is not paid by plaintiff which was to be paid by July 2011 as per terms of agreement. She has stated that her mother had transferred the flat by way of family settlement in the year 2008 to her and thereafter she gifted the flat to her sister Sunita Anand in the year 2009. She has stated that thereafter her sister had given GPA in favour of her mother and thereafter flat in question was gifted back to her and she is still owner of flat in question. She has stated that in case plaintiff would give balance amount along with interest then she would execute the sale deed. She has stated that plaintiff did not come forward to execute the sale deed as per terms of agreement. She has stated that balance sale consideration amount is only Rs.39 lacs (Rupees thirty nine lacs only). She has stated that she is ready to receive the remaining sale consideration amount of Rs.39 lacs (Rupees thirty nine lacs only). She has stated that she is ready to execute the sale deed in favour of the plaintiff after the receipt of sale consideration amount along with interest in the office of Sub Registrar.

Findings upon issue No.1

10. Submission of learned Advocate appearing on behalf of the plaintiff that plaintiff is entitled for decree of specific performance of contract on the basis of agreement to sell dated 12.3.2007 is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused agreement Ext.PW1/A placed on record. It has been specifically mentioned in condition No. 4 of agreement that case No. 38 of 2004 is pending before Hon'ble High Court of H.P. relating to suit property and sale deed will be executed only if case No. 38 of 2004 is decided in favour of seller namely Mrs. Sudesh Dogra. There is no evidence on record in order to prove that case No. 38 of 2004 has been decided in favour of Mrs. Sudesh Dogra by Hon'ble High Court of H.P. No certified copy of decision of case No. 38 of 2004 has been placed on record. It is held that decision of case No. 38 of 2004 in favour of Sudesh Dogra by Hon'ble High Court of H.P. is the pre-condition for execution of sale deed in favour of plaintiff. The pre-condition relating to decision of Case No. 38 of 2004 in favour of seller Mrs. Sudesh Dogra mentioned in agreement dated 12.3.2007 Ext.PW1/A is not proved on record. In view of the fact that pre-condition of decision of case No. 38 of 2004 in favour of Sudesh Dogra not proved on record in present case it is not expedient in the ends of justice to direct the defendants to execute and register the sale deed of flat No. 9 situated in third floor at Brockhurst Chhota Shimla Tehsil and District Shimla.

11. Another submission of learned Advocate appearing on behalf of the plaintiff that possession of flat in dispute be also handed over to the plaintiff is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that mere agreement of sale of immovable property does not create title, interest or charge in immovable property. ***(See AIR 1981 Delhi 291 titled Jiwan Dass Rawal vs. Narain Dass. See AIR 1987 Delhi 36 titled Imtiaz Ali vs. Nasim Ahmed. See AIR 1981 Calcutta 404 titled Amulya Gopal Majumdar vs. United Industrial Bank Ltd. and others. . See AIR 1995 Allahabad 316 titled Indira Fruits and General Market Meerut vs. Bijendra Kumar Gupta and others)*** Hence it is held that plaintiff is also not entitled for possession of flat in dispute. Even as per Section 54 of Transfer of Property Act contract of sale of immovable property itself does not create any interest or charge upon the immovable property. It was held in case reported in ***AIR 1994 Bombay 228 titled Crest Hotel Ltd. and another vs. The Assistant Superintendent of Stamps and another*** that contract of sale of immovable property is a contract that sale of such property shall take place on terms settled between the parties. It was held that merely contract does not by itself create any interest in or charge in the property. It was further held that an agreement to sell is merely a document creating a right to obtain another document of sale on fulfillment of the conditions specified

in agreement. It was held that on the strength of agreement only buyer does not become owner of the property and ownership remain with seller. It was held that ownership shall be transferred to buyer only on execution of sale deed by seller. It was also held that what the buyer gets from an agreement for sale is only a right to obtain a sale deed executed in his favour.

12. Submission of learned Advocate appearing on behalf of the plaintiff that plaintiff is also entitled for decree of permanent prohibitory injunction as prayed for in the relief clause is rejected being devoid of any force for the reasons hereinafter mentioned. There is no recital in agreement dated 12.3.2007 Ext.PW1/A placed on record that possession of flat was delivered to the plaintiff. In absence of recital in agreement that possession of flat was delivered to plaintiff it is not expedient in the ends of justice to grant relief of injunction in favour of plaintiff as sought in relief clause of plaint.

13. Another submission of learned Advocate appearing on behalf of plaintiff that in alternative plaintiff is also legally entitled for recovery of Rs.6 lacs (Rupees six lacs only) along with interest is accepted for the reasons hereinafter mentioned. It is proved on record that plaintiff has paid Rs.6 lacs (Rupees six lacs only) as earnest money. Plaintiff has specifically stated when he appeared in witness box that he paid Rs.6 lacs (Rupees six lacs only) to co-defendant No.1 namely Sudesh Dogra. Ms. Sudesh Dogra did not appear in witness box for the purpose of cross examination. Hence adverse inference is drawn against Sudesh Dogra under Section 114 (g) of Indian Evidence Act. It was held in case reported in ***AIR 1999 SC 1441 titled Vidyadhar vs. Mankikrao and another*** that if party does not enter into the witness box then adverse inference should be drawn against that party. ***(Also see 1999(1) S.L.J. 724 titled Iswar Bhai C. Patel @ Bachu Bhai Patel vs. Harihar Behera and another)*** Even DW1 Urvashi when appeared in witness box has admitted that agreement dated 12.3.2007 was executed between the plaintiff and co-defendant No. 1 for consideration amount of Rs.45 lacs (Rupees forty five lacs only). DW1 Urvashi has admitted that out of Rs.45 lacs (Rupees forty five lacs only) an amount to the tune of Rs.6 lacs (Rupees six lacs only) was paid by plaintiff. In view of the fact that co-defendant No. 1 did not appear in witness box for the purpose of cross examination and in view of the fact that DW1 Urvashi had admitted that plaintiff had paid Rs.6 lacs (Rupees six lacs only) to co-defendant No. 1 Court is of the opinion that it is expedient in the ends of justice to grant decree of recovery of Rs.6 lacs (Rupees six lacs only) along with interest at the rate of 6% per annum. Issue No. 1 is party decided in favour of the plaintiff.

<u>Findings upon Issue No.2</u>

14. Another submission of learned Advocate appearing on behalf of the defendants that suit is bad for non-joinder of necessary parties is rejected being devoid of any force for the reasons hereinafter mentioned. Agreement dated 12.3.2007 Ext.PW1/A was executed between the plaintiff and co-defendant No.1. It is proved on record that thereafter Hon'ble High Court of H.P. impleaded Ms. Urvashi Dogra as co-defendant No. 2 vide order dated 4.5.2012. It is proved on record that thereafter Hon'ble High Court of H.P. vide OMP No. 299 of 2012 dismissed the application of Sunita Anand to be impleaded as co-defendant. It is proved on record that agreement was executed between the plaintiff and co-defendatn No.1 only and it is well settled law that liability of agreement is *personam* in nature in accordance with law. Since signatories of agreement Ext.PW1/A dated 12.03.2007 are only the plaintiff and co-defendant No. 1 it is held that present suit is not bad for non-joinder of necessary parties. Issue No. 2 is decided against the defendants.

Findings upon issue No.3.

15. Submission of learned Advocate appearing on behalf of defendants that suit in present form is not maintainable is also rejected being devoid of any force for the reasons hereinafter mentioned. Plaintiff has filed the suit for specific performance on the basis of agreement Ext.PW1/A dated 12.3.2007. It is well settled law that suit for specific performance of agreement can be filed on the basis of agreement. It is proved on record that written agreement was executed inter se the parties. However written agreement Ext.PW1/A relating to execution of sale deed could not be executed due to pre-condition mentioned in agreement that sale deed would be executed only if case No. 38 of 2004 pending in Hon'ble High Court of H.P. is decided in favour of vendor. There is no evidence on record in order to prove that Hon'ble High Court of H.P. had decided case No. 38 of 2004 in favour of Mrs. Sudesh Dogra. Issue No. 3 is decided against the defendants.

Findings upon issue No.4

16. Submission of learned Advocate appearing on behalf of the defendants that agreement is not enforceable in view of suit filed by Sunita Anand titled Ms.Sunita Anand vs. Ms. Urvashi Dogra is rejected being devoid of any force for the reasons hereinafter recorded. Court is of the opinion that Sunita Anand and Urvashi Dogra are not signatories to agreement Ext.PW1/A dated 12.3.2007 executed between the plaintiff and co-defendant No.1. Even it is not proved on record that Sumit Kumar is co-party in civil suit filed by Ms. Sunita Anand before the Civil Court. It is well settled law that judgments are of two types i.e. judgment *in-rem* and judgment *in-personam*. It is well settled law that judgment *in-personam* could not be enforced against third person who is not party in civil suit. It is held that civil suit filed by Sunita Anand could only be enforced against Urvashi and Sudesh Dogra and could not be enforced against the plaintiff because plaintiff is not co-party in civil suit filed by Sunita Anand titled Ms.Sunita Anand vs. Ms.Urvashi Dogra. In view of above stated facts issue No. 4 is decided against the defendants.

Relief.

17. In view of findings upon above issues civil suit filed by plaintiff is partly decreed. Relief No.1, relief No.2 and relief No. 3 declined. However alternative relief is granted and decree for recovery of Rs.6 lacs (Rupees six lacs only) is passed in favour of plaintiff and against the defendants jointly and severally. In addition interest at the rate of 6% per annum qua decreetal amount is also awarded from the date of institution of suit till recovery of decreetal amount in favour of plaintiff against defendants as per Section 34 of Code of Civil Procedure 1908 in the absence of contractual rate of interest in agreement Ext.PW1/A dated 12.03.2007 in favour of plaintiff. Condition of 12% interest per annum in agreement Ext.PW1/A is unilateral only in favour of vendor only. Parties are left to bears their own costs. Learned Registrar (Judicial) will prepare the decree sheet strictly in accordance with law. Civil suit stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Amar Singh …Petitioner.

Versus

State of Himachal Pradesh …Respondent.

Cr.Revision No.207 of 2012.

Date of decision: 25.06.2015.

Code of Criminal Procedure, 1973- Section 468- An offence punishable under Section 323 of IPC is punishable with imprisonment for a period of one year- FIR was registered on 01.06.2008 and final report was presented on 4.1.2010 beyond the period of limitation- held, that charge-sheet presented against the petitioner was time barred. (Para-13 to 16)

Indian Penal Code, 1860- Sections 109, 147, 148, 149 and 323- A charge was framed against the petitioner for the commission of offences punishable under Sections 109, 147, 148, 149 and 323 of IPC- only petitioner was arrayed as accused and other persons were arrayed as suspects- held, that offence can be committed by an unlawful assembly of 5 or more than five persons - when only one accused has been arrayed before the Court, he cannot be charged for the commission of offence punishable under Section 149.

(Para-4 to 12)

Cases referred:

Subran alias Subramanian and others versus State of Kerala (1993) 3 SCC 32,
Amar Singh and others versus State of Punjab AIR 1987 SC 826

For the Petitioner : Mr.Sunil Mohan Goel, Advocate.

For the Respondent : Mr.Virender Kumar Verma, Ms. Meenakshi Sharma, Mr.Rupinder Singh, Additional Advocate Generals with Ms.Parul Negi, Deputy Advocate General.
Inspector Vikrant Bonsra, Addl.SHO, P.S.,West, Shimla at P.P. Summerhill, present.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge **(Oral).**

By medium of this revision petition, the petitioner has sought quashing of charges framed against him under Sections 109, 147, 148, 149 and 323 of the Indian Penal Code (for short 'IPC').

The essential facts may be noticed.

2. An FIR No.138/2008 was registered against the petitioner on 01.06.2008 under the aforesaid sections on the basis of the inquiry report submitted by the District Magistrate, Shimla with the SHO, Police Station, Boileauganj, Shimla. It is not in dispute that it is the petitioner alone, who has been arraigned as accused in the FIR and a number of other persons have been arraigned as suspects and kept in column No.12 in the Final Report submitted to the Court.

3. Learned counsel for the petitioner has made two-fold legal submissions:-

i) that the offences under Sections 109, 147, 148 and 149 IPC can only be committed by two or more persons and, therefore, charges framed against him deserve to be quashed and;

ii) that since the maximum punishment under Section 323 IPC is imprisonment for one year or fine of 1,000/- rupees or both, then the charge is not sustainable in view of the charge sheet having not been presented within one year of the date of commission of offence as prescribed under Section 468 of the Code of Criminal Procedure (for short 'Code').

4. Section 107 IPC provides for abetment of a thing and reads thus:-

"**107. Abetment of a thing**.- A person abets the doing of a thing, who-

First.-Instigates any person to do that thing; or

Secondly.- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.- A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2.-Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."

5. Section 108 IPC defines abettor to mean:-

"**108. Abettor**.- A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor."

i. *Explanation 1.*-The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

ii. *Explanation 2.*-To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

iii. *Explanation 3.*-It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

Explanation 4.-The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

iv. *Explanation 5.*-It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed."

6. Section 109 IPC only provides for punishment of abetment. A combined reading of Sections 107, 108 would suggest that in order to constitute an offence of abetment, there must be a combining together two or more persons in an act or an illegal omission and, therefore, the abetment of an offence cannot be committed singly.

7. Sections 147, 148 and 149 IPC for which the petitioner has been charged reads thus:-

"**147. Punishment for rioting**.- Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

148. Rioting, armed with deadly weapon.-Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with

imprisonment of either description for a term which may extend to three years, or with fine, or with both.

149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.- If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

8. Rioting as mentioned in Sections 147 and 148 IPC has been defined in Section 146 to mean:-

"**146. Rioting.-** Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting."

Whereas unlawful assembly as mentioned in Section 149 IPC has been defined in Section 141 IPC to mean:-

"**141. Unlawful assembly**.- An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is-

First.- To overawe by criminal force, or show of criminal force, [the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant, or

Second.- To resist the execution of any law, or of any legal process; or

Third.- To commit any mischief or criminal trespass, or other offence; or

Fourth.- By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.- An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly."

9. A combined reading of Sections 141, 146, 147, 148 and 149 IPC would suggest that the offence of rioting can only be committed by an unlawful assembly for which there have to be an assembly of five or more persons. To constitute the offence of an unlawful assembly, there must be five or more persons and less than five is not an unlawful assembly within the meaning of Section 141 IPC and, therefore, cannot form the basis of an offence with the aid of Section 149 IPC.

10. In ***Subran alias Subramanian and others*** *versus* ***State of Kerala (1993) 3 SCC 32,*** the Hon'ble Supreme Court held as under:-

"10. A combined reading of Section 141 and Section 149 IPC (supra) show that an assembly of less than five members is not an unlawful assembly within the meaning of Section 141 and cannot, therefore, form the basis for conviction for an offence with the aid of Section 149 IPC. The effect of the

acquittal of the two accused persons by the High Court and without the High Court finding that some other known or unknown persons were also involved in the assault, would be that for all intent and purposes the two acquitted accused persons were not members of the unlawful assembly. Thus, only four accused could be said to have been the members of the assembly but such an assembly which comprises of less than five members is not an unlawful assembly within the meaning of Section 141 IPC. The existence of an unlawful assembly is a necessary postulate for invoking Section 149 IPC. Where the existence of such an unlawful assembly is not proved, the conviction with the aid of Section 149 IPC cannot be recorded or sustained. The failure of the prosecution to show that the assembly was unlawful must necessarily result in the failure of the charge under Section 149 IPC. Consequently, the conviction of appellants 2 to 4 for an offence under Section 326/149 IPC cannot be sustained and the same would be the position with regard to the conviction of all the appellants for other offences with the aid of Section 149 IPC also."

11. In ***Amar Singh and others*** *versus* ***State of Punjab AIR 1987 SC 826***, it was held as under:-

> "8. In our opinion, there is much force in the contention. As the appellants were only four in number, there was no question of their forming an unlawful assembly within the meaning of section 141, IPC. It is not the prosecution case that apart from the said seven accused persons, there were other persons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, cannot be convicted under Section 148 or section 149, IPC for any offence, for, the first condition to be fulfilled in designating an assembly an "unlawful assembly" is that such assembly must be of five or more persons, as required under sections 141, IPC. In our opinion, the convictions of the appellants under sections 148 and 149 IPC cannot be sustained."

12. It is more than settled that Section 149 IPC deals with liability for constructive criminality i.e. vicarious liability of a person for acts of others. It is combination of persons, who become punishable as sharers in an offence. Admittedly, in this case, there is only one accused and, therefore, cannot be charged for the commission of the aforesaid offences.

13. Now, I proceed to deal with the second contention regarding the offence under Section 323 IPC being time barred. Section 323 IPC reads thus:-

> "**323. Punishment for voluntarily causing hurt.**- Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both."

14. Section 468 of the Code provides of bar to taking cognizance after lapse of the period of limitation and reads thus:-

> "**468. Bar to taking cognizance after lapse of the period of limitation.**- (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.
>
> (2) The period of limitation shall be –

(a) Six months, if the offence is punishable with fine only;

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

[(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.]"

15. A bare perusal of the aforesaid provisions would show that no Court is competent to take cognizance of an offence after the expiry of the period of limitation and insofar as the present case is concerned, admittedly, the punishment prescribed under Section 323 IPC is one year. If that be so, then the prescribed period of limitation is only one year.

16. In the present case, the FIR was registered on 01.06.2008 while the final report was presented only on 04.01.2010 which is far beyond the prescribed period of limitation. Therefore, it can safely be concluded that the charge sheet presented against the petitioner for commission of offence under Section 323 IPC was time barred.

17. In view of the aforesaid discussion, I find merit in this petition and the same is allowed and the proceedings against the petitioner arising out of FIR No.138/2008, registered on 01.06.2008 including the proceedings pending before the learned Judicial Magistrate 1st Class, Court No.6, in Case No.176-2 of 2010, titled 'State versus Amar Singh' are hereby quashed and set aside, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Karan Laroiya & another ….Petitioners
versus
State of H.P. & others. ….Respondents.

Cr. MMO No. 247 of 2014
ORDER on: 25.6.2015.

Code of Criminal Procedure, 1973- Section 482- Cancellation report has been filed before the trial Court, therefore, the petition dismissed as infructuous- however, petitioners will be at liberty to file fresh petition on the same cause of action.

For the petitioners : Mr. Hamender Chandel, Advocate.
For respondents No. 1 & 2: Mr. J.S. Rana, Assistant Advocate General.
Respondent No.4 exparte.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Assistant Advocate General appearing on behalf of the State submitted that cancellation report of FIR already stood filed before the learned trial Court. In view of the above stated facts present petition has become infructuous. However

petitioners will be at liberty to file fresh petition on the same cause of action as per exigencies of subsequent circumstances. Petition is disposed of. Pending applications are also disposed of.

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

Narinder Lal Negi ……Petitioner.

Vs.

State of Himachal Pradesh and others …..Respondents.

CWP No. 9859 of 2013
Reserved on : 22.04.2015
Date of decision: 25.06.2015

Himachal Pradesh Nautor Land Rules, 1968- Rules 13 and 14- Petitioner was a government employee at the time of allotment of nautor land- land was granted to him for the construction of cow-shed - he had mentioned his annual income as Rs. 4,800/- from all sources- he had spent a sum of Rs. 80,000/- on the construction of the shops- he was not even resident of estate for which he had applied for the grant of nautor land- he had violated the Rule 7 as he had used the land for the purpose other than for which the land was sanctioned by constructing a shop- his income was Rs. 48,000/- but he had given his income as Rs. 4,800/- p.a. which was more than Rs. 2,000/- prescribed under the Rules- the object of nautor land rules was to help the persons who were landless or were in dire need of land for cultivation- petitioner cannot be called to be a landless or needy person- nautor land was allotted in 5,769 cases in the State- Financial Commissioner directed to call for the records in all the cases and to pass the order of resumption/cancellation if the allotment had been made contrary to the provision of Rules – a further direction issued to refund the amount with interest if the land has been acquired.

Cases referred:

Gopinder Singh *Vs.* The Forest Department of Himachal Pradesh & Ors., AIR 1991 SC 433
Percy Chauhan Vs. State and another, Indian Law Reports (Himachal Series) 1979 (Vol.-8) 35
S.C. Prashar and another Vs. Vasantsen Dwarkadas and others, AIR 1963 Supreme Court 1356
Mangheru Vs. State of Himachal Pradesh and others, ILR 1981 Vol.X 283
Kanshi Ram and another Vs. Lachhman and others (2001) 5 Supreme Court Cases 546
Gopinder Singh Vs. The Forest Department of Himachal Pradesh and others, AIR 1991 Supreme Court 433
Ibrahimpatnam Taluk Vyavasaya Collie Sangham Vs. K. Suresh Reddy and others (2003) 7 Supreme Court Cases 667
Saurabh Chaudri and others Vs. Union of India and others (2004)5 SCC 618
M.A. Murthy Vs. State of Karnataka and others (2003) 7 Supreme Court Cases 517

For the petitioner: Mr. T. S. Chauhan, Advocate.
For the respondents: Mr. M.A. Khan, Additional Advocate General, with Mr. P.M. Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

Though the present petition is a private litigation, but it has been treated as a Public Interest Litigation, since a question of great public importance has been raised and also on the basis of the material placed on record by the State Government in sequel to various orders, passed by this Court, which shows total recklessness on the part of the statutory authorities under The Himachal Pradesh Nautor Land Rules, 1968 to allot Nautor land in contravention of the Rules.

2. Petitioner was granted Nautor land measuring 0-00-79 hectares, situated in Up Mohal Chirgaon, Tehsill Nichar, District Kinnaur vide order, dated 27th December, 1989. The Sub-Divisional Officer (Civil) reviewed the said order vide order, dated 5th March, 1993 and cancelled the order of Nautor land granted in favour of the petitioner. Petitioner filed an appeal before the Deputy Commissioner, Kinnaur against the order, dated 5th March, 1993. The appeal was dismissed vide order, dated 5th June, 1993. Petitioner filed the revision petition before the Financial Commissioner bearing Civil Revision No. 264 of 1994, which was partly accepted by the Financial Commissioner on 16.08.1996 and the case was remanded back to the Deputy Commissioner, Shimla. The Deputy Commissioner, Shimla dismissed the same on 24.02.1997. The petitioner filed the revision petition against the order, dated 24.02.1997 before the Financial Commissioner (Appeals), Himachal Pradesh, Shimla bearing Revision Petition No. 58/97. The case was remanded back to the Sub-Divisional Officer (C), Nichar vide order, dated 05.11.2003. The Sub-Divisional Officer (C), conducted the spot investigation on 20.01.2004. He recommended the cancellation of the Nautor land granted in favour of the petitioner vide Annexure P-4. Thereafter, on the recommendations made by the SDO (C), the Nautor land granted in favour of the petitioner was cancelled by the Deputy Commissioner, Kinnur. Petitioner filed a revision petition before the Divisional Commissioner, Shimla, which was dismissed in default and an application for restoration of the same was also dismissed on 04.04.2011 vide Annexure P-5. Thereafter, the petitioner filed a revision petition against the order, dated 04.04.2011, before the Financial Commissioner (Appeals), Himachal Pradesh, Shimla-2. The Financial Commissioner (Appeals), H.P. dismissed the revision petition on 27.08.2013 by upholding the order, dated 04.04.2011, passed by the Divisional Commissioner, Shimla.

3. The respondent-State has framed the Rules called “The Himachal Pradesh Nautor Land Rules, 1968”. Rule-3 defines the expressions “Nautor Land”, “Tenant”, “Landowner”, “Circle”, “Resident” and “State Government”. Rule-5 provides the purpose for which Nautor Land could be granted, which reads thus:

> *“5. Purpose for which nautor land may be granted:- Nautor land may be granted only for one or more of the following purposes, namely:-*
>
> *(a) Horticulture.*
>
> *(b) Agriculture, including raising of fodder, growing of vegetables, growing of any special grasses, herbs, shrubs and trees for domestic use or for cash income and dairy farming.*
>
> *(c) Construction of :-*
>
> *(i) Any building subservient to agriculture;*
>
> *(ii) thrashing floor;*
>
> *(iii) water mill; and*
>
> *(iv) water channel*

(d) construction of a building for resident.

(e) Consolidation of Holdings.

(f) For genuine public purposes like construction of Dharmsala, etc."

4. Rule-6 prescribes the maximum limit of grant of Nautor Land, which reads as under:

"6. The maximum limit of grant-Maximum limits to grant nautor land shall be as under:-

(i) For horticultural purposes.....20 bighas

(ii) (a) For Agriculture ....20 bighas

(b) For raising of fodder, growing of vegetables, growing of any special grasses, herbs, shrubs and trees for domestic use or for cash income and dairy farming.

(iii) for water mills ....2 bighas

(the land actually required for taking out a water channel for the water mill shall be sanctioned in addition as actually needed or, in alternative, only the right to take out the water channel through Government land shall be allowed if grant of nautor land be against public interest in any case).

(iv) For a thrashing floor .....2 biswas

(v) For a building subservient to agriculture or construction of a residential house. ....1 bigha.

Provided that if an applicant already holds some land under him, the grant of nautor land under sub-rule (i) and (ii) above shall be restricted only to the extent by which his total holding falls short of 20 bighas, except in the case of Pangi and Bharmaur areas of Chamba District, Panddrabis and Dodra Kwar areas of Shimla District and the whole of Lahaul and Spiti and Kinnaur Districts where dhanks and ghasnis, if any, comprised in his holding shall be excluded therefrom while calculating this limit of 20 bighas.

and(ii) severally or collectively. The grants for other purposes, can be obtained in addition thereto.

Provided further that a person who is granted nautor for a house site shall not become by virtue of this grant, right holder in the revenue estate in which such grant is made and it shall not entitle him to acquire nautor under these Rules.

Explanation:-In the case of a joint holding i.e. a holding held jointly by more persons than one, the respective proportionate share of each joint holder, as entered in the revenue records shall be taken to be holding, for the purposes of the limits within which nautor land may be granted, in respect of each joint holder."

5. Rule-7 lays down the eligibility for the grant of Nautor land, which reads as under:

"7. Eligibility for nautor land:-Save for the widow and the children of a member of an armed force or semi-armed force, who has laid down his life for the country (whose widow and children were eligible for grant anywhere within the Tehsil subject to the conditions

mentioned in the wajib-ul-Ari in respect of the areas where the land applied for is situated) no one who is not the resident in the estate in which the land applied for is situated, shall be eligible for the grant. Every resident of the estate in which the land appoied for lies will be eligible in the following orders of preference:-

(a) Such persons who have less than ten bighas of land under self cultivation on 1.1.1974, whether as owners, or as tenants, or as lessees, either individually or collectively, or have an income of less than Rs.2000/- per annum from all sources including lands. Provided that in this category a dependent of one who has laid down his life for the defence of the country will get preference over his counterparts.

(b) Scheduled Castes and Scheduled Tribes applicants; and

(c) The deponents of those who have laid down their lives for the defence of the country Service, for the defence of the country will mean service in a uniformed force as well aqs in the capacity of civilian, so long as the death occurs on a front, be it military or civil.

(d) Services personnel in the armed forces and Ex-servicemen.

(e) Panchayats.

(f) Others.

Provided that a bonafide landless resident of Spiti shall be eligible for the grant of land in Nautor within the Spiti Sub-Division."

6. Rule-12 prescribes for resumption of the Nautor land, which reads as under:

"12. Resumption-The grant of nautor land shall be cancelled and the land granted resumed by the State Government without payment of any compensation in the following events:

(a) if, in the case of ordinary agriculture, the grantee fails to break the land granted to him within two years from the date of the patta.

(b) if, in the case of horticulture, the grantee fails to plant the area with fruit trees within two years from the date of the patta.

(c) If, in the case of a water mill and a water channel, the grantee fails to set up the water mill, or to dig out the water channel, as the case may be, within two years from the date of the patta.

(d) If, in the case of nautor for any other purpose the gurantee fails substantially to start utilization of the land for the purpose for which the nautor land has been granted to him within two years of the grant of the patta.

(e) *If the grantee, at any time, uses the land for any purpose other than the purpose for which the grant was made to him.*

(f) *If, the grantee or his legal representative successor alienates the land granted in nautor, within 15 years from the date of the patta, or if he alienates, it, at any time for a purpose other than the one for which the land was granted to him in the event of other kind of alienation the power to the State Government to cancel the grant and to resume the land shall govern the alience also; and*

(g) *if, the grantee secures the sanction of nautor by suppression of material facts in his nautor application*

Provided that the periods laid down in (a), (b), (c) and (d) shall in each case, by counted after the removal of trees by the Forest Department/Deputy Commissioner whenever it becomes the responsibility of that Department, Deputy Commissioner to dispose of trees under these rules.

7. The manner in which an application has to be submitted for grant of Nautor land is provided under Rule-13, which reads thus:

"13. Application for Nautor Land-Application in form (c) appended to these rules, duly accompanied by three blank application forms shall be made to the Sub-Divisional Officer (Civil) of the Sub-Division in whose jurisdiction, the land applied for is situated. The original application shall bear a court fee stamp of Rs.2.50 and shall be accompanied by a Tatima Shajra (Supplementary Map) to be prepared by the Patwari on the spot showing the arda applied for. The Tatima Shajra should indicate the boundaries of the Land applied for, on all the sides, with specific reference to at least two permanent boundary marks or fixed marks near enough which should be easily identified on the spot and with the help of which the plot applied for could undoubtedly be located on the spot. Such a copy of the Tatima Shajra shall invariably be attached to the patta to be executed according to rules, the Tatima Shajra should also contain the following additional details to be given thereon by the Patwari:-

(h) *The area and the field No. of the land applied for in the Nautor;*

(i) *the total area of the waste land and its Khasra No. out of which nautor has been applied for; and*

(j) *the number of standing trees, if any on the land applied for.*

8. The application form (c) was required to be duly accompanied by three blank application forms to be made to the Sub-Divisional Officer (Civil) of the Sub-Division in whose jurisdiction the land applied for was situated. It was required to be accompanied by a Tatima Shajra (Supplementary Map) to be prepared by the Patwari on the spot showing the area applied for. The Tatima Shajra was required to indicate the boundaries of the land applied for on all sides with specific reference to at least two permanent boundary marks or fixed marks, which could be easily identified on the spot and with the help of which the plot applied for could undoubtedly be located on the spot. The Tatima Shajra was required to contain the additional details to be given thereon by the Patwari, i.e., the area and the field number of the land applied for in the Nautor, the total area of the waste land and its Khasra

number out of which nautor has been applied for and the number of standing trees, if any on the land applied for.

9. Rule-14 lays down the procedure in which the application submitted under Rule-13 was to be processed. Rule-16 provides that the Sub-Divisional Officer (Civil) of the Sub-Division shall be competent to grant nautor land up to the maximum limits prescribed in Rule-6 and such application was to be disposed of by him within a maximum period of three months from the date of the receipt thereof from the Tehsil Revenue Officer. Rule-18 lays down the procedure after sanction of nautor lands. According to sub-rule (2) of Rule-18, after the expiry of the period prescribed for filing an appeal/revision, the patta shall be issued under the seal and signature of the Collector of the District to whom it will be put up by the Tehsil Revenue Officer after due completion and after the execution of the Patta in Form 'D' for purposes other than Horticulture and in Form 'E' for Horticulture, the mutation memorandum in Form 'B' shall be completed in the office of the Sub-Divisional Officer (Civil) and issued under his signatures to the Revenue Officer of the area concerned for entry and attestation of mutation. Rule-18 made the grantee bound by the conditions of patta. Rule-25 authorizes the Deputy Commissioner to pass orders as he deems fit after giving an opportunity to the person affected to be heard. Rule-28 provides that an appeal from the order of the S.D.O. (C) under Rule-16 shall lie to the Deputy Commissioner within 60 days from the date of the order and a further appeal from the appellate order of the Deputy Commissioner shall lie to the Commissioner within 60 days from the date of the order and in case of original grant made by the Deputy Commissioner, an appeal from his order shall lie to the Commissioner within 60 days from the date of order and a second appeal to the Financial Commissioner within 90 days from the date of order and no second appeal could lie when the original order is confirmed on first appeal.

10. Rule-29 deals with review. It reads as under:

> *"29. Review-The Financial Commissioner or the Commissioner or the Deputy Commissioner or the Sub-Divisional Officer (c) may either of his own motion or on application of any party interested review, and modify, reverse or confirm any order passed by himself or any of his predecessors in office, provided as follows:-*
>
> *(a) When the Sub-Divisional Officer (C) thinks it necessary to review any order, he shall first obtain the sanction of the Deputy Commissioner;*
>
> *(b) when the Commissioner or the Deputy Commissioner think it necessary to review any order which he has not himself passed, he shall first obtain the sanction of the Financial Commissioner in the case of the Commissioner and the Commissioner in the case of the Deputy Commissioner;*
>
> *(c) the application for review of an order shall not be entertained unless it is made within 90 days from the passing of the order and unless the applicant satisfied the Financial Commissioner or the Commissioner or the Deputy Commissioner or the Sub-Divisional Officer (Civil) as the case may be, that he had sufficient cause for not making the application within that period;*
>
> *(d) an order shall not modified or reversed in review unless reasonable notice has been given to the parties effected thereby to appear and be heard in support of the order;*
>
> *(e) an order against which an appeal has been preferred shall not be reviewed."*

11. Rules-30 lays down that the Financial Commissioner may at any time call for the record of any case pending before or disposed of by any officer subordinate to him and the Commissioner may at any time call for the record of any case pending before or disposed of by any officer subordinate to him and if in any case, in which the Commissioner has called for the record and if order made should be modified or reversed, he shall report the case with his opinion thereon for the orders of the Financial Commissioner. The Financial Commissioner may in any case called for by himself under Sub-rule (i) or reported to him under Sub-rule (iii), pass such order as he thinks fit. However, the authorities were required to hear the parties before reversing the order or modifying any proceedings or order of the Subordinate Revenue Officer.

12. In the instant case, the petitioner was Government employee at the time of allotment of Nautor land on 27.12.1989. He was granted land for the construction of a cow shed. Petitioner has mentioned his annual income as Rs.4800/- from all sources. He has spent a sum of Rs.80,000/- on the construction of the shops as per the orders passed by the Deputy Commissioner, Kinnaur on 05.06.1993. The Financial Commissioner (Appeals), Himachal Pradesh, Shimla vide order, dated 05.11.2003 has remanded the case back to the Sub-Divisional Officer (C) Nichar to inquire afresh into the matter and to submit a factual report to the District Collector, Kinnaur. The Sub-Divisional Officer (C) conducted the spot investigation on 20.01.2004. He recommended the cancellation of the Nautor land granted in favour of the petitioner vide Annexure P-4. Thereafter, on the recommendations made by the SDO (C), the Nautor land granted in favour of the petitioner was cancelled by the Deputy Commissioner, Kinnur. Petitioner filed a revision petition before the Divisional Commissioner, Shimla, which was dismissed in default and an application for restoration of the same was also dismissed on 04.04.2011 vide Annexure P-5. Thereafter, the petitioner filed a revision petition against the order, dated 04.04.2011, before the Financial Commissioner (Appeals), Himachal Pradesh, Shimla-2. The Financial Commissioner (Appeals), H.P. dismissed the revision petition on 27.08.2013 by upholding the order, dated 04.04.2011, passed by the Divisional Commissioner, Shimla. The Financial Commissioner has given the reasons the manner in which the petitioner had applied for the grant of Nautor land by suppressing the material facts qua his income. He was also not even resident of the estate for which he had applied for the grant of Nautor land. Petitioner was a resident of Mohal Chagaon, whereas he applied for nautor land for the construction of a cow shed in revenue estate Tapri. The petitioner has violated Rule-7 of the H.P. Nautor Rules, 1968. He has used the land for the purpose other than for which the land was sanctioned. He was sanctioned land, as noticed above, for the construction of cow shed, but he has constructed shops for commercial purpose. Petitioner could not apply for the grant of land since his income was more than Rs.2000/- per annum, rather his income was Rs.48,000/-, but he has given his income as Rs.4800/- per annum. His case was rejected by the Divisional Commissioner on 04.04.2011. He filed the revision only on 22.12.2011 without explaining the delay.

13. Case of the petitioner is that the income criteria would not apply to him since he belongs to Scheduled Tribes category and his case would be covered under Clause (b) of Rule-7 of The Himachal Pradesh Nautor Land Rules, 1968. However, the fact of the matter is that the petitioner has suppressed the material facts at the time of submission of application for allotment of Nautor land. He has used the land for the purpose other than for which it was allotted by constructing shops for commercial use. He belongs to Mohal Chagaon, but he has applied for the land in revenue estate Tapri. The object of grant of Nautor land was to implement the policy of the Government to help certain persons who were either landless or in dire need of land for cultivation for their sustenance. Petitioner was Deputy Ranger employed in the Forest Department. His income was more than Rs.2000/- per annum. He

can not be held to be eligible even though he belongs to Scheduled Tribes category as per Sub-rule (b) of Rule-7 of The Himachal Pradesh Nautor Land Rules, 1968. Moreover, he has also violated the conditions of Patta executed between him and the State. Petitioner cannot be termed either landless or needy person for the purpose of allotment of Nautor land. The criteria of holding less than 10 bighas of land under his cultivation read with income criteria would apply to Scheduled Castes and Scheduled Tribes as well. Since objective of the Scheme was to help the needy and landless persons, the persons with more than 10 bighas of land and having income more than Rs.2000/- per annum, cannot be presumed to be needy for whom Nautor land could be granted.

14. The Court has passed the following order on 27.12.2013:

> *"The issue which arises for consideration is as to whether a Government employee is entitled for allotment of land under the H.P. Nautor Land Rules, 1968. We direct respondent No. 4 to file response by his personal affidavit, disclosing the number of Government employees within the State, to whom the land stands allotted under the Rules. The response shall positively be filed within a period of three weeks and rejoinder within one week thereafter. List on 28.02.2014.*
>
> *2. In the meanwhile, we direct the parties to maintain status quo, qua nature and possession of the land, which is subject matter of the present writ petition."*

In sequel thereto, an affidavit, dated 19.02.2014, was filed by the Chief Secretary, Government of Himachal Pradesh. According to the averments made in the affidavit, Nautor land was sanctioned/granted to 5532 Government employees including employees of Central Government and Defence/Army/Para Military Forces.

15. The Court passed the following order on 28.02.2014:

> *"Affidavit dated 19.2.2014 perused. Chief Secretary, Government of Himachal Pradesh is directed to furnish list of all the Officers presently serving the State Government, to whom, land stands allotted in terms of Nautor Policy. Needful be positively done within a period of two weeks.*
>
> *List on 22.3.2014."*

In sequel to order, dated 28.02.2014, the Chief Secretary, Government of Himachal Pradesh filed the affidavit, dated 22nd March, 2014. According to the averments made in the affidavit, dated 22nd March, 2014, the Deputy Commissioner Lahaul & Spiti has reported 237 more allotment cases of Government employees. Hence, the figure 5532 mentioned in earlier affidavit, dated 19.02.2014 was requested to be read as 5769.

16. The Court passed the following order on 28.04.2014:

> *"Affidavit dated 22nd March, 2014 is not in respect of order dated 27.12.2013. Mr. Anup Rattan, learned Additional Advocate General submits that order shall positively be complied with and affidavit disclosing the list of recipients of land under the policy, shall be filed within four weeks.*
>
> List on 29th May, 2014."

In sequel thereto, the Chief Secretary, Government of Himachal Pradesh filed an affidavit, dated 21.06.2014.

17. The Court passed the following order on 31.07.2014:

> *"For the reasons explained by Mr. B.S. Parmar, learned Additional Advocate General, personal appearance of Chief Secretary, State of Himachal Pradesh is exempted. He shall not appear unless so directed by us. On the request of Sh. Parmar, matter is adjourned by two weeks. List on 21.8.2014."*

In sequel thereto, an affidavit was filed on 01.09.2014 and the information with regard to Deputy Commissioner, Lahaul & Spiti, Kinnaur and Chamba was given.

18. The Court passed the following order on 18.09.2014:

> *"The Himachal Pradesh Nautor Land Rules, 1968 came up for consideration before the Hon'ble Apex Court in Gopinder Singh Vs. The Forest Department of Himachal Pradesh & Ors., AIR 1991 SC 433. Respondent No. 4 is directed to file his personal affidavit, disclosing the names of all the applicants/Government officials, whether in service or retired, to whom nautor land stands allotted in violation of the directions issued in Gopinder Singh (supra). At this point in time, we refrain from passing any order qua the allottees, whose names stand disclosed in terms of affidavit dated 01.09.2014. Needful be positively done within a period of four weeks. List on 30.10.2014."*

Thereafter, affidavits, dated 25th November, 2014 and 6th January, 2015, were filed by the Chief Secretary, Government of Himachal Pradesh, whereby the details of Districts Una, Hamirpur, Kangra, Sirmaur and Bilaspur have been given. According to the details given vide Annexure R/4-1, no land was allotted in Districts Una, Hamirpur and Kangra under the provisions of Nautor Rules. 1968. The Deputy Commissioner, Sirmaur has informed that no land has been allotted in violation of the directions issued by the Hon'ble Apex Court vide judgment *in* **Gopinder Singh** *Vs.* **The Forest Department of Himachal Pradesh & Ors.**, AIR 1991 SC 433. In District Bilaspur, 425 Government employees have been allotted Nautor land. It is clear from the details given that the applicants, though Government employees, have been allotted Nautor land, but they have not mentioned their income in the respective case files in all the 425 cases. It was a serious lapse on the part of the authorities, who have sanctioned the Nautor land in favour of the Government employees, who have not given their details of income. Thus, the allotment of Nautor land was made in violation of Sub-rule (a) of Rule-7 The Himachal Pradesh Nautor Land Rules, 1968. Similarly, in District Lahaul and Spiti, 537 Government employees have been granted Nautor land under the H.P. Nautor Rules, 1968. It is submitted that in all 537 cases, the allotments were made under Clause (b) of Rule-7 of The Himachal Pradesh Nautor Land Rules, 1968 as the whole Lahaul and Spiti District is tribal area. It is evident from the affidavit that the income of all the allottees in District Lahaul and Spiti was more than Rs.2000/- per annum.

19. Now, we will advert to District Chamba. In District Chamba, 656 Government employees have been granted nautor land under The Himachal Pradesh Nautor Land Rules, 1968. It is evident from the details given therein that the income of all the Government employees was more than Rs.2000/- per annum. Thus, they were not entitled to grant of Nautor land under The Himachal Pradesh Nautor Land Rules, 1968.

20. In District Mandi, 198 Government employees have been granted Nautor land under The Himachal Pradesh Nautor Land Rules, 1968. It is duly established from the details that the income of all the Government employees, who have been granted Nautor

land was more than Rs.2000/- per annum. The Government employees in most of the cases have not mentioned their income in the application forms. Thus, they were also not entitled to Nautor land under The Himachal Pradesh Nautor Land Rules, 1968.

21. In District Kinnaur, 534 Government employees have been granted Nautor land under The Himachal Pradesh Nautor Land Rules, 1968. Even in these cases, income of few of the Government employees who have been granted Nautor land was even more than Rs.2000/- per annum. What has to be seen, is the objective of the Scheme, which was to help the persons who were having less than 10 bighas of land and their income was less than Rs.2000/- per annum and were also Scheduled Castes and Scheduled Tribes. Cases of those Scheduled Castes and Scheduled Tribes persons can be considered for grant of Nautor land, who are landless and are in need of land for the purpose of cultivation, construction of their houses, cow shed, any building subservient to agriculture, thrashing floor, water mill, water channel, consolidation of Holdings and for public purposes like construction of Dharamshala etc. The affluent persons, who were Government employees and whose income was more than Rs.2000/- per annum and were already in possession of land, were not entitled to get the land under Sub-rule (b) of Rule-7 of The Himachal Pradesh Nautor Land Rules, 1968.

22. In District Shimla also, 848 Government employees have been granted Nautor land under The Himachal Pradesh Nautor Land Rules, 1968. They have shown their income more than Rs.2000/- per annum, but still they have been granted Nautor land in contravention of The Himachal Pradesh Nautor Land Rules, 1968.

23. In District Kullu, 44 Government employees have been granted Nautor land under The Himachal Pradesh Nautor Land Rules, 1968. There is a standard pattern whereby the income has been shown less than Rs.1900/- per annum. All the incumbents have made false declarations qua their income. Their income even at the time of allotment of Nautor land could not be less than Rs.2000/- per annum, even if their salary is assumed to be less than Rs.400/- per month.

24. State largess has been distributed without due application of mind to Government employees, who were not eligible for the grant of Nautor land and those who were landless, Scheduled Cast and Scheduled Tribes with meager income, have been left out.

25. In District Chamba, 13 Government employees have been granted Nautor land whose income was more than Rs.2000/- per annum, in violation of the directions issued by the Hon'ble Apex Court in **Gopinder Singh** *Vs.* **The Forest Department of Himachal Pradesh & Ors.**, AIR 1991 SC 433. In District Mandi, after the judgment rendered by the Hon'ble Apex Court on 17.08.1990, 180 Government employees have been granted Nautor land whose income was more than Rs.2000/- per annum. In District Shimla, 12 Government employees have been granted Nautor land, though their income was more than Rs.2000/- per annum, in violation of the judgment rendered by the Hon'ble Apex Court on 17.08.1990. In District Solan, two Government employees have been granted Nautor land, though their income was more than Rs.2000/- per annum, in violation of the judgment rendered by the Hon'ble Apex Court on 17.08.1990. The state has undertaken to issue notices to those 207 allottees as per the affidavit dated 8th April, 2015.

26. The details discussed hereinabove make a startling revelation the manner in which the land has been allotted to the Government employees, who were not entitled to the same under The Himachal Pradesh Nautor Land Rules, 1968. The Government land can be allotted only for the purposes of Horticulture, Agriculture, construction of any building

subservient to agriculture, thrashing color, water mill, water channel, construction of a building for resident, consolidation of holdings and for public purposes like construction of Dharamshala etc. The maximum limit has been prescribed under Rule-6. The grant of Nautor land could be cancelled as per Rule 12 on the grounds if the grantee secured the sanction of nautor land by suppression of material facts in his nautor application. According to Rule-7, a person could only submit his application for the grant of Nautor land in the Mohal where he permanently resides. In the instant case, all the Government employees have violated Rule-7(a) or (b) and they have suppressed the material facts at the time of submission of their applications under Rule-13. Under Rule-25, the Deputy Commissioner could resume the possession. Thereafter, the same is required to be taken back by the Tehsil Revenue Officer. Rule-29 deals with review. The Financial Commissioner or the Commissioner or the Deputy Commissioner or the Sub-Divisional Officer (C) may either of his own motion or on application of any party interested review, modify, reverse or confirm any order passed by himself or any of his predecessors-in-office on the conditions stipulated therein. We have already discussed the scope of Rule-30 which deals with the revision. The Financial Commissioner may at any time call for the record of any case pending before or disposed of by any officer subordinate to him, however, provided that before exercising this power, the parties concerned are to be heard inconformity with the principles of natural justice.

27. The Nautor Rules have all the ingredients of law. According to Form (c) prescribed under Rule-13 of The Himachal Pradesh Nautor Land Rules, 1968, the applicant has to disclose the income criteria accruing to the applicant from all sources. It has to be in the shape of an affidavit.

28. Mr. P.M. Negi, learned Deputy Advocate General submitted that the power of review and revision has to be exercised within a reasonable period. We are of the considered opinion that a revision would lie within three years from the date of detection of fraud. In the instant case, nobody knew about the large scale scam the manner in which the Nautor land has been granted to the Government employees in violation of The Himachal Pradesh Nautor Land Rules, 1968. It is only by way of the affidavits filed during the course of proceedings that the Court has noticed that the land has been obtained under The Himachal Pradesh Nautor Land Rules, 1968 by concealing the material facts qua income. Fraud vitiates every action. It is the duty of all the statutory functionaries to protect, preserve and safeguard the State property. It cannot be distributed in an indiscriminate manner. The order of grant of land can be reviewed or revised after grant of *patta* as laid down by this Court in **Percy Chauhan Vs. State and another,** Indian Law Reports (Himachal Series) 1979 (Vol.-8) 35.

29. Their Lordships of the Hon'ble Supreme Court in **S.C. Prashar and another** Vs. **Vasantsen Dwarkadas and others**, AIR 1963 Supreme Court 1356 have held that the words "any time" means that the action to be taken without any limit of time. Their Lordships have held as under:

> *"69. The next requirement of S. 4 of the Act of 1959 is that the notice must have been issued at any time before the commencement of that Act. The present notice which had been issued in 1954 had clearly been so issued. When the section uses the words "at any time", I suppose it means at any time; it does not thereby say that the notice must be issued at any time before the 1959 Act but after a certain other point of time. The other limit is not to be found in the section at all; all that it requires is that the notice must be issued before the 1959 Act.*

In the instant case, the expression "at any time" mentioned in The Himachal Pradesh Nautor Land Rules, 1968 has to be read taking into consideration the objectives of these Rules.

30. The Full Bench of this Court in **Mangheru** Vs. **State of Himachal Pradesh and others**, ILR 1981 Vol.X 283 has held that Article 56 of the Limitation Act lays down a limitation of three years from the date of the knowledge of fraud and the Court was of the opinion that it would be reasonable to lay down that ordinarily within a period of three years from the date of knowledge of fraud the *suo motu* powers can be exercised. Their Lordships have further held that arbitration clause cannot take away the *suo motu* powers of review and revision granted to various authorities. Their Lordships have held as under:

> *"20. Now, there is no dispute that the peculiar facts and circumstances of each case should determine 'a reasonable time'. For example, if a grantee has suppressed material facts or has obtained the allotment by playing a fraud or a deception 'the reasonable time' will have to be determined with reference to the time when the fraud or deception came to light. Various cases where a party had concealed material facts and succeeded in obtaining the allotment have come to our notice. We cannot all a party to reap the fruits of his deception or fraud simply on the ground that it had successfully kept them concealed over a sufficiently long period of time. However, once the fraud is uncovered, then action is required to be taken within a reasonable time thereafter. Article 56 of the Limitation Act lays down a limitation of three years from the date of the knowledge of fraud, and we are of the opinion that it will be reasonable to lay down that ordinarily within a period of three years from the date of knowledge of fraud the suo motu powers can be exercised.*
>
> *23. It will be noticed that only where the differences have arisen "in any way touching or concerning this grant……" the matter shall be referred to arbitration. If the differences are arising in respect of 'this grant' then the matter has to be referred to the arbitration. This intention is clear also from the use of the words: "save in so far as the decision of any such matter has been hereinbefore provided for……" Moreover, rule 19 unambiguously provides that the conditions of the patta are to be enforced subject to the provisions of the rules. Since rules 29 and 30 provide for sou motu review and revision, this power could not be taken away by the arbitration clause. It has to be remembered that in the scheme of things, the patta may be granted at a very early stage and the aggrieved persons may be filing the appeals etc. in terms of rule 28. An application for review can also be made under Clause © of rule 29. It cannot be held that the moment the patta is granted the rights of other persons to file appeals and applications for review are automatically taken away. Indeed they are not parties to the patta and they cannot be held bound by the arbitration clause. The arbitration clause cannot also take away the sou motu powers of review and revision granted to various authorities. We may at this stage also record that this arbitration clause has since been deleted by a gazette notification dated 21st September, 1974."*

31. Their Lordships of the Hon'ble Supreme Court in **Kanshi Ram and another** Vs. **Lachhman and others** (2001) 5 Supreme Court Cases 546 have held that the use of

expression “at any time” for making an application or filing a suit is indicative of the legislative intent that the Act provides a fresh opportunity to the debtor for getting relief under the Act. The legislature has taken care to make the relevant provisions of the Act granting relief to debtors by giving overriding effect over any law, agreement, contract or decree contrary to the provisions of the Act. Their Lordships have held as under:

> *“15. The object of the Act and the scheme underlying it as obtained from the provisions made therein is to grant relief to debtors and enable them to get back properties mortgaged by them with possession for a loan. The use of expression "at any time" for making an application or filing a suit is indicative of the legislative intent that the Act provides a fresh opportunity to the debtor for getting relief under the Act. The legislature has taken care to make the relevant provisions of the Act granting relief to debtors by giving overriding effect over any law, agreement, contract or decree contrary to the provisions of the Act. It was not disputed before us during hearing of the case that the plaintiffs filed the suit under provisions of the Act for restoration of the possession of the mortgaged property. Undisputedly there is no decree for foreclosure in favour of the creditor/mortgagee.*
>
> *16. In the backdrop of the above the question of limitation is to be considered. The reason given by the High Court in support of the finding that the suit was barred by limitation is that more than 30 years had elapsed since the date of the mortgage (February, 1946) when the suit was filed in 1981. Therefore the mortgagor had lost his right to redeem the property mortgaged. The provisions in Section 27 of the Limitation Act have been considered in support of the finding. This reasoning appears to us to be fallacious. It defeats the object and the purpose of the statute enacted by the legislature specially to give relief to debtors in the State. The first appellate Court had given cogent reasons in support of its finding in favour of the appellants. The Court held and in our view, rightly that the suit was one for recovery of possession from the mortgagee who was in unauthorised possession of the mortgaged property after the mortgage loan was satisfied. The cause of action for filing such a suit under the Act arose when the enactment was enforced in 1979. Viewed from that angle the suit was filed in time and the trial Court and the first appellate Court rightly recorded the findings to that effect. The High Court erred in reversing the concurrent finding of the Courts below on the erroneous assumption that the suit was one for redemption of the mortgage simpliciter. It is relevant to note here that the present suit is not one filed under Section 60 or 62 of the Transfer of Property Act. It is a suit filed for relief on the basis of the Himachal Pradesh Debt Reduction Act, 1976.”*

32. Their Lordships of the Hon’ble Supreme Court in **Gopinder Singh** Vs. **The Forest Department of Himachal Pradesh and others**, AIR 1991 Supreme Court 433 have held as under:

> *“6. We have carefully examined the provisions of clause (a) of R. 7 reproduced above. The clause reads "such persons who have less than 10 bighas of land .... or have an income of less than 2,000 per annum from all sources including lands". There is thus inherent evidence in the clause itself to show that the two parts cannot be read disjuntively.*

> *The second part makes it clear that an income of less than Rs. 2,000/- per annum should be from all sources including lands. It is thus obvious that a person who has got less than 10 bighas of land but has an income of more than Rs. 2,000/- from the said land is not eligible for allotment of nautor land under clause (a). Even otherwise if we interpret the clause the way learned couasel for the appellant wants us to do it would produce absurd result. A person having two bighas of land but otherwise earning Rs. 20,000/- per annum would be eligible for allotment of nautor land if we accept the appellant's interpretation. The object of granting nautor land under the rules is to help poor and unprovided for residents of Himachal Pradesh. Considering the nature, scope and the clear intention of the framers of the Rules it is necessary to read the word "or" in between the first and the second part of clause (a) as "and". The appellant's income was admittedly more than Rs. 2,000 / per annum and as such his claim for nautor land was rightly rejected.*

33. Mr. P.M. Negi, learned Deputy Advocate General submitted that since the judgment in ***Gopinder Singh's*** case (supra) was delivered by the Hon'ble Supreme Court on 17.08.1990, therefore, the Nautor land allotted to the Government employees before this date may not be disturbed. In other words, his submission is that the judgment rendered in ***Gopinder Singh's*** case would apply prospectively. Their Lordships of the Hon'ble Supreme Court in ***Gopinder Singh's*** case (supra) have categorically laid down that the two parts, i.e., such persons who have less than 10 bighas of land or have an income of less than Rs.2000/- per annum from all sources including lands, cannot be read disjunctively. The second part makes it clear that an income of less than Rs.2000/- per annum should be from all sources including lands. It is thus obvious that a person who has got less than 10 bighas of land but has an income of more than Rs.2000/- from the said land was not eligible for allotment of nautor land under Clause (a). The object of granting nautor land under the rules is to help poor and unprovided for residents of Himachal Pradesh. We are also of the considered view that the scope and clear intention of framing of the Rules is required to be looked into while interpreting all the clauses of The Himachal Pradesh Nautor Land Rules, 1968. The judgment would also cover the previous cases where land has been illegally granted to those employees whose income was more than Rs.2000/- per annum from all the sources, even if their land holding was less than 10 bighas.

Thus, there is no merit in the contention of Mr. P.M. Negi, learned Deputy Advocate General that the cases before and after 17.08.1990 be treated differently.

34. Their Lordships of the Hon'ble Supreme Court in **Ibrahimpatnam Taluk Vyavasaya Collie Sangham** Vs. **K. Suresh Reddy and others** (2003) 7 Supreme Court Cases 667 have laid down that expression 'at any time" for exercising of the power by the Collector under revision in case of fraud can be exercised within a reasonable time from the date of detection of the fraud. Their Lordships have held as under:

> *"12. The learned Single Judge has referred to and relied on various decisions including the decisions of this Court as to how the use of the words "at any time" in sub-section (4) of Section 50-B of the Act should be understood. In the impugned order the Division Bench of the High Court approves and affirms the decision of the learned Single Judge. Where a statute provides any suo motu power of revision without prescribing any period of limitation, the power must be*

exercised within a reasonable time and what is "reasonable time" has to be determined on the facts of each case.

13. In the light of what is stated above, we are of the view that the Division Bench of the High Court was right in affirming the view of the learned Single Judge of the High Court that the suo motu power under sub-section (4) of Section 50-B of the Act is to be exercised within a reasonable time.

35. Their Lordships of the Hon'ble Supreme Court in **Saurabh Chaudri and others** Vs. **Union of India and others** (2004)5 Supreme Court Cases 618 have held that by reason of a judgment, a law is declared. Declaration of such law may affect the rights of the parties retrospectively. Prospective application of a judgment by the Court must, therefore, be expressly stated. Their Lordships have held as under:

"20. By reason of a judgment, as is well known, a law is declared. Declaration of such law may affect the rights of the parties retrospectively. Prospective application of a judgment by the Court must, therefore, be expressly stated. The order dated 1.5.2003 furthermore is a pointer to the fact that this Court refused to interfere at that stage having regard to the fact that the admission of the students had already taken place. Despite the same, such admissions were made subject to the result of the writ petition. The parties, therefore, could not have any doubt as regards the fact that the judgment will be implemented in relation to the students who were to take admission in 2004 and onwards. The students appearing at the All-India Entrance Examination held by AIIMS or by the State Government or the universities, presumably were aware of the said fact."

In the instant case, it cannot be gathered from the judgment in ***Gopinder Singh's*** case (supra) that it was to apply prospectively. Thus, it would also cover the cases of those persons who have been allotted land before the date of judgment, i.e., 17.08.1990.

36. Their Lordships of the Hon'ble Supreme Court in **M.A. Murthy** Vs. **State of Karnataka and others** (2003) 7 Supreme Court Cases 517 have held that normally, the decision of the Supreme Court enunciating a principle of law is applicable to all cases irrespective of stage of pendency thereof because it is assumed that what is enunciated by the Supreme Court. There is, in fact, the law from inception. Their Lordships have held as under:

"8. Learned counsel for the appellant submitted that the approach of the High Court is erroneous as the law declared by this Court is presumed to be the law at all times. Normally, the decision of this Court enunciating a principle of law is applicable to all cases irrespective its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception. The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to the normal principle of law, was imported and applied for the first time in L.C. Golak Nath and others v. State of Punjab and another, (AIR 1967 SC 1643). In Managing Director, ECIL, Hyderabad and others v. B. Karunakar and others, (1993 (4) SC 727) the view was adopted. Prospective overruling is a part of the principles of constitutional canon of interpretation and can be resorted to by this Court while superseding law declared by it

earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law declared prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases. (See Ashok Kumar Gupta v. State of U. P., (1997) 5 SCC 201, Baburam v. C. C. Jacob, (1999) 3 SCC 362). It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling. The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs. That being the position, the High Court was in error by holding that the judgment which operated on the date of selection was operative and not the review judgment in Ashok Kumar Sharma's case No. II. All the moreso when the subsequent judgment is by way of Review of the first judgment in which case there are no judgments at all and the subsequent judgment rendered on review petitions is the one and only judgment rendered, effectively and for all purposes, the earlier decision having been erased by countenancing the review applications. The impugned judgments of the High Court are, therefore, set aside.

37. Accordingly, the writ petition is dismissed, however, in larger public interest, the following mandatory directions are issued to the State Government:

1. The Financial Commissioner (Appeals) is directed to call for the records of 5769 cases in which the Government employees have been granted Nauator land under The Himachal Pradesh Nautor Land Rules, 1968, whose income was more than Rs.2000/- per annum at the time of submission of application(s). It is made clear by way of abundant precaution that the records of all the cases shall be called whether the land has been allotted under The Himachal Pradesh Nautor Land Rules, 1968 before or after 17.08.1990.
2. The Financial Commissioner (Appeals) shall decide all the revisions within a period of one year from today after hearing the parties and shall pass detailed/speaking orders in all the cases in which grant of Nautor land was found to be in violation of The Himachal Pradesh Nautor Land Rules, 1968. Thereafter, the possession shall be resumed within a period of eight weeks after resumption/ cancellation of the grant of Nautor land to allottees.
3. If the Financial Commissioner comes to the conclusion that the Nautor land has been granted for horticulture, agriculture, construction of any building subservient to agriculture, thrashing floor, water mill, water channel, construction of a building for residence, consolidation of

holdings and for public purposes like construction of Dharamsala etc. in violation of The Himachal Pradesh Nautor Land Rules, 1968, the same shall vest in the State of Himachal Pradesh free from all encumbrances and these persons shall not be entitled to any compensation.

4. Since the Financial Commissioner (Appeals) has to deal with 5769 cases, the respondent-State is directed to appoint/post, two more Financial Commissioner (Appeals) to hear the revisions, within a period of six weeks from today.

5. It is made clear that in all the cases where the land has been allotted/granted to the Government employees in breach of The Himachal Pradesh Nautor Land Rules, 1968 and the same has been acquired under the Land Acquisition Act, in those cases also, the amount received by the allottees/grantees shall be refunded to the State Government with interest @9% per annum.

38. The miscellaneous application(s), if any, also stand(s), disposed of.

****

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

Smt. Satya Devi widow of late Shri Udho Ram ....Appellant/Defendant

Versus

Hari Chand son of Udho Ram ...Respondent/Plaintiff.

RSA No. 162 of 2013
Order reserved on 22nd May 2015
Date of Judgment 25th June 2015

H.P. Land Revenue Act, 1954- Section 134- A person can apply for delivery of possession within three years from the date of preparation of instrument of partition – if the possession is not delivered within three years, aggrieved person can seek possession on the basis of title before the Civil Court. (Para-12)

Specific Relief Act, 1963- Section 5- Plaintiff filed a Civil suit for recovery of possession pleading that plaintiff and defendant were co-sharers of the suit land- plaintiff applied for partition and the possession was delivered to him- defendant occupied the suit land forcibly- defendant pleaded that he was never dispossessed from the suit land- a wrong report was made in the rapat roznamcha- held, that joint status of co-owner is extinguished after preparation of instrument of partition- allottee becomes exclusive owner of the allotted land- defendant had not pleaded adverse possession- plaintiff is entitled to the relief of possession on the basis of his title. (Para-11)

Cases referred:

Darbara Singh and another vs. Gurdial Singh and another, 1994 (1) S.L.J. 433 (Punjab and Haryana)

Mohinder Singh (died) through his LRs. and others vs. Kashmir Singh and another, 1985 SLJ 94

For the Appellant: Mr. Ajay Sharma, Advocate.

For the Respondent: Mr. K.D. Sood Sr. Advocate with Mr.Mukul Sood, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present regular second appeal is filed against the judgment and decree dated 30.10.2012 passed by learned District Judge Hamirpur in Civil Appeal No. 12 of 2010 titled Satya Devi vs. Hari Chand.

2. Brief facts of the case as pleaded are that Hari Chand plaintiff filed suit for possession in respect of the immovable land comprised in Khata No. 83 min, Khatauni No. 89 Khasra No. 283/1 measuring 0-09-23 hectares and Khasra No. 754/1 measuring 0-01-90 hectares situated in Tikka Samoh Tappa Bani Tehsil Barsar District Hamirpur (H.P.) It is pleaded that previously plaintiff and defendant were co-shares of suit land and plaintiff applied for partition of land before A.C. 1st Grade Barsar and after hearing both parties learned A.C. 1st Grade Barsar ordered for partition of suit land. It is pleaded that land was partitioned on dated 9.5.2005 and plaintiff was allotted Khasra No. 283/1 measuring 0-09-23 hectares and Khasra No. 754/1 measuring 0-01-90 hectares. It is pleaded that after partition of land plaintiff applied for warrant of possession and thereafter warrant of possession was issued. It is further pleaded that after delivery of possession of partitioned land to the plaintiff on dated 23.5.2007 defendant again occupied the land of plaintiff in the third week of June 2007 forcibly and thereafter plaintiff requested the defendant to hand over the peaceful possession of suit land but defendant has refused. Prayer for decree of suit as mentioned in relief clause of plaint sought.

3. Per contra written statement filed on behalf of defendant pleaded therein that suit of the plaintiff is not maintainable and plaintiff is estopped from filing the present suit by his act and conduct and further pleaded that suit is bad for non-joinder of necessary parties. It is pleaded that no warrant of possession was delivered at the spot and suit land is joint between the parties. It is pleaded that defendant is entitled to special costs under Section 35-A CPC. It is pleaded that rapat No. 438 was drawn by revenue authorities in connivance with the plaintiff. It is pleaded that defendant was not dispossessed from Khasra No. 238 and 754 and plaintiff was not in possession of suit land. It is denied that defendant had occupied the suit land in third week of June 2007. It is pleaded that plaintiff has no cause of action and locus standi to file the present suit. Prayer for dismissal of suit sought.

4. Plaintiffs also filed replication and re-asserted the allegations mentioned in plaint. As per the pleadings of parties learned trial Court framed following issues on dated 3.12.2007:-

1. Whether plaintiff is entitled for a decree of possession as prayed for? OPP
2. Whether suit of the plaintiff is not legally maintainable in the present form? OPD
3. Whether plaintiff is estopped from filing the present suit by his act and conduct? …..OPD
4. Whether suit of the plaintiff is bad for non-joinder or mis-joinder of necessary parties? ……OPD
5. Whether no warrant of possession has been delivered and suit land is in defendant's possession? ……OPD
6. Whether the defendant is entitled to special costs under Section 35-A CPC? ……OPD

7. Relief.

5. Following oral witnesses examined:-

Sr.No.	Name of witness
PW1	Hari Chand
PW2	Vinay Kumar
PW3	Prakash Chand
PW4	Madan Lal
PW5	Jai Chand
PW6	Prakash Chand
PW7	Jai Chand
PW8	Seeta Devi
PW9	Hari Ram
DW1	Satya Devi
DW2	Tirath Ram
DW3	Vijay Kumar

6. Following documentary evidence produced:-

Exhibit	Description
Ext.P1	Copy of Jamabandi
Ext.PW2/A	Rapat
Ext.PW3/A	Application for possession of land on basis of partition proceedings.
Ext.PW4/A	Copy of mutation on basis of partition proceedings.
Ext.PW5/A	Warrant of possession on basis of partition proceedings.
Ext.PW6/A	Application for demarcation.
Ext.PW6/B	Demarcation report
Ext.PW6/C &Ext.PW6/D	Statements of parties during demarcation proceedings.

7. Learned trial Court decided issue No. 1 in favour of plaintiff and decided issues Nos. 2 to 6 against the defendant. Learned trial Court passed the decree of possession in favour of the plaintiff and against the defendant directing the defendant to hand over possession of suit land to the plaintiff.

8. Feeling aggrieved against the judgment and decree passed by learned trial Court appellant Smt. Satya Devi filed Civil Appeal No. 12 of 2010 titled Satya Devi vs. Hari Chand before learned District Judge Hamirpur. Learned first Appellate Court affirmed the judgment and decree passed by learned trial Court and dismissed the appeal filed by appellant Satya Devi.

9. Feeling aggrieved against the judgment and decree passed by learned first Appellate Court Satya devi filed RSA No. 162 of 2013. On dated 31.7.2014 Hon'ble High Court admitted the appeal and framed following substantial questions of law:-

1. Whether both learned Courts below erred in appreciating the provisions of law applicable, pleadings of the parties and evidence adduced by them

in its right perspective thereby vitiating the impugned judgment and decree?

2. Whether both learned Courts below misread and mis-appreciated the provisions of H.P. Land Revenue Act and Rules with respect to delivery of property after partition, thereby vitiating the impugned judgments and decrees?

3. Whether learned Courts below misread and mis-appreciated the statements of PW1 to PW9 and Ext.PW1/A to Ext.PW6/D more particularly documents Ext.PW2/A and Ext.PW4/A thereby vitiating the impugned judgments and decrees?

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

10. Oral evidence adduced by the parties:-

10.1 PW1 Hari Chand has filed affidavit Ext.PW1/A in his examination in chief. There is recital in affidavit that defendant had forcibly occupied the suit land without any title. There is further recital in affidavit that partition application was filed and thereafter A.C. 1st Grade had delivered the possession to the plaintiff in partition proceedings. There is further recital in affidavit that defendant forcibly took possession of suit land in the month of June. There is further recital in affidavit that possession be delivered to the plaintiff. In cross examination PW1 stated that possession was given on dated 23.5.2007. PW1 stated that spot was visited by Patwari Halqua, Tehsildar and Chowkidar. PW1 has denied suggestion that Satya Devi is in possession of suit land since her ancestors.

10.2 PW2 Vinay Kumar Patwari has stated that he is Patwari since 1½-2 years. He has brought the original record of rapat No. 438 Ext.PW2/A which is correct as per original record. He has stated that he was present at the spot when possession was delivered to plaintiff.

10.3 PW3 Parkash Chand Reader to Tehsildar Barsar has stated that he has brought the original file. He has stated that he had seen application titled Hari Chand vs. Satya Devi relating to delivery of possession. He has stated that copy Ext.PW3/A is correct as per original record. He has stated that he is Reader to Tehsildar since 2004 and further stated that partition appeal was filed and after dismissal of partition appeal possession was delivered to plaintiff.

10.4 PW4 Madan Lal Assistant Kanungo has stated that he is posted as Assistant Kanungo in the office of Tehsildar. He has stated that he has brought the original record of mutation No. 104. He has stated that copy Ext.PW4/A is correct as per original record. He has denied suggestion that he has deposed falsely in Court.

10.5 PW5 Jai Chand Tehsildar has stated that he is posted as Tehsildar Barsar since 16.3.2006 and application for possession Ext.PW3/A was produced before him. He has stated that he had issued order of delivery of possession Ext.PW5/A. He has stated that mutation Ext.PW4/A was attested by him. He has stated that possession of four khasra numbers was given i.e. 283/1, 735/1, 754/1 and 756/2. He has stated that he had verified delivery of possession of four khasra numbers at the time of attestation of mutation. He has denied suggestion that he has attested the mutation in collusion with the plaintiff.

10.6 PW6 Parkash Chand Reader to Tehsildar Barsar has stated that he has brought the summoned record. He has stated that he had seen application for demarcation

Ext.PW6/A. He has stated that demarcation report is Ext.PW6/B and statements are Ext.PW6/C and Ext.PW6/D.

10.7 PW7 Jai Chand has stated that he is retired as Tehsildar on dated 31.7.2008 and further stated that he perused original file. He has stated that application for demarcation was received by him and he submitted the demarcation report Ext.PW6/B. He has stated that he also recorded statements Ext.PW6/C and Ext.PW6/D. He has stated that he has personally conducted the demarcation on dated 8.6.2008. He has stated that he located three points prior to demarcation. He has stated that tatima (Field book) was already prepared as per partition papers. He has denied suggestion that he did not demarcate the land as per instructions of Financial Commissioner.

10.8 PW8 Seeta Devi has stated that she was present when demarcation was conducted. She has stated that her statement was also recorded in demarcation proceedings. She has stated that her statement is Ext.PW6/D. She has stated that before partition Smt. Satya Devi was in possession of suit property and Smt. Satya had cultivated the wheat crop. She has denied suggestion that she was not present at the time of demarcation. She has stated that even after partition Smt. Satya Devi is in cultivating possession of suit land.

10.9 PW9 Hari Ram has tendered affidavit in his examination in chief. There is recital in affidavit that deponent has seen the suit property. There is recital in affidavit that suit land was joint inter se the plaintiff and defendant. There is further recital in affidavit that thereafter partition proceedings took place. There is recital in affidavit that warrant of possession was issued in partition proceedings. There is recital in affidavit that defendant forcibly possessed the suit property and plaintiff requested the defendant to deliver the possession but defendant refused to deliver the possession. There is further recital in affidavit that demarcation was conducted on dated 8.6.2008 by Tehsildar in presence of deponent. PW9 has stated that before partition defendant was in possession of suit land and defendant had cultivated the wheat crop over the suit property. He has denied suggestion that no possession of suit property was delivered to plaintiff by revenue department.

10.10 DW1 Satya Devi has filed her affidavit in examination-in-chief. There is recital in affidavit that no possession of suit land was delivered to plaintiff. There is further recital in affidavit that defendant is in settled possession of suit land since her ancestors. There is also recital in affidavit that deponent was not dispossessed from suit land. There is recital in affidavit that suit land is still joint inter se the parties. There is further recital in affidavit that no possession was delivered on dated 23.5.2007. There is recital in affidavit that present suit filed by the plaintiff just to harass the deponent. Defendant has admitted in cross examination that earlier the suit land was joint inter se the parties and thereafter plaintiff Hari Chand filed partition proceedings before the revenue officer. She has denied suggestion that partition was effected by revenue officials. She has denied suggestion that Khasra Nos. 283/1 and 754/1 were allotted to the plaintiff in partition proceedings. She has denied suggestion that appeal was filed qua partition proceedings. She has denied suggestion that partition appeal was dismissed by the Collector. She has denied suggestion that possession was delivered to the plaintiff in partition proceedings. She has denied suggestion that she forcibly took possession of suit property.

10.11 DW2 Tirath Ram has filed affidavit in examination in chief. There is recital in affidavit that deponent is familiar with parties. There is recital in affidavit that Satya Devi is in possession of suit property since her ancestors. There is further recital in affidavit that no warrant of possession was executed on dated 23.5.2007. There is further recital in affidavit that defendant Satya Devi had inherited the suit property from her husband. There is also

recital in affidavit that defendant did not possess the suit land forcibly in third week of June 2007. There is also recital in affidavit that false suit was filed by plaintiff. DW2 has stated in cross examination that he does not know whether defendant Satya Devi had filed appeal before Collector qua partition proceedings. He has stated that he does not know that appeal filed by Satya Devi was dismissed by Collector. He has denied suggestion that defendant had forcibly occupied the suit property without any title.

10.12 DW3 Vijay Kumar has tendered affidavit in examination in chief. There is recital in affidavit that parties are known to deponent. There is further recital in affidavit that Satya Devi is in possession of suit property since the time of her ancestors. There is recital in affidavit that no possession was delivered on dated 23.5.2007 in partition proceedings. There is recital in affidavit that plaintiff filed the present suit just to harass the defendant. In cross examination DW3 has denied suggestion that Hari Chand plaintiff is owner of suit property. DW3 has admitted that suit property was joint inter se the parties. DW3 has stated that demarcation did not take place in his presence. DW3 has denied suggestion that Satya Devi had forcibly occupied the suit land. DW3 has admitted that plaintiff had filed criminal complaint in police and police had visited spot. DW3 has admitted that there is civil litigation between him and plaintiff relating to path and flow of water.

Findings on Point No. 1 of Substantial question of law

11. Submission of learned Advocate appearing on behalf of the appellant that learned trial Court and learned first Appellate Court have not properly appreciated the provisions of law applicable in present case and further submission of learned Advocate that learned trial Court and learned first Appellate Court have not properly appreciated pleadings of parties and oral as well as documentary evidence adduced by parties is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that suit land was joint inter se the parties. It is also proved on record that thereafter partition proceedings were filed by Hari Chand plaintiff before A.C. 1st Grade Barsar. It is also proved on record that thereafter final partition was effected inter se the parties by A.C. 1st Grade Barsar. It is also proved on record that thereafter appeal was filed before the Collector Sub Division Barsar and same was dismissed on dated 28.9.2006. As per Chapter IX and Section 123 of H.P. Land Revenue Act 1953 a joint co-owner can file an application for partition relating to immovable land. As per Section 133 of H.P. Land Revenue Act 1953 instrument of partition is prepared. It was held in case reported in ***1994 (1) S.L.J. 433 (Punjab and Haryana) titled Darbara Singh and another vs. Gurdial Singh and another*** that after preparation of instrument of partition joint status of co-owner is extinguished. It is proved on record that suit land was allotted to plaintiff in partition proceedings. It is also proved on record that partition proceedings have attained the stage of finality. It is well settled law that after completion of partition proceedings and after preparation of instrument of partition allottee becomes exclusive owner of allotted land. It is proved on record that Khasra Nos. 283/1 and 754/1 were allotted to plaintiff in partition proceedings. It is held that title of appellant in suit property was extinguished after the completion of partition proceedings and after preparation of instrument of partition. It is further held that plaintiff acquired title in suit property after completion of partition proceedings and after preparation of instrument of partition. It is well settled law that as per Section 65 of Limitation Act 1963 suit for possession of immovable property on the basis of title could be filed within twelve years when possession of defendant becomes adverse to the plaintiff. In present case defendant did not plead right of adverse possession over the suit property. It is well settled law that there is no period of limitation for possession when suit is filed on the basis of title unless the right of plaintiff is defeated by way of right of adverse possession. ***(See 1985 SLJ 94 titled Mohinder Singh (died) through his LRs. and others vs. Kashmir Singh and another).*** In present case plaintiff has sought the relief of possession on the basis of title

and it is held that plaintiff is legally entitled for possession of suit land on the basis of title. It is held that after completion of partition proceedings and after preparation of instrument of partition title of appellant is extinguished automatically from suit property. Point No.1 of substantial question of law is decided against appellant.

Findings upon point No. 2 of substantial question of law

12. Submission of learned Advocate appearing on behalf of the appellant that both learned trial Court and learned first Appellate Court have misread and mis-appreciated the provisions of H.P. Land Revenue Act and Rules with respect to delivery of possession of property after partition is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that as per rapat No. 438 placed on record as Ext.PW2/A possession of Khasra No. 735/1 was delivered and possession of Khasra No. 283/1 and 754/1 was not delivered. It is held that as per Section 134 of H.P. Land Revenue Act a person can apply for delivery of possession within three years from the date of preparation of instrument of partition. It is held that if possession is not delivered within three years by revenue Court qua partition land then aggrieved person can file a suit for possession on the basis of title before Civil Court. It is held that learned trial Court and learned Appellate Court have rightly granted decree of possession in favour of plaintiff on the basis of title. Point No. 2 of substantial question of law is decided against the appellant.

Findings upon Point No. 3 of substantial question of law

13. Another submission of learned Advocate appearing on behalf of the appellant that learned trial Court and learned first Appellate Court have misread and mis-appreciated the statements of PW1 to PW9 and have also not properly appreciated documents Ext.PW1/A to Ext.PW6/D is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the testimonies of PW1 to PW9. It is proved on record that partition application was filed before A.C.1st Grade Barsar by plaintiff and it is also proved on record that thereafter partition proceedings were completed. It is also proved on record that thereafter appeal was filed relating to partition proceedings before the Collector and same was dismissed and thereafter instrument of partition was prepared. It is held that after preparation of instrument of partition in partition proceedings status of joint ownership extinguishes and allottee becomes exclusive owner of immovable property allotted in partition proceedings. It is proved on record that suit land was allotted to plaintiff in partition proceedings and defendant did not adduce any positive cogent and reliable evidence in order to prove that suit land was allotted to her in partition proceedings. On contrary it is proved on record that suit land was allotted to plaintiff in partition proceedings which has attained the stage of finality. It is held that title was accrued in favour of plaintiff qua suit land after partition proceedings and it is further held that plaintiff is entitled for relief of possession on the basis of title. Appellant did not plead right of adverse possession over the suit property. It is held that plaintiff is legally entitled for relief of possession on the basis of title. Title of plaintiff over suit land remained un-rebutted on record. It is held that after completion of partition proceedings and after preparation of instrument of partition by revenue officer possession of defendant/appellant over suit land is illegal and plaintiff is legally entitled for relief of possession from Civil Court on the basis of title over suit property. It is held that status of appellant over suit property as co-owner is extinguished after completion of partition proceedings and after preparation of instrument of partition over suit property.

14. In view of above stated facts appeal filed by appellant is dismissed. Judgment and decree passed by learned trial Court and learned first Appellate Court are affirmed. Parties are left to bear their own costs. Files of learned trial Court and learned first Appellate Court along with certified copy of this judgment and decree sheet be sent back

forthwith. The Registrar (Judicial) will prepare the decree sheet as required under Section 100 of Code of Civil Procedure 1908. Appeal stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

SPS Steels Rolling Mills Ltd. …Petitioner.
Versus
State of Himachal Pradesh & others …Respondents.

CWP No. 2783 of 2015-I
Reserved on: 18.06.2015
Decided on: 25.06.2015

Constitution of India, 1950- Article 226- **Securitisation and Reconstruction of Financial Assets and Enforcements of Security Interest Act, 2002** (SARFAESI Act) – Section 13(4)- Petitioner filed a Writ Petition against an action taken against it in terms of Section 13(4) of SARFAESI Act- petitioner has a remedy of appeal under Section 17 of the Act- held that when an alternative remedy is available, writ petition is not maintainable.

(Para- 4 to 11)

Cases referred:

United Bank of India versus Satyawati Tondon and others, (2010) 8 SCC 110
Union Bank of India and another versus Panchanan Subudhi, (2010) 15 SCC 552
Indian Bank versus M/s. Blue Jaggers Estate Ltd. & Ors., 2010 AIR SCW 4751
Kanaiyalal Lalchand Sachdev and others versus State of Maharashtra and others, (2011) 2 Supreme Court Cases 782
Standard Chartered Bank versus V. Noble Kumar and others with Senior Manager, State Bank of India and another versus R. Shiva Subramaniyan and another, (2013) 9 SCC 620
J. Rajiv Subramaniyan and another versus Pandiyas and others, (2014) 5 SCC 651
Keshavlal Khemchand and sons Private Limited and others versus Union of India and others, (2015) 4 Supreme Court Cases 770
Union of India and others versus Major General Shri Kant Sharma and another, 2015 AIR SCW 2497
Sadashiv Prasad Singh versus Harender Singh and others, (2015) 5 SCC 574
KSL and Industries Limited versus Arihant Threads Limited and others, (2015) 1 SCC 166

For the petitioner: Mr. Naresh K. Sood, Senior Advocate, with Mr.Ajay Vaidya, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Vikram Thakur, Deputy Advocate Generals, for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

The writ petitioner, on the grounds taken in the memo of the writ petition, has sought the following reliefs amongst others:

> *"a) Issue a Writ of and in the nature of certiorari calling upon the concerned respondent and each of them to*

forthwith certify and transmit to this Hon'ble Court all records of the case culminating in the order dated 07.02.2015 passed by the Respondent No. 2 so that upon consideration thereof, the same may be quashed and conscionable justice be rendered to the Petitioners;

b) Issue a Writ of and in the nature of certiorari declaring that the notices dated 18.06.2014, 02.09.2014 (Ann. P-10), 03.12.2014 (Ann. P-11), 06.12.2014 (Ann. P-12) and 05.05.2015 (Ann. P-17) (including all actions taken pursuant thereto) issued by the Respondent No. 3 are void ab initio and non-est in law and consequently quash the same,

c) Issue a Writ of and in the nature of a mandamus directing the Respondent No. 3 to forthwith restore physical possession of the Plot No. 1, Phase No. II, Industrial Area Gwalthai, District Bilaspur, Himachal Pradesh back to the Petitioners along with all fixtures, fittings, plant and machinery,

d) Direct the Respondents not to take any coercive measures against the properties of the Petitioners including inter alia the properties which are the subject matter of the notices dated 03.12.2014 (Ann. P-11), 06.12.2014 (Ann. P-12) and 05.05.2015 (Ann. P-17) issued."

2. The writ petition came up for admission before this Court on 28.05.2015. Learned counsel for the writ petitioner was asked to justify the maintainability of the writ petition.

3. Mr. Ajay Vaidya, learned counsel for the writ petitioner, stated at the Bar that during the pendency of the writ petition, reliefs (a), (b) and (c) sought by the writ petitioner have become infructuous and the writ petition survives only so far it relates to relief (d). His statement is taken on record.

4. The question is - whether the writ petition is maintainable and whether this Court has jurisdiction to pass appropriate orders while keeping in view relief (d) sought by the writ petitioner?

5. It appears that action has been drawn against the writ petitioner in terms of Section 13 (4) of The Securitisation and Reconstruction of Financial Assets and Enforcements of Security Interest Act, 2002 (for short "SARFAESI Act"). SARFAESI Act is a self-contained mechanism and the aggrieved party has to invoke the remedies provided by the SARFAESI Act. The writ petitioner has remedy of appeal as per the mandate of Section 17 of the SARFAESI Act. It is apt to reproduce relevant portion of Section 17 of the SARFAESI Act herein:

*"**17. Right to appeal.** - (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:*

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation. - For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17.

......................."

6. The Apex Court in a series of judgments in the cases titled as **United Bank of India versus Satyawati Tondon and others,** reported in **(2010) 8 Supreme Court Cases 110; Union Bank of India and another versus Panchanan Subudhi,** reported in **(2010) 15 Supreme Court Cases 552; Indian Bank versus M/s. Blue Jaggers Estate Ltd. & Ors.,** reported in **2010 AIR SCW 4751; Kanaiyalal Lalchand Sachdev and others versus State of Maharashtra and others,** reported in **(2011) 2 Supreme Court Cases 782; Standard Chartered Bank versus V. Noble Kumar and others with Senior Manager, State Bank of India and another versus R. Shiva Subramaniyan and another,** reported in **(2013) 9 Supreme Court Cases 620; J. Rajiv Subramaniyan and another versus Pandiyas and others,** reported in **(2014) 5 Supreme Court Cases 651;** and **Keshavlal Khemchand and sons Private Limited and others versus Union of India and others,** reported in **(2015) 4 Supreme Court Cases 770,** has discussed the issue and held that the writ petition is not maintainable.

7. This Court in **CWP No. 4779 of 2014,** titled as **M/s Indian Technomac Company Ltd. versus State of H.P. & ors.,** decided on 04.08.2014, held that when an alternate remedy is available, writ petition is not maintainable. The said judgment of this Court has been upheld by the Apex Court on 22.08.2014 in SLP (C) No. 22626-22641 of 2014.

8. The Apex Court in a latest judgment in the case titled as **Union of India and others versus Major General Shri Kant Sharma and another,** reported in **2015 AIR SCW 2497,** held that when an alternate efficacious remedy is available to the writ petitioner, he should not be allowed to give a slip to law.

9. The Apex Court in the case titled as **Sadashiv Prasad Singh versus Harender Singh and others,** reported in **(2015) 5 Supreme Court Cases 574,** held that the writ petition is not maintainable when a remedy of appeal is available to the writ petitioner. It is apt to reproduce para 23.3 of the judgment herein:

"23.3. Thirdly, a remedy of appeal was available to Harender Singh in respect of the order of the Recovery Officer assailed by him before the High Court under Section 30, whcih is being extracted herein to assail the order dated 5-5-2008:

*"**30. Appeal against the order of Recovery Officer.** - (1) Notwithstanding anything contained in Section 29, any person aggrieved by an order of the Recvoery Officer made under this Act may, within thirty days*

> *from the date on whcih a copy of the order is issued to him, prefer an appeal to the Tribunal.*
>
> *(2) On receipt on an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under Sections 25 to 28 (both inclusive)."*
>
> *The High Court ought not to have interfered with in the matter agitated by Harender Singh in exercise of its writ jurisdiction. In fact, the learned Single Judge rightfully dismissed the writ petition filed by Harender Singh."*

10. Learned counsel for the writ petitioner has placed reliance on the judgment rendered by the Apex Court in a case titled as **KSL and Industries Limited versus Arihant Threads Limited and others,** reported in **(2015) 1 Supreme Court Cases 166,** is not applicable in the facts and circumstances of this case.

11. Having said so, the writ petition is not maintainable.

12. However, learned counsel for the writ petitioner submitted that reference is pending before respondent No. 3, mention of which has been made in para 5 (iv) and (xix) of the writ petition, but the authority was not functioning for the reason that Chairman was not selected/appointed. Further stated that now the Chairman has taken over and respondent No. 3 be directed to determine the said reference/application within time frame and till then, some interim direction be granted to the writ petitioner in view of relief (d).

13. In the given circumstances, we deem it proper to direct respondent No. 3 to decide the reference/application within four weeks. The writ petitioner is at liberty to apply for interim relief before the said authority.

14. The writ petition is disposed of accordingly alongwith all pending applications.

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

D.S.R. No. 4001 of 2013 a/w
Cr. Appeal No. 186 of 2014
Reserved on: 24.06.2015
Date of decision: 25.06. 2015

<u>D.S.R. No. 4001 of 2013</u>

State of Himachal Pradesh …..Appellant

Vs.

Om Parkash @ Pappu …..Accused.

<u>Cr. Appeal No. 186 of 2014</u>

Om Parkash alias Pappu ….Appellant.

Vs.

State of Himachal Pradesh. ….Respondent.

Indian Penal Code, 1860- Section 302- Accused resided with his wife, mother and sister-in-law in a temporary shed- PW-16, father-in-law of the accused, was asked by PW-7 to call mother of the accused to milk the cattle- temporary shed occupied by the accused was

bolted from inside and his daughter refused to open the same -on the second day same reply was received – matter was reported to police and the door was got opened- dead bodies of the parents of the accused were found- accused made a disclosure statement and got darat and scissor recovered- there was contradiction regarding the person who had asked the father-in-law of the accused to leave- further, he had not informed his employer that the door was found locked from the inside – it is difficult to believe that accused, his children, his wife and sister-in-law would have remained inside the room for 48 hours after the commission of crime and would not have run away from the scene of crime- in normal course, the occupants of the house would have come out of the room and would have raised hue and cry- wife of the accused who was present in the room was also not examined- clothes of the accused were recovered but no blood stains were found - blood stains were bound to be present on the clothes if the accused had committed the crime- there was contradiction as to who had informed the police- the motive for killing the parents was not established- held, that these circumstances made prosecution case doubtful- accused acquitted. (Para-20 to 23)

D.S.R. No. 4001 of 2013

For the appellant-State: Mr. M.A. Khan, Additional Advocate General.

For the respondent/convict: Mr. V.S. Rathore, Advocate.

Cr. Appeal No. 186 of 2014

For the appellant : Mr. V.S. Rathore, Advocate.

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

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

Since both the Death Sentence Reference No. 4001 of 2013 and Criminal Appeal No. 186 of 2014 have arisen out of the common judgment and order, dated 10.09.2013/18.09.2013, the same were taken up together for hearing and are being disposed of by this common judgment.

2. Criminal Appeal No. 186 of 2014 is instituted against the judgment and order, dated 10.09.2013/18.09.2013, rendered by the learned Sessions Judge (Forests), Shimla, H.P., whereby the appellant-accused, who was charged with and tried for an offence punishable under Section 302 of the Indian Penal Code, was convicted and awarded death sentence and a fine of Rs.5000/-. He was ordered to be hanged by neck till he was dead. The sentence was deferred until and unless confirmed by this Court. Learned Sessions Judge (Forests) submitted a Reference Petition to this Court for confirmation of death sentence bearing Death Sentence Reference No. 4001 of 2013.

3. Case of the prosecution, in a nut-shell, is that PW-7, Sh. Daulat Ram Chauhan was owner in possession of an orchard at village Chalnehar. He has constructed two sheds in his orchard, one of which was occupied by the accused and the other was occupied by his father-in-law PW-16 Man Bahadur. The accused was putting up in his temporary shed alongwith his wife, mother and sister-in-law. PW-16 Man Bahadur was employed by PW-7 Daulat Ram Chauhan to look after his orchard and mother and father of the accused used to take care of the cattle of PW-7 and also to milk the cow. On 17.01.2012, PW-16 Man Bahadur was asked by PW-7 to call Parvati, mother of the accused to milk the cattle. However, the temporary shed occupied by the accused was bolted from inside and his daughter refused to open the same. On the second day, again the same reply was received from inside the temporary shed. Thereafter, PW-7 directed PW-16 to inform the police. The

police was informed. PW-17 Sub-Inspector Rattan Chand alongwith police party reached on the spot. Thereafter, the door was opened by the police in the presence of villagers and witnesses. The Investigating Officer recorded the statement Ex. PW-12/A of Mohan Chauhan, Pradhan of village under Section 154 Cr. P.C., on the basis of which FIR Ex. PW1/A was registered. The photographs were clicked on the spot and the spot map Ex. PW-17/A was prepared by the Investigating Officer. The inquest papers were prepared and the investigating officer took into possession griddle (Tawa) Ex. P-3, frame of window Ex. P-5, brief case Ex. P-6, blood stained soil Ex. P-8 from the spot. The accused was interrogated and arrested. Statements of the witnesses were recorded. Post mortem of the dead bodies of Man Bahadur and Parvati, father and mother of the accused respectively were got conducted. Post mortem reports Ex. PW-11/B and Ex. PW-11/C were obtained. On 20.01.2012, accused made a disclosure statement Ex. PW8/A in police custody and led the police party to the spot for recovery of Drat Ex. P-1 and Scissors Ex. P-4. These were taken into possession vide memo Ex. PW-15/C. The challan was put up after completing all the codal formalities in the Court.

4. The prosecution has examined number of witnesses to support its case. The accused was also examined under Section 313 of the Cr. P.C. Accused denied the case of the prosecution. The accused was convicted and sentenced, as noticed hereinabove. Hence, this appeal.

5. Mr. V.S. Rathore, learned counsel for the appellant has vehemently argued that the prosecution has failed to prove the case against the appellant/accused.

6. Mr. M.A. Khan, learned Additional Advocate General has supported the judgment and order, dated 10.09.2013/18.09.2013. He vehemently argued that the prosecution has proved the case against the accused beyond reasonable doubt. He then argued that the death penalty awarded to the accused be confirmed.

7. We have heard the learned counsel for the parties and gone through the judgment and records, carefully.

8. PW-1, Sita Ram deposed that he recorded the FIR Ex. PW-1/A. On 18.01.2012, Suresh deposited with him three packets alongwith specimen impression of seal. He made entries in the malkhana register. On 20.1.2012, two packets sealed with seal 'A' alongwith impression of seal were also deposited. The entries were made in the malkhana register. On 21.01.2012, Suresh Kumar deposited with him eight packets sealed with seal 'AK' alongwith specimen impression of seal. He made entries in the malkhana register vide Ex. PW-1/C. These packets alongwith specimen seal impression were sent to CFL on 23.01.2012. PW-2, Suresh Kumar deposed that on 23.01.2012, he deposited three packets sealed with 'N', two packets with 'NK' and eight packets with 'KKI' alongwith sample seal at FSL vide Ex. PW1/D.

9. PW-3, Constable Pradeep Kumar did videography and photography of the dead body at the place of occurrence. He took photographs Ex. A-1 to Ex. A-6. From the videography, CD was prepared vide Ex. PW-3/A.

10. PW-4, Constable Dimple deposed that on 18.01.2012 at 1:10 p.m., Pardhan, Gram Panchayat, Bagdomer telephonically informed that a Nepali was residing in the orchard of Daulat Ram and someone had killed him. He entered the information in the computer vide Ex. PW4/A. PW-5, Kuldeep Singh Thakur deposed that on 10.04.2011 at the instance of the police, he prepared site plan of the place of incident vide Ex. PW5/A. PW-6 is a formal witness.

11. PW-7, Daulat Ram Chauhan deposed that Man Bahadur, his wife Parwati, their son Om Parkash and his wife and children used to work in his land. Sometimes, sister-in-law of the accused also used to come there. All of them were residing in the Dhara (temporary shed) on his land. Parwati used to come to his house for milking his cow. On 16.01.2012, Parwati had come to his house for milking the cow in the morning, but during evening time, she had not come. On the next day, one another Man Bahadur, father of Dropti had come to him and he asked him to call Parwati. When he came back, the he told him that the door of the Dhara of Parwati was closed from inside and some voice of girl was coming. He asked Man Bahadur to report the matter to the police in case Parwati did not open the door. On 18.01.2012, police came there and he had also been called by the police to the spot. The door was opened by the police in his presence and after opening the door, Man Bahadur and Parwati were found inside dead in naked condition. There were injuries on the left side of Man Bahadur in his head and arm and his private part was found to be mutilated. When Deviyani and Dropti were asked about it, they had told them that Man Bahadur and Parwati had been killed by accused Om Prakash with drat and scissor used for pruning apples. In his cross-examination, he could not say that Devyani was in the house of accused from 16.01.2012 to 18.01.2012. However, he volunteered that when the door was opened on 18.01.2012, she was found inside *Dhara* of the accused. He also admitted that in the morning of 17.01.2012, father of Dropti, namely Man Bahadur did not report back to him. He had come only in the morning of 18.01.2012. Man Bahadur had not told him as to whose voice he had heard from inside the house. He had instructed Man Bahadur to report the matter to the police. He had never seen the accused and his family members quarrelling with each other in the *Dhara.* He had not gone inside the room, but he had seen the scene from the door.

12. PW-8, Vikas Nanda deposed that the accused while in police custody had given the statement in his presence to the police about his having hidden the drat with handle and the scissors for pruning of the apples in the room of his house and that he could get the same recovered. His statement is Ex. PW8/A.

13. PW-9, Jai Pal Chauhan has proved the copy of Jamabandi Ex. PW-9/C. PW-10, Arvind Sharma deposed that on 25.01.2012, the Police Constable Pradeep Kumar had given him his camera and photographs of digital camera for preparing CD and developing the photographs, on which he had prepared the CD Ex. PW3/A.

14. PW-11, Dr. Manika Sharma has conducted the post mortem on the dead body of Man Bahadur and Smt. Parwati Devi. According to her, the cause of death of Man Bahadur was multiple ante mortem injuries leading to hemorrhage which lead to cardio respiratory arrest leading to death. The probable duration between injuries and death was less then six hours and between death and post mortem was more than 24 hours. The cause of death of Smt. Parwati Devi was multiple ante mortem injuries leading to hemorrhage which lead to cardio respiratory arrest leading to death. The probable duration between injury and death was less then six hours and between death and post mortem was more than 12 to 24 hours. According to her, injury Nos. 1 and 2 caused on the person of deceased Man Bahadur could be caused with drat Ex. P1 and injury No. 4 caused on the person of deceased Man Bahadur could be caused by iron rod Ex. P2. The remaining injuries on the person of Man Bahadur could be caused with Tawa Ex. P3. Injury No. 1 on the person of Parwati Devi could be caused with scissor Ex. P4 and the other injuries No. 2 to 5 on her person could be caused by drat Ex.P1, rod Ex. P2, Tawa Ex. P3 and scissor Ex. P4.

15. PW-12, Mohan Chauhan, deposed that Sh. Daulat Ram was resident of his Panchayat. He had employed the parents of the accused in his house for agricultural land and orchard work. The accused, his wife, his two children and sister-in-law were also

residing with the parents of the accused in the same *Dhara*. On 18.01.2012, he came to know that the *Dhara* of parents of the accused was closed from inside and the parents-in-laws of the accused told about it to him, on which, he had telephonically informed the police. When police reached the spot, then he, Ward Member Naresh Kumar and Daulat Ram had also joined the police. Police got the *Dhara* opened in their presence. From one room, accused, his wife, his children and sister-in-law were taken out and when the kitchen was opened, in that room the parents of the accused were found dead in naked condition. There were injuries on their body parts. His statement was recorded under Section 154 Cr. P.C. vide Ex. PW12/A. In his presence, the police had interrogated Devyani and Dropti, the wife and sister-in-law of the accused, who told them that on the night of 16.01.2012, the accused had asked them and his parents to line up inside the room in naked condition and then he had picked up their clothes and had burn them in Chulla (hearth). They also told the police in their presence that they were threatened by the accused when they had tried to intervene. The accused had taken out the electric bulb and then in the darkness, he started beating them. He had given beatings to the deceased with Tawa and drat blows. He had also used the scissor for beating his mother. They had also told the police in their presence that the accused had kept them inside for two days and he had threatened them to be killed in case of their making noise. The police recovered drat Ex. P1 and scissor Ex. P4, Tawa Ex. P3 and frame of the window Ex. P5.

16. PW-13, Deviyani is the most material witness. According to her, accused was her brother-in-law. She was residing with his family. The accused, his parents and other family members were residing in the *Dhara* (temporary shed) of Daulat Ram, in whose orchard they had been working. Her brother-in-law, the accused was away to Rohru in connection with his work and he had come back to Chalnehar on 13.01.2012. On the night of 16.01.2012, the accused did not allow anyone to go out of the house/*Dhara*. At about 11/12 mid-night, the accused asked them and his parents to undress. After undressing them all in the kitchen, the accused had burnt their clothes in the *Chulla (hearth)*. The accused asked her and her sister Dropti Devi to stand on the side and then he started beating his father with iron Tawa. The accused directed his wife to take out the electric bulb. Thereafter, in the darkness, the accused killed his father with drat and his mother with scissors. Due to fear, they kept on standing there because the accused had threatened them to keep quite. She identified drat Ex. P1, Tawa Ex. P3 and scissors Ex. P4. During whole night, they remained in the kitchen and in the morning, they were allowed to go to the other room. On 17.01.2012 also, they remained in that room. On 17.01.2012, during day time, her father had come there. He called them from outside, but the accused asked him to go from inside. Her father again came on 18.01.2012 during morning hours and called from outside, on which the accused again told him to go away. During day time, her father came again with owner of the *Dhara*, police and other villagers including Pradhan and asked the accused to open the door, but he did not open the door. Thereafter, the police officials pushed the door and the door was opened. The police officials had seen the dead bodies inside the room. In her cross-examination, she has admitted that behaviour of the accused with them was nice.

17. PW-14, Sub-Inspector Gauri Dutt Sharma is formal witness. PW-15, Dalip Chauhan deposed that he was called to the Police Station on 20.01.2012. In his presence and in the presence of Vikas Nanda, the accused made a disclosure statement vide Ex. PW8/A that he could recover a drat and scissor, which he had concealed in the side of a room below a sack. The accused led the police party to a room situated in the apple orchard of one Daulat Ram Chauhan. He took out a blood stained drat from the corner of the room concealed under a sack and produced before the police. Thereafter, he took out a blood stained scissors.

18. PW-16 Man Bahadur deposed that he had two daughters, namely Dropti and Devyani and three sons. He married his daughter Dropti with the accused. Accused had two children from his daughter. Accused was also residing in the orchard of Daulat Ram Chauhan at Chalnehar. Accused was residing there with his parents and family members. His younger daughter Devyani also used to reside with them. During winter season, when there was snow fall, he had gone to the house of Daulat Ram to take *Lassi*. Daulat Ram directed him to call Parwati, mother of the accused to milk the cow. He went to the temporary shed of accused and called from outside. His daughter Dropti told him to leave since door was closed. Thereafter, he left for his *Dhara* (temporary shed) at Bagga. On the next day, he again went to the house of Daulat Ram Chauhan at 10:00 a.m. and told him that when he had gone to call Parawati, the door was closed from inside. Thereafter, Daulat Ram directed him to report the matter to the police. When he was about to leave to call the police, President of Gram Panchayat, Mohan Chauhan came to the spot alongwith police and other residents of the village. The police and Pradhan directed to open the door. Thereafter, he noticed that dead bodies of mother and father of accused were lying in pool of blood in naked condition in the temporary shed of accused. He inquired about the incident from his daughters Dropti and Devyani. They disclosed that accused gave beatings to Parwati and Man Bahadur with griddle (Tawa). They also disclosed that accused made all the persons naked and thereafter their cloths were set ablaze and electric bulbs were also put into fire. Thereafter, accused gave beatings to Parwati and Man Bahadur with griddle. In his cross-examination, he deposed that he had not noticed anything outside the door of the temporary shed of accused. On 17.01.2012, he had not made any effort to open the door of *Dhara*. He had also not inquired about the reasons from his daughter for not opening the door.

19. PW-17, Sub-Inspector, Rattan Chand, investigated the matter. On 18.01.2012, Pradhan, Gram Panchayat Chelnehar Mohan Chauhan telephonically informed the police that somebody had killed Man Bahadur and Parwati Devi, regarding which rapat Ex. PW-4/A was entered in the computer. On reaching the spot, he recorded the statement of Mohan Chauhan, under Section 154 Cr. P.C. vide Ex. PW12/A, on the basis of which, FIR Ex. PW-1/A was registered against the accused. He clicked the photographs Ex. A-1 to A-6. Inquest papers were prepared. He took into possession the griddle (Tava) Ex. P3, frame of window Ex. P5, brief case Ex. P6 vide memo Ex. PW12/B. He also took into possession the blood stained soil Ex. P8 vide memo Ex. PW12/C. These were duly sealed. The post mortem on the bodies of the deceased was got conducted. Drat Ex. P1 and scissor Ex. P4 were also taken into possession. He also got prepared the site plan Ex. PW5/A from the Junior Engineer. In his cross-examination, he has admitted that he had not seized the clothes of accused from the spot, however, volunteered that clothes were not blood stained.

20. Case of the prosecution, precisely is that the accused alongwith his family members was residing in a Dhara of PW-7, Sh. Daulat Ram Chauhan. On 17.01.2012, PW-7, Sh. Daulat Ram Chauhan asked PW-16, Man Bahadur to call Parwati. He went to the *Dhara* of accused. It was bolted from inside. PW-7, Daulat Ram again asked him to call Parwati on 18.1.2012, but he found the door of the *Dhara* closed. Thereafter, PW-7, Sh. Daulat Ram Chauhan asked him to report the matter to the police. Police reached the spot and recovered the bodies. PW-16, Sh. Man Bahadur has testified that his younger daughter Devyani also used to reside with the family of the accused. On 17.01.2012, during winter season when there was snow fall, he had gone to the house of Daulat Ram to take *Lassi*. Daulat Ram directed him to call Parwati, mother of the accused to milk the cow. He went to the temporary shed of accused and called from outside. His daughter Dropti told him to leave since door was closed. Thereafter, he left for his temporary shed at Bagga. On the next day, he again went to the house of Daulat Ram Chauhan at 10:00 a.m. and told him that

when he had gone to call Parwati, the door was closed from inside. He again went to the Dhara (temporary shed) on 18.01.2012. He found it locked. Thereafter, Daulat Ram directed him to report the matter to the police. PW-13, Smt. Devyani deposed that the accused asked her and her sister Dropti Devi to stand on the side and then he started beating his father with iron Tawa. Accused directed his wife to take out the electric bulb. Thereafter, in the darkness, the accused killed his father with drat and his mother with the scissor. Due to fear, they kept on standing there because the accused had threatened them not to speak anything. During whole night, they remained in the kitchen and in the morning, they were allowed to go to the other room. On 17.01.2012 also, they remained in that room. On 17.01.2012 during day time, her father had come there. He called them from outside, but the accused asked him to go from inside. Her father again came on 18.01.2012 during morning hours and he called from outside, on which the accused again told him to go away. PW-16, Sh. Man Bahadur in his examination-in chief deposed that when he went to the temporary shed of accused and called from outside, his daughter Dropti told him to leave since door was closed. But, PW-13, Smt. Devyani deposed that it was the accused who told from inside the room to Man Bahadur to leave. PW-7, Sh. Daulat Ram, in his cross-examination, has admitted that in the morning of 17.01.2012, the father of Dropti, namely, Man Bahadur had not contacted him and had come only on the morning of 18.01.2012. Man Bahadur had not told him as to whose voice he had heard from inside the house. The conduct of PW-16, Sh. Man Bahadur is unusual. He had gone to the house of accused in the morning of f 17.01.2012. He was told by his daughter to leave the house. He had gone to the house of accused at the instance of PW-7, Sh. Daulat Ram Chauhan. He did not inform Sh. Daulat Ram Chauhan on 17.01.2012 that the door was found locked from inside. PW-7, Sh. Daulat Ram again told him on 18.01.2012 to call Parwati. He went to the Dhara, but the door was found locked. It should have aroused his suspicion why the door was not opened in the morning of 17.01.2012 and in the morning of 18.01.2012. It is also intriguing to note that why the accused with his children, his wife and sister-in-law PW-13, Smt. Devyani would have remained in the room after the commission of the crime for about 48 hours. The endeavour of the accused would have been to run away from the scene of crime instead of locking himself inside the room for two days. The prosecution has not examined the wife of accused, who was also present in the house when the incident took place. In normal circumstances, all the occupants of the room would have come out of the room and raised hue and cry.

21. PW-16, Sh. Man Bahadur has admitted in his cross-examination that on 17.01.2012, he had not made any effort to open the door of Dhara. He had also not inquired about the reasons from his daughter for not opening the door. On 18.01.2012, he had also not made any effort to open the door. He had not made any complaint to Pradhan and police. It was an unusual behaviour on behalf of PW-16, Sh. Man Bahadur of not making efforts to open the door on the morning of 17.01.0212 and also on the morning of 18.01.2012 and not ascertaining the reason from his daughter why the door was not being opened. This casts serious doubt upon the prosecution version about the commission of the crime. The cause of death of deceased Man Bahadur was multiple ante mortem injuries leading to hemorrhage leading to cardio respiratory arrest leading to death. The probable duration between injuries and death was less then six hours and between death and post mortem was more than 24 hours and the cause of death of deceased Parwati Devi was multiple ante mortem injuries leading to hemorrhage leading to cardio respiratory arrest, leading to death. The probable duration between injury and death was less than six hours and between death and post mortem was more than 12 to 24 hours. PW-17, Sub Inspector Rattan Chand has not even recovered the cloths of the accused. The blood stains were bound to be on the cloths of the accused the manner in which according to the prosecution the murder has taken place.

22. Mr. M.A. Khan, learned Additional Advocate General has argued that on the basis of the disclosure statement made by the accused, the police has recovered the Tawa, Scissor and Drat. The recoveries must connect the accused with the commission of offence. According to Mr. M.A. Khan, learned Additional Advocate General, PW-13, Smt. Devyani was an eye witness of the incident. However, the statements of PW-13, Smt. Devyani and PW-16, Sh. Man Bahadur do not inspire confidence. It is also not clear, who has informed the police. PW-12, Sh. Mohan Chauhan in his cross-examination testified that the father-in-law of the accused Sh. Man Bahadur had come to him at about 1:00 p.m. to give the information. However, PW-16, Sh. Man Bahadur deposed that Daulat Ram had directed him to report the matter to the police and when he was about to leave to call the police, President of Gram Panchayat, Mohan Chauhan came to the spot alongwith police and other residents of village. This is major contradiction in the statement of PW-12, Sh. Mohan Chauhan and PW-16, Sh. Man Bahadur. Now, as per the version of PW-12, Sh. Mohan Chauhan, PW-16 Sh. Man Bahadur told him to give information to the police, but PW-16, as noticed above, has stated that when he was about to leave to contact the police, PW-12 alongwith the police had already reached the spot.

23. Mr. V.S. Rathore, learned counsel for the appellant has vehemently argued that no motive has been attributed to the accused. However, Mr. M.A. Khan, learned Additional Advocate General submitted that the accused was annoyed with his father for keeping a bad eye on his sister-in-law. If that was so, he would have killed only his father and not his mother. It has come in the statement of PW-13, Smt. Devyani that the accused was nice to them. The sister-in-law, Smt. Devyani, though according to the prosecution version was living with the accused, she was supposed to live with her father PW-16, Sh. Man Bahadur and not in the house of the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

24. Accordingly, in view of the observations and discussion made hereinabove, the Criminal Appeal No. 186 of 2014 is allowed. The judgment and order, dated 10.09.2013/18.09.2013, are set aside. The accused is acquitted of the charge framed against him. He be released forthwith, if not required in any other case. The Registry is directed to prepare the release warrant and send the same to the concerned Superintendent of Jail. Since the appeal of the appellant/accused has been allowed, the Death Sentence Reference No. 4001 of 2013 has become infructuous. Order accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Union of India & others ....Petitioners
Versus
Paras Ram ....Respondent

Review Petition No. 65 of 2015
Date of decision: 25.06.2015

of Civil Procedure, 1908- Order XLVII- Review petitioners claimed that the original petitioner was not sponsored by the employment exchange nor was he entitled to the grant of temporary status- he was not entitled to regularization and was a casual worker- the grounds taken in the Review Petition show that petitioners have filed an appeal and not a Review Petition – there was no error on the face of the record- petition dismissed.

(Para-2 to 4)

For the petitioner : Mr. Ashok Sharma, Assistant Solicitor General of India.
For the respondents: Mr. Onkar Jairath, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

By the medium of this review petition, the petitioners have sought review of the judgment and order dated 04.07.2014, made by this Court in CWP No. 962 of 2008, titled Sh. Paras Ram Sharma versus Union of India and others, on the grounds taken in the memo of the review petition.

2. The petitioners have specifically averred in the review petition that the writ petitioner was neither sponsored by the employment exchange nor was entitled to grant of temporary status. He was not entitled to regularization. He was a casual worker. The mistake has crept-in, which is apparent on the face of the record.

3. Order XLVII of the Code of Civil Procedure, 1908, mandates how the power of review can be exercised. This Court in the judgment rendered in **Review Petition No. 56 of 2014,** titled as **Ranjeet Khanna versus Chiragu Deen and another,** decided on 8th August, 2014, has discussed how the power of review has to be exercised. It is apt to reproduce paras 9 to 14 of the aforesaid judgment herein:

> "9. It is beaten law of the land that the power of review has to be exercised sparingly and as per the mandate of Section 114 read with Order 47 Rule 1 CPC. A reference may be made to Section 114 CPC and Order 47 Rule 1 CPC hereunder:
>
> **"114. Review. -** Subject as aforesaid, any person considering himself aggrieved,—
>
> (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,
>
> (b) by a decree or order from which no appeal is allowed by this Court, or
>
> (c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."
>
> "ORDER XLVII
>
> **REVIEW**
>
> **1. Application for review of judgment. – (1**) Any person considering himself aggrieved—
>
> > (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
> >
> > (b) by a decree or order from which no appeal is allowed,
> >
> > Or
> >
> > (c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made

against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree on order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Explanation—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."

10. I, as a Judge of the Jammu and Kashmir High Court, while sitting in Division Bench, authored a judgment in case titled **Muzamil Afzal Reshi vs. State of J&K & Ors., Review (LPA) No.16/2009, decided on 29.3.2013,** in which it was laid down that power of review is to be exercised in limited circumstances and, that too, as per the mandate of Section 114 read with Order 47 CPC. It was further held that the review petition can be entertained only on the ground of error apparent on the face of the record. The error apparent on the face of record must be such which can be unveiled on mere looking at the record, without entering into the long drawn process of reasoning.

11. The Division Bench of this Court has also laid down the similar principle in **Review Petition No.4084 of 2013**, **titled M/s Harvel Agua India Private Limited vs. State of H.P. & Ors., decided on 9th July, 2014**, and observed that for review of a judgment, error must be apparent on the face of the record; not which has to be explored and that it should not amount to rehearing of the case. It is apt to reproduce paragraph 11 of the judgment herein:

> "**11.** The error contemplated under the rule is that the same should not require any long-drawn process of reasoning. The wrong decision can be subject to appeal to a higher form but a review is not permissible on the ground that court proceeded on wrong proposition of law. It is not permissible for erroneous decision to be "re-heard and corrected." There is clear distinction between an erroneous decision and an error apparent on the face of the record. While the former can be corrected only by a higher form, the latter can be corrected by exercise of review jurisdiction. A review of judgment is not maintainable if the only ground for review is that point is not dealt in correct perspective so long the point has been dealt with and answered. A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition of old and overruled arguments cannot create a ground for review. The present stage is not a virgin ground but review of an earlier order, which has the normal feature of finality."

12. The Apex Court in case **Inderchand Jain (deceased by L.Rs.) vs. Motilal (deceased by L.Rs.), 2009 AIR SCW 5364,** has observed that the Court, in a review petition, does not sit in appeal over its own order and rehearing of the matter is impermissible in law. It is apt to reproduce paragraph 10 of the said decision hereunder:

"10. It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A re-hearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order. Review is not appeal in disguise. In Lily Thomas v. Union of India [AIR 2000 SC 1650], this Court held:

"56. It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated an appeal in disguise."

13. The Apex Court in case **Haryana State Industrial Development Corporation Ltd. vs. Mawasi & Ors. Etc. Etc., 2012 AIR SCW 4222,** has discussed the law, on the subject in hand, right from beginning till the pronouncement of the judgment and laid down the principles how the power of review can be exercised. It is apt to reproduce paragraphs 9 to 18 of the said judgment hereunder:

"9. At this stage it will be apposite to observe that the power of review is a creature of the statute and no Court or quasijudicial body or administrative authority can review its judgment or order or decision unless it is legally empowered to do so. Article 137 empowers this Court to review its judgments subject to the provisions of any law made by Parliament or any rules made under Article 145 of the Constitution. The Rules framed by this Court under that Article lay down that in civil cases, review lies on any of the grounds specified in Order 47 Rule 1 of the Code of Civil Procedure, 1908 which reads as under:

"Order 47, Rule 1:

1. Application for review of judgment.-

(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case of which he applies for the review.

Explanation- The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the

subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."

10. The aforesaid provisions have been interpreted in several cases. We shall notice some of them. In S. Nagaraj v. State of Karnataka 1993 Supp (4) SCC 595, this Court referred to the judgments in Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai AIR 1941 FC 1 and Rajunder Narain Rae v. Bijai Govind Singh (1836) 1 Moo PC 117 and observed:

"Review literally and even judicially means reexamination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh that an order made by the Court was final and could not be altered:

"... nevertheless, if by misprision in embodying the judgments, by errors have been introduced, these Courts possess, by Common law, the same power which the Courts of record and statute have of rectifying the mistakes which have crept in .... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies."

Basis for exercise of the power was stated in the same decision as under:

"It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard."

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order XLVII Rule 1 of the Civil Procedure Code. The expression, 'for any

other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of Court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice."

11. In Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius AIR 1954 SC 526, the three-Judge Bench referred to the provisions of the Travancore Code of Civil Procedure, which was similar to Order 47 Rule 1 CPC and observed:

"It is needless to emphasise that the scope of an application for review is much more restricted than that of an appeal. Under the provisions in the Travancore Code of Civil Procedure which is similar in terms to Order 47 Rule 1 of our Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein. It may allow a review on three specified grounds, namely, (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record, and (iii) for any other sufficient reason. It has been held by the Judicial Committee that the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule". See Chhajju Ram v. Neki AIR 1922 PC 12 (D). This conclusion was reiterated by the Judicial Committee in Bisheshwar Pratap Sahi v. Parath Nath AIR 1934 PC 213 (E) and was adopted by on Federal Court in Hari Shankar Pal v. Anath Nath Mitter AIR 1949 FC 106 at pp. 110, 111 (F). Learned counsel appearing in support of this appeal recognises the aforesaid limitations and submits that his case comes within the ground of "mistake or error apparent on the face of the record" or some ground analogous thereto."

12. In Thungabhadra Industries Ltd. v. Govt. of A.P. (1964) 5 SCR 174, another three-Judge Bench reiterated that the power of review is not analogous to the appellate power and observed (Para 11):

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions, entertained about it, a clear case of error apparent on the face of the record would be made out."

13. In Aribam Tuleshwar Sharma v. Aibam Pishak Sharma (1979) 4 SCC 389, this Court answered in affirmative the question whether the High Court can review an order passed under Article 226 of the Constitution and proceeded to observe (Para 3):

"But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within

the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."

14. In Meera Bhanja v. Nirmala Kumari Choudhury (1995) 1 SCC 170, the Court considered as to what can be characterised as an error apparent on the fact of the record and observed (Para 8):

"…….it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any longdrawn process of reasoning on points where there may conceivably be two opinions. We may usefully refer to the observations of this Court in the case of Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale AIR 1960 SC 137 wherein, K.C. Das Gupta, J., speaking for the Court has made the following observations in connection with an error apparent on the face of the record:

"An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ."

15. In Parsion Devi v. Sumitri Devi (1997) 8 SCC 715, the Court observed:

"An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47 Rule 1 CPC…….. A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise"."

16. In Lily Thomas v. Union of India (2000) 6 SCC 224, R.P. Sethi, J., who concurred with S. Saghir Ahmad, J., summarised the scope of the power of review in the following words (Para 15):

"Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised."

17. In Haridas Das v. Usha Rani Banik (2006) 4 SCC 78, the Court observed (Para 13):

"The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is

manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict."

18. In State of West Bengal v. Kamal Sengupta (2008) 8 SCC 612, the Court considered the question whether a Tribunal established under the Administrative Tribunals Act, 1985 can review its decision, referred to Section 22(3) of that Act, some of the judicial precedents and observed (Para 14):

"At this stage it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review ex debito justitiae. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment / decision"

14. The Apex Court in a recent judgment in case **Akhilesh Yadav v. Vishwanath Chaturvedi & Ors., 2013 AIR SCW 1316**, has held that scope of review petition is very limited and submissions made on questions of fact cannot be a ground to review the order. It was further observed that review of an order is permissible only if some mistake or error is apparent on the face of the record, which has to be decided on the facts of each and every case. Further held that an erroneous decision, by itself, does not warrant review of each decision. It is apt to reproduce paragraph 1 of the said judgment hereunder:

"Certain questions of fact and law were raised on behalf of the parties when the review petitions were heard. Review petitions are ordinarily restricted to the confines of the principles enunciated in Order 47 of the Code of Civil Procedure, but in this case, we gave counsel for the parties ample opportunity to satisfy us that the judgment and order under review suffered from any error apparent on the face of the record and that permitting the order to stand would occasion a failure of justice or that the judgment suffered from some material irregularity which required correction in review. The scope of a review petition is very limited and the submissions advanced were made mainly on questions of fact. As has been repeatedly indicated by this Court, review of a judgment on account of some mistake or error apparent on the face of the record is permissible, but an error apparent on the face of the record has to be decided on the facts of each case as an

erroneous decision by itself does not warrant a review of each decision. In order to appreciate the decision rendered on the several review petitions which were taken up together for consideration, it is necessary to give a background in which the judgment and order under review came to be rendered."

4. We have gone through the judgment under review and the grounds taken in the review petition. It appears that the petitioners have filed an appeal, not a review petition. We find no error on the face of the record.

5. Having said so, the review petition merits to be dismissed. Accordingly dismissed.

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

Dixit Chauhan …Petitioner.
Versus
Jagdish Thakur and others …Respondents.

CMPMO No. 238 of 2015.
Date of decision : 26th June, 2015

Motor Vehicle Act, 1988- Section 169- Petitioner filed an application for releasing the awarded amount but MACT only released 25% of the arrear- held, that compensation awarded in favour of minors, illiterate claimants or widows is to be invested- petitioner does not fall in the category of claimants specified above- no reason was assigned as to why the entire amount was not released to the claimant- petition allowed and the entire amount ordered to be released in favour of petitioner.

Case referred:
A.V. Padma and others vs. R. Venugopal and others (2012) 3 SCC 378

For the Petitioner : Mr. B. M. Chauhan, Advocate.
For the Respondents : Nemo.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This is an unfortunate case where the petitioner has been dragged to an otherwise avoidable litigation.

2. The award passed by the learned Motor Accidents Claims Tribunal (III), Shimla in favour of the petitioner had admittedly attained finality, but when the Tribunal got down to releasing the amount, it only released 25% of the share of the claimant/petitioner constraining him to approach this Court challenging therein the order so passed by the learned Tribunal on 31.3.2015.

3. No doubt, the Tribunals are entrusted with a duty to safeguard the interest of the claimants, more particularly, when they happen to be minors, illiterate claimants or widows. But then it is not in every case, more particularly, in the decided cases that the

Tribunal is to insist on investment of the compensation amount in long -term fixed deposit. Similar fact was noticed by the Hon'ble Supreme Court in ***A.V. Padma and others*** vs. ***R. Venugopal and others (2012) 3 SCC 378***, which constrained it to pass the following orders:

"6. *Even as per the guidelines issued by this Court Court, long term fixed deposit of amount of compensation is mandatory only in the case of minors, illiterate claimants and widows. In the case of illiterate claimants, the Tribunal is allowed to consider the request for lumpsum payment for effecting purchase of any movable property such as agricultural implements, rickshaws etc. to earn a living. However, in such cases, the Tribunal shall make sure that the amount is actually spent for the purpose and the demand is not a ruse to withdraw money. In the case of semi-illiterate claimants, the Tribunal should ordinarily invest the amount of compensation in long term fixed deposit. But if the Tribunal is satisfied for reasons to be stated in writing that the whole or part of the amount is required for expanding an existing business or for purchasing some property for earning a livelihood, the Tribunal can release the whole or part of the amount of compensation to the claimant provided the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid. In the case of literate persons, it is not mandatory to invest the amount of compensation in long term fixed deposit.*

7. The expression used in guideline No. (iv) issued by this Court is that in the case of literate persons also the Tribunal may resort to the procedure indicated in guideline No. (i), whereas in the guideline Nos. (i), (ii), (iii) and (v), the expression used is that the Tribunal should. Moreover, in the case of literate persons, the Tribunal may resort to the procedure indicated in guideline No. (i) only if, having regard to the age, fiscal background and strata of the society to which the claimant belongs and such other considerations, the Tribunal thinks that in the larger interest of the claimant and with a view to ensure the safety of the compensation awarded, it is necessary to invest the amount of compensation in long term fixed deposit.

8. Thus, sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long term fixed deposit and to release even the whole amount in the case of literate persons. However, the Tribunals are often taking a very rigid stand and are mechanically ordering in almost all cases that the amount of compensation shall be invested in long term fixed deposit. They are taking such a rigid and mechanical approach without understanding and appreciating the distinction drawn by this Court in the case of minors, illiterate claimants and widows and in the case of semi-literate and literate persons. It needs to be clarified that the above guidelines were issued by this Court only to safeguard the interests of the claimants, particularly the minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering an application seeking release of the money.

9. The guidelines cast a responsibility on the Tribunals to pass appropriate orders after examining each case on its own merits. However, it is seen that even in cases when there is no possibility or chance of the feed being frittered away by the beneficiary owing to ignorance, illiteracy or susceptibility to exploitation, investment of the amount of compensation in long term fixed deposit is directed by the Tribunals as a matter of course and in a routine

manner, ignoring the object and the spirit of the guidelines issued by this Court and the genuine requirements of the claimants. Even in the case of literate persons, the Tribunals are automatically ordering investment of the amount of compensation in long term fixed deposit without recording that having regard to the age or fiscal background or the strata of the society to which the claimant belongs or such other considerations, the Tribunal thinks it necessary to direct such investment in the larger interests of the claimant and with a view to ensure the safety of the compensation awarded to him.

10. The Tribunals very often dispose of the claimant's application for withdrawal of the amount of compensation in a mechanical manner and without proper application of mind. This has resulted in serious injustice and hardship to the claimants. The Tribunals appear to think that in view of the guidelines issued by this Court, in every case the amount of compensation should be invested in long term fixed deposit and under no circumstances the Tribunal can release the entire amount of compensation to the claimant even if it is required by him. Hence a change of attitude and approach on the part of the Tribunals is necessary in the interest of justice."

4. The relevant portion of the order passed by the learned Tribunal below reads thus:

"……I have perused the award passed by this Tribunal. Accordingly, the application is allowed and out of the awarded amount 25% of the share of applicant No.2 Dixit Chauhan alongwith interest accrued thereon be released in his favour by remitting the same in his bank account against proper receipt and identification…"

5. As is evident from the aforesaid order, there is no reason whatsoever given by the learned Tribunal as to why an amount to the extent of 25% of the share is being released. Even the Hon'ble Supreme Court has observed that the guidelines issued by the Court were only to safeguard the interest of the claimants, particularly, minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering the application for release of money.

6. Having said so, the case of the petitioner does not fall in the categories of the claimants identified by the Hon'ble Supreme Court whose amounts are to be kept in long term deposits. The petitioner admittedly is not a minor and as per the affidavit, his age is 30 years, therefore, there is no reason why the entire amount falling to his share should not have been ordered to be released in his favour.

7. In view of the aforesaid discussion, there is merit in this petition and the same is allowed and the order passed by learned Motor Accidents Claims Tribunal (III), Shimla in CMP No. 26-S/6 of 2014/11 dated 31.3.2015 is ordered to be set-aside and the entire amount falling to the share of the petitioner/claimant is ordered to be released in his favour by remitting the same to his bank account against proper receipt and identification. Petition stands disposed of in the aforesaid terms.

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

M/s United India Insurance Company ...Petitioner.

Versus

M/s Kishan Singh & Co. Pvt. Ltd & others.

...Respondents.

Arb. Case No.48 of 2007
Reserved on: 24.6.2015
Decided on : 26.6.2015

Arbitration and Conciliation Act, 1996 - Section 34- A contract was awarded by NHPC for the construction of permanent suitable bridge across the river Siul- 67 meters length of suspended portion being launched with 33.5 meters length of the nose fell down in the river- 16 persons died on the spot and 5 persons were grievously injured- the bridge was insured – a claim for loss of Rs.1,51,30,000 was made- Arbitral Tribunal awarded various amounts towards loss of bridge and rejected the claim for compensation on account of death of workmen- held, that Court cannot reappraise the material on record and substitute its own view in place of Arbitrator's views – the findings recorded by Tribunal are based upon correct evidence and cannot be termed as perverse - where two views are possible, the view taken by arbitrator has to be preferred- petition dismissed. (Para- 5 to 12)

Cases referred:

Navodaya Mass Entertainment Limited versus J.M. Combines, (2015) 5 Supreme Court Cases 698

Swan Gold Mining Limited vs. Hindustan Copper Limited, (2015) 5 SCC 739

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

For the Respondent: Mr. Rajnish Maniktala, Advocate for respondent No.1.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge

Petitioner has filed the present application under Section 34 of the Arbitration and Conciliation Act, 1996 against the award made on 17.3.2001 by the Arbitral Tribunal.

2. "Key facts" necessary for the adjudication of the present application are that respondent No. 1-Contractor was awarded by National Hydro-Electric Power Corporation Limited (for short "NHPC") the work of construction of permanent suitable bridge across river Siul, near village Koti on 30.8.1991 on lump sum basis at a total cost of Rs. 131.50 lacs. The work of bridge was to be undertaken in two spans, i.e. one of 53.6 meters cantilever span resting on concrete pier and second 67 meters span resting on tip of cantilever at one end and supported on roller bear bearing on the other end. An agreement between Contractor and NHPC was executed on 19.11.1991 for the revised contract of Rs. 138 lacs. It was further revised to Rs. 173 lacs from Rs. 138 lacs on 25.8.1993. The Contractor got the risk of the work covered by the petitioner by effecting its insurance for Rs. 1, 28,34,000/- with 3rd party liability for a period between 15.5.1992 to 31.5.1992. It was extended by another six months upto 30.11.1993 and further extended from 1.12.1993 to

31.1.1994 as per the terms and conditions of the insurance policy as amended by the insurer vide letter dated 1.12.1993.

3. The construction work of bridge was undertaken; however, at about 12 p.m. on 12.12.1993, there was a big bang and 67 meters length of suspended portion being launched with 33.5 meters length of the nose fell down in the river over a height of 50-60 meters. 16 persons died on the spot and 5 persons were grievously injured. The Contractor informed the insurer of the loss occurred at the work vide letter dated 17.1.1994. He made a tentative claim for the apparent loss of Rs. 1,51,30,000/-.

4. The matter was referred to the Arbitral Tribunal. The parties were directed to appear before the Arbitral Tribunal vide order dated 10.11.1998. The parties were afforded opportunity to file their respective additional documents in support of their case. The admission and denial of documents was also done.

5. Claim No. 1 was qua the cost of reconstruction of lost 67 meters span of bridge, i.e. Rs. 1,51,96,286.37/-. The learned Tribunal on the basis of the claim statement, rejoinder and the documents came to the conclusion that the Contractor did not take up the reconstruction of the portion of the work. It was got done by allotment of the work to another contractor, namely, Shri Vinay Kumar Gupta at higher rates. The work, as noticed hereinabove, was awarded by the NHPC to the Contractor for a lump sum payment of Rs. 173 lacs revised cost. It was insured for Rs. 1,18,34,000/- besides Rs. 10,00,000/- for 3rd party liability. Learned Tribunal has taken into consideration the report of Surveyors M/s Mita Marine and General Survey Agencies. The cost of the reconstruction of the same design was worked out at 260 MT and its cost was worked out at Rs. 41,60,000/-. The cost of fabrication, erection and launching was claimed at Rs. 73,25,000/-. The total cost was Rs. 1,14,85,000/-. Adding supervision and contingencies at 5%, i.e. Rs. 5,74,250/-, the amount claimed from the Contractor was Rs. 1,20,69,250/-. However, in view of considered view of the Arbitral Tribunal, the total actual payment made by the NHPC to the Contractor for 120.6 meters was Rs. 1,51,74,000/- and the cost of 67 meters span of bridge lost was Rs. 84,30,000/-. The total loss came to Rs. 62,00,265/-.

6. According to claim No. 2, the Cost of repair, strengthening and replacement of numbers and load testing of 53.6 meters span of the bridge and ultrasound testing of joint was considered for a sum of Rs. 41,37,913/-. The Tribunal on the basis of the figures given in Annexures-II to appendix S & T of the Survey report came to the conclusion that the damage to 53.6 meters span of bridge was Rs. 10.40 lacs and the insurers was liable to pay Rs. 7,14,920/-.

7. According to claim No.3, the cost of balance work, i.e. deck slab, railing, footpath etc. was claimed for Rs. 20,76,000/-. It was rejected by the learned Arbitral Tribunal. Thereafter, the Arbitral Tribunal has made award for cost of retrieval of salvage of lost 67 meters span of the bridge including watch ward of retrieved salvage. The net realization from the salvage according to the Arbitral Tribunal was Rs. 2,99,600/-.

8. The claim for compensation on account of death of workmen was rejected by the Arbitral Tribunal. The Arbitral Tribunal on the basis of evidence oral as well as documentary and survey report has awarded for loss of 67 meters span of the bridge Rs. 62,00,265/-. Compensation for repairs of the damage caused to 53.6 span of the bridge was Rs. 7,64,920/-. Less payment on sale of salvage due from NHPC to the insurer was Rs. 2,99,600/-, less payment of compensation already made by the insurer to NHPC on 14.3.1999 was Rs. 22,64,963/- and the net balance amount of compensation required to be paid by the insurer was Rs. 44,00,622/-. The interest @ 12% per annum was awarded from

1.2.1994 with future interest at the same rate from the date of award till actual payment with cost of Rs. 90,000/-.

9. This Court cannot re-appraise the material on record and substitute its own view as Arbitrator's view. The Arbitrators have applied their mind. The findings recorded by them are based on correct appreciation of evidence and the same cannot be termed as perverse.

10. Their Lordships of the Hon'ble Supreme Court in ***Navodaya Mass Entertainment Limited*** versus ***J.M. Combines***, (2015) 5 Supreme Court Cases 698 have held that even if two views are possible, view taken by the Arbitrator would prevail and reappraisal by the Court is not permissible. Their Lordships have held as under:

> **"[8] In our opinion, the scope of interference of the Court is very limited. Court would not be justified in reappraising the material on record and substituting its own view in place of the Arbitrator's view. Where there is an error apparent on the face of the record or the Arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the Arbitrator. Once the Arbitrator has applied his mind to the matter before him, the Court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the Arbitrator would prevail. (See: Bharat Coking Coal Ltd. Vs. L.K. Ahuja, 2004 5 SCC 109; Ravindra & Associates Vs. Union of India, 2010 1 SCC 80; Madnani Construction Corporation Private Limited Vs. Union of India & Ors., 2010 1 SCC 549; Associated Construction Vs. Pawanhans Helicopters Limited, 2008 16 SCC 128; and Satna Stone & Lime Company Ltd. Vs. Union of India & Anr., 2008 14 SCC 785.)"**

11. Their Lordships of the Hon'ble Supreme Court in ***Swan Gold Mining Limited*** vs. ***Hindustan Copper Limited***, (2015) 5 SCC 739 have held that arbitrator's decision is generally considered binding between the parties and, therefore, the power of the court to set aside the award would be exercised only in cases where the court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. Their Lordships have further held that the arbitrator appointed by the parties is the final judge of the facts. The findings of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him. Their Lordships have held as under:

> **"11. Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal.**

12. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.

18. Mr. Sharan, learned senior counsel appearing for the appellant, also challenged the arbitral award on the ground that the same is in conflict with the public policy of India. We do not find any substance in the said submission. This Court, in the case of Oil and Natural Gas Corporation Ltd. (supra), observed that the term 'public policy of India' is required to be interpreted in the context of jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The Court held that an award can be set aside if it is contrary to fundamental policy of Indian law or the interest of India, or if there is patent illegality. In our view, the said decision will not in any way come into rescue of the appellant. As noticed above, the parties have entered into concluded contract, agreeing terms and conditions of the said contract, which was finally acted upon. In such a case, the parties to the said contract cannot back out and challenge the award on the ground that the same is against the public policy. Even assuming the ground available to the appellant, the award cannot be set aside as because it is not contrary to fundamental policy of Indian law or against the interest of India or on the ground of patent illegality.

19. The words "public policy" or "opposed to public policy", find reference in Section 23 of the Contract Act and also Section 34 (2)(b)(ii) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy."

12. Accordingly, there is no merit in the application and the same is rejected, so also the pending application(s), if any.

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

Birbal ...Appellant.

Vs.

State of H.P. ...Respondent.

Criminal Appeal No.549 of 2010
Reserved on : 11.5.2015
Date of Decision : June 29, 2015.

Indian Penal Code, 1860- Sections 302, 364 and 201- PW-1 and PW-4 were staying at Mehatpur- they had two daughters and one son- accused claimed to be putative father of the son- he took away the girls on 3.8.2009- PW-1 brought the matter to the notice of the police- investigation revealed that accused had thrown his daughters in a water canal- dead

bodies were recovered- parents had duly identified the girls- accused made a disclosure statement and identified the place from where the girls were thrown in the canal- chappals were recovered which were identified by the parents- it was duly proved that accused had taken away the girls without the consent of the parents- Medical Officer specifically stated that girls had died due to drowning- recovery of chappals pursuant to the disclosure statement was duly proved- all the circumstances led to the guilt of the accused- held, that accused was rightly convicted. (Para-6 to 23)

For the Appellant : Mr. Surinder Sharma, Advocate.
For the Respondent : Mr. Ashok Chaudhary, Mr. V.S. Chauhan, Additional Advocates General and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Birbal, hereinafter referred to as the accused, has assailed the judgment dated 27.7.2010/4.8.2010, passed by Additional Sessions Judge, Fast Track Court, Una, District Una, Himachal Pradesh, in Sessions Case No.1/2010 (Sessions Trial No.1/2010), titled as *State v. Birbal*, whereby he stands convicted and sentenced as under:

Offence	Sentence
302 IPC	Imprisonment for life and to pay fine of Rs.10,000/- and in default of payment thereof to further undergo simple imprisonment for a period of six months.
364 IPC	Rigorous imprisonment for a period of five years to pay fine of Rs.5,000/- and in default of payment thereof to further undergo simple imprisonment for a period of three months.
201 IPC	Imprisonment for a period of one year and to pay fine of Rs.1,000/- and in default of payment thereof to further undergo simple imprisonment for a period of one month.

2. In relation to FIR No.286, dated 5.8.2009 (Ex.PW-24/A), registered, under the provisions of Section 364 of the Indian Penal Code, at Police Station, Sadar (Una), accused was charged to face trial for having committed offences, punishable under the provisions of Sections 364, 302 & 201 of the Indian Penal Code.

3. Undisputedly, defence taken by the accused, in his statement, under the provisions of Section 313 of the Code of Criminal Procedure, reads as under:

> "I am innocent. I have not done anything. I have been implicated in this case as Parvesh Kumar was suspicious about paternity of girls-daughters and was also suspicious that his wife Ritu had illicit relations with me. Due to this reason I have been implicated in this case falsely."

4. Finding the testimonies of the prosecution witnesses to be reliable and their version to be clear, cogent and consistent, trial Court found the prosecution to have proved

on record the chain of circumstances, beyond reasonable doubt, leading to the only hypothesis of the guilt of the accused,. Correctness of the findings and the judgment is the subject matter of the present appeal.

5. Prosecution relies upon the following circumstances in order to establish the guilt of the accused:

i. Recovery of dead bodies of the deceased from the canal, who died of drowning.

ii. Accused would often visit the house of the deceased.

iii. On the date of occurrence of incident, under the influence of alcohol, accused took away the deceased with himself.

iv. Immediately prior to the occurrence of crime, deceased were lastly seen in the company of the accused,

v. Accused having confessed of having committed the crime, which led to the identification of spot of crime and recovery of *Chappals* (slippers) of the deceased.

6. In brief, it is the case of prosecution that Parvesh Kumar (PW-1) and Ritu (PW-4) were staying at Mehatpur. They had two daughters Tamanna & Rajju (both deceased) and son Kishan. Accused claimed himself to be the putative father of Kishan. On 3.8.2009, at about 7.30 p.m., in the absence of Parvesh Kumar, accused took away the girls. Finding his daughters to be missing, Parvesh Kumar brought the matter to the notice of the police and on the basis of his statement, so recorded, under the provisions of Section 154 of the Code of Criminal Procedure, FIR (Ex. PW-24/A) was recorded at Police Station, Sadar (Una). Investigation revealed that the accused first took the girls to the shop of Sanjeev Kumar (PW-2), where he purchased toffees and thereafter boarded a bus towards Nangal. Lateron he threw the decessed in the water canal, as a result of which they died. On 7.8.2009, police found the dead bodies at the Gate of Ganguwal Power House, which were recovered vide Memo (Ex.PW-1/D). Parents identified the dead bodies. Accused, who was arrested on 7.8.2009, made a disclosure statement (Ex.PW-10/A), not only admitting his guilt but voluntarily got the spot, from where he had thrown the girls in the canal, identified. This was so done in the presence of HHC Mohinder Kumar (PW-10) and independent witness Harish Chander (PW-20). Pursuant thereto, accused identified the spot from where police also recovered a pair of *Chappals* (Ex. P-1 & P-2), belonging to the deceased, vide Memo (Ex.PW-1/B). This was in the presence of independent witness Rajiv Thakur (PW-9) and HC Pawan Kumar (PW-11). Recovered articles were also identified by the parents. Postmortem was conducted by Dr. P.S. Rana (PW-19), who issued postmortem reports (Ex. PW-19/D & 19/E). He opined the deceased to have died on account of asphyxia following aspiration of water due to ante-mortem drowning.

Circumstance No.II

7. In Court, Ritu, mother of the deceased, has deposed that the accused claimed himself to be the putative father of her son Kishan. Unrebuttedly, accused was known to the witness from before and was on visiting terms. Also the deceased used to consider and call the accused as their "*Mama*" (uncle). This witness further states that on 3.8.2009, at about 6.30 p.m., accused, who was under the influence of liquor, came to her house and desired that the daughters be given to the husband and that she elope with him carrying Kishan, whom he claimed to be the putative father. She objected to the same. Also, accused quarrelled with her. The deceased, who were playing in the *Gali* (street), were taken away by the accused. Only when they did not return at about 8.30 p.m., she started searching for them and also informed her husband. Though the witness does state that she

had actually not seen the accused take away the deceased, but has explained that children were playing in the adjoining *Gali* and accused took them away.

8. Version of this witness stands corroborated by her husband Parvesh Kumar (PW-1), who has further deposed that Sanjeev Kumar, a shop-keeper, had also informed him of the accused having purchased toffees, at the time when deceased were with him.

9. What is important in the testimony of both these witnesses is that the children were not taken away by the accused with the consent of parents. He, under the influence of alcohol, took away the deceased after quarrelling with Ritu. In our considered view, nothing has emerged from the cross-examination part of testimony of these witnesses, which would impeach the credence or credibility, of the witnesses, rendering their version, in any manner, to be lacking in confidence. Thus, prosecution has been able to establish this link in the chain.

Circumstance No.IV

10. Sanjeev Kumar (PW-2) has testified that on 3.8.2009, at about 7.30 p.m., accused came to his shop with the daughters (deceased) of Parvesh and purchased toffees. Evidently, he knew both the accused and the children from before, as his shop is situated in the *Gali* near the house of Parvesh.

11. We find that even Chander Shekhar (PW-3) noticed the accused with the deceased. This was same day at about 8 p.m.

12. Presence of the accused at Mehatpur, on the date of occurrence of the incident, also stands recorded through the testimony of Pardeep Kumar (PW-8).

13. Sham Lal (PW-6), who is an auto-rickshaw driver, has also testified to the fact that same day, at about 8 p.m., he saw the accused board a bus towards Nangal. At that time, daughters of Parvesh were with him. The witness does not remember whether the bus was private or Government owned, but then this fact would not render his testimony to be doubtful. His version that accused was holding one of the girls with hand and the other on his lap, is not so recorded in his previous statement, with which he was confronted. Even this fact, in our considered view, would not shatter his testimony, for the reason that on material facts, there is neither any improvement, nor any exaggeration/embellishment. Thus, prosecution has been able to prove the circumstance of the deceased lastly seen in the company of the accused.

Circumstance No.III

14. Through the testimony of Kamal Singh (PW-7), prosecution has been able to establish that on 3.8.2009, accused had consumed alcohol in the *Ahata* owned by this witness. This was at about 5 p.m. Accused was a regular visitor to the *Ahata* and was personally known to this witness. He has categorically denied the suggestion of any quarrel having taken place between him and the accused.

Circumstance No.I

15. Dead bodies of Tamanna and Rajju, so recovered by the police on 7.8.2009, vide Memo (Ex.PW-1/D) were identified by Parvesh Kumar. Thereafter, Investigating Officer Sewa Singh (PW-24) got conducted postmortem from Dr. P.S. Rana (PW-19), who issued postmortem reports (Ex. PW-19/D and 19/E). The doctor has explained that two doctors, simultaneously, conducted the postmortem, whereafter reports were prepared by him. The deceased died on account of asphyxia following aspiration of water due to ante-mortem drowning.

16. Tara Singh (PW-12), who was posted at BBMB Power House, Ganguwal, has also deposed about the recovery of dead bodies. Thus, the prosecution has proved recovery of dead body from the canal and the deceased having died due to drowning.

Circumstance No.V

17. In his testimony IO Sewa Singh has testified that during investigation, accused, who was in custody, in the presence of Mohinder Kumar (PW-10) and Harish Chander (PW-20) made a disclosure statement (Ex. PW-10/A). Immediately, Dy. S.P. Raman Sharma (PW-25) was informed of such fact. On this count, Mohinder Singh, in his unrebutted testimony, has also corroborated such version. It also stands corroborated by Harish Chander, who is an independent witness and member of Municipal Council, Mehatpur. He has explained the circumstances under which he was present at the Police Post. Dy.S.P. Raman Sharma, in Court, has corroborated the version of Harish Chander. We do not find the version of these witnesses to be doubtful or their credence to be impaired or shattered in any manner. Their version with regard to disclosure statement is clear and testimonies consistent and unimpeachable.

18. It has come on record that after the disclosure statement, investigation was taken over by Dy.S.P. Raman Sharma, who has further deposed that pursuant to the disclosure statement (Ex. PW-10/A), accused led the police to the spot, from where he had thrown the deceased in the water canal. The spot was identified, from where two *Chappals* (Ex. P-1 & P-2) were recovered, which were identified by Parvesh to be that of the deceased. The same were taken into possession in the presence of independent witness Rajeev Thakur (PW-9) and HC Pawan Kumar (PW-11), vide Memo (Ex. PW-1/B). It is only after recovery of *Chappals* that the police started looking for the bodies of the missing girls, which were recovered from the gate of the Ganguwal Power House. The photographs (Ex.PW-15/1 to 15/9) were also taken on the spot by HC Ashok Kumar (PW-15). Rajeev Thakur, though initially supported the prosecution on the question of identification of the spot, from where the accused had thrown the deceased into the canal, but however, on the question of recovery of the *Chappals,* resiled from his previous statement and was declared hostile. However, when cross-examined by the Public Prosecutor, admitted having signed the recovery memo (Ex.PW-1/B), upon which the accused had put his thumb impression. Significantly, on the issue of identification of the spot, his version goes unrebutted. Also, Pawan Kumar (PW-11) has corroborated the version of Dy.S.P. Raman Sharma. Thus, factum of identification of spot and recovery of *Chappals,* belonging to the deceased, stands materially proved on record by the prosecution.

19. We find no discrepancy, contradiction or inconsistency in the testimony of the witnesses, which would render the prosecution case to be doubtful, in any manner. Prosecution has been clearly able to establish, beyond reasonable doubt, the fact that the accused, who was on visiting terms, came to the house of Parvesh and after quarrelling with Ritu, without consent, took away the children (deceased) and threw them in the water canal, as a result of which they died. Motive stands explained by the mother.

20. Accused made a disclosure statement, which further led to the identification of the spot, from where deceased were thrown, which further led to recovery of their dead bodies at the gates of the Power House. Also, *Chappals* (slippers) belonging to the deceased were recovered by the police.

21. Evidence produced on record is clear, cogent, convincing and the unbroken chain of circumstances only establishes the prosecution case of the accused having intentionally kidnapped the deceased with an intent of committing murder, which actually was so done. Innocently, children went with the accused, whom they called their *Mama.*

They were not in the know of any quarrel, which took place between the accused and their mother. To allure the children, accused bought them toffees from a nearby shop. Significantly, at that time, they were playing in the *Gali* and not in the courtyard of their house. The occasion, cause and effect in relation to the fact in issue, so also motive, preparation, previous and subsequent conduct of the accused, stand established on record.

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

23. In our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

24. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

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

Sesh Ram ...Appellant.
Versus
State of H.P. ...Respondent.

Criminal Appeal No.310 of 2012
Reserved on : 26.5.2015
Date of Decision: June 29, 2015

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 8 k.g of charas- police did not have any prior information- it was a case of chance recovery- accused was unable to satisfactorily answer the queries of the police party, on which he was searched- non-association of the independent witnesses in such circumstances is not material- police officials had corroborated testimonies of each other- their version is clear, cogent and consistent – testimonies are free from exaggerations, embellishments and major contradictions- once possession has been proved, burden is upon the accused to prove that possession was not conscious- held, that prosecution version was proved beyond reasonable doubt and the accused was rightly convicted. (Para-9 to 30)

Cases referred:
Mohinder Kumar v. State, Panaji, Goa, (1998) 8 SCC 655
Dharampal Singh v. State of Punjab, (2010) 9 SCC 608
Madan Lal and another vs. State of H.P., 2003 (7) SCC 465
Dehal Singh v. State of Himachal Pradesh, (2010) 3 SCC (Cri) 1139)
Shivaji Sahabrao Bobade & another vs. State of Maharashtra, (1973) 2 SCC 793
State of H.P. v. Sunil Kumar, (2014) 4 SCC 780.

For the Appellant : Mr. Ashwani Kaundal, Advocate.
For the Respondent : Mr. Ashok Chaudhary, Mr. V.S. Chauhan, Additional Advocates General and Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Sesh Ram, hereinafter referred to as the accused, has assailed the judgment dated 21.4.2012, passed by Special Judge (II), Kinnaur at Rampur, Himachal Pradesh, in Sessions Trial No.61-AR/3 of 2011, titled as *State of Himachal Pradesh v. Sesh Ram*, whereby he stands convicted of the offence punishable under the provisions of Section 20(b)(ii)(C) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to undergo rigorous imprisonment for a period of ten years and pay a fine of Rs.1,20,000/-, and in default thereof, to further undergo simple imprisonment for a period of two years.

2. It is the case of prosecution that a police party of the State CID, Police Station, Bharari (Shimla), was on duty in the field. They had left the Police Station on 20.2.2011 and spent two nights at a place known as Nogli. On 22.2.2011, the party headed towards Nirmand Baghipul side and at about 1 p.m., while they were just 1 km behind Baghipul, they saw the accused coming with a *Pithu* on his back. Seeing the accused, SI Rattan Singh (PW-7), who was heading the police party, stopped the vehicle and enquired the area from which he was coming. Not finding a satisfactory response, police officials enquired as to what he was carrying in the bag. At that accused got scared. Hence, on suspicion, the bag was searched, from which Charas in the shape of small balls and sticks, wrapped in two carry bags, was recovered. In the presence of police officials ASI Rajesh Kumar (PW-1) and Constable Nazar Lal (PW-11), Memo of identification (Ex.PW-1/A) was prepared. Upon weighment, the contraband substance was found to be 8 kgs, which was sealed in a parcel with seal impression 'L'. NCB form (Ex.PW-6/D) was filled up in triplicate. HC Tilak Raj (PW-3) took the Ruka to the CID Police Station, Bharari. Ruka was also sent through FAX by Constable Parkash Chand (PW-10), from the shop of Shri Ajit Sankhian (PW-2), on the basis of which FIR No.3, dated 22.2.2011 (Ex. PW-6/A) was registered by Shri Tenjing Shashni (PW-6). The file was taken to the spot by HC Devinder (PW-8). Accused was arrested. With the completion of investigation on the spot, SI Rattan Singh entrusted the case property to Shri Tejjing Shashni, who resealed the same with his own seal of seal impression 'H'. HC Parkash Chand (PW-4), to whom the case property was entrusted, made entries in the Malkhana Register (Ex.PW-4/C) and sent it to the Forensic Science Laboratory, Junga, through HC Bhagirath (PW-9). Repot of the Laboratory (Ex. PW-6/D) was obtained by the police. Also, Special Report (Ex.PW-5/A), taken by Constable Nazar Lal, was delivered in the Office of the Superintendent of Police (Crimes), State CID, which was received by ASI Shiv Ram (PW-5). With the completion of investigation, which, prima facie,

revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

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

4. In order to establish its case, prosecution examined as many as 11 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took the following defence:

> "I am innocent. The police party had been in the area for last many days meeting people and staying locally. On 22.02.2011 they made telephone calls to may people including Jai Singh of village Tharla and also called me to Jaon Bazar. They were accompanied one lady inspector in civil dress and one person from Nalagarh side. In presence of Jai Singh and local shopkeepers and a tailor master I was arrested and taken to PWD rest house Nirmand and documents were prepared there. The contraband was collected by the police people with the help of the person belonging to Nalagarh and was planted on me."

In defence, accused examined one witness.

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

6. Learned counsel for the appellant, attacking the judgment of trial Court, has made the following submissions:

I) Area in question is prone to trafficking of Charas. Police had prior information and detection of such crime was the reason for the police to be present on the spot. Under these circumstances, there is infraction of provisions of Sections 42, 52 and 57 of the Act.

II) In the absence of non-association of independent witnesses, testimony of police officials is rendered unreliable and unbelievable.

III) Defence set up by the accused stands probablized through testimony of defence witness so examined by him.

7. Mr. V.S. Chauhan, learned Additional Advocate General, has supported the findings of fact and judgment, so rendered by the trial Court.

8. Having perused the testimony of the prosecution witnesses, at the threshold, it be only observed that there is nothing on record to even remotely suggest, that the area in question is prone to trafficking of drugs. Also, there is nothing on record to even remotely suggest that police party was on patrol duty in the area, in connection with detection of crime pertaining to narcotic substances. Under these circumstances, there is no question of violation of the provisions of Sections 42, 52 and 57 of the Act.

9. Rattan Singh (PW-7), who headed the police party, has categorically deposed that the police party left Shimla on 20.2.2011. They spent two nights at a place known as Nogli and only in the morning of 22.2.2011, they left towards Nirmand Baghipul side. Further, just 1 km before Baghipul, he saw the accused, holding a *Pithu* on his back. He made enquiries to which there was no satisfactory response. Also accused got scared. Hence, on suspicion, after informing him of his statutory rights, and obtaining his consent,

the bag was searched. Police officials ASI Rajesh Kumar and Nazar Lal were associated in this process. From the bag, contraband substance i.e. Charas, weighing 8 kgs, was recovered. The same was sealed with seal impression 'L' NCB form was filled up in triplicate and the property taken onto possession, vide Memo (Ex.PW-1/C). Ruka (Ex. PW-3/A), alongwith case property, was sent through Constable Tilak Raj to the Police Station. On 23.2.2011, after receiving the case file, remaining formalities were completed. Ruka, which was sent by FAX, bearing endorsement of SHO Tenjing, was taken on record.

10. Apart from corroborating the aforesaid version, Tilak Raj has deposed that he delivered the case property to SHO Tenjing. He is categorical that so long as the case property remained with him, it was not tampered with.

11. Testimony of ASI Rajesh Kumar, Constable Parkash Chand (PW-10) and Constable Nazar Lal (PW-11) is also to similar effect. Additionally, Parkash Chand has deposed that he faxed the Ruka from Sankhian Book Depot at Nirmand and obtained cash Memo (Ex. PW-2/A) and Tilak Raj (PW-3) states that he took the Ruka alongwith the contraband substance and deposited the same with SHO Tenjing.

12. Shri Ajit Sankhian (PW-2) is the Proprietor of Sankhian Book Depot, who has also corroborated the version of Parkash Chand (PW-10).

13. SHO Tenjing Shashni (PW-6) has also testified that with the registration of FIR, on the basis of Ruka so received by him, case file was sent through HC Davinder (PW-8). Also, Tilak Raj deposited the case property with him, which he resealed with his seal impression 'H'. Relevant entries in the NCB form (Ex. PW-6/B) were made. Specimen of the seal, so embossed by him, is Ex. PW-6/C, and the resealing certificate is Ex. PW-4/B.

14. Prosecution witnesses, and more particularly, Tilak Raj (PW-3), have clarified that the place where the accused was apprehended is isolated and secluded. No vehicular traffic passed, at the time when the contraband substance was recovered and seized.

15. It is a case of chance recovery and not of prior information. Only when the accused was not able to satisfactorily answer the queries of the police party, he was searched, which led to the recovery of the contraband substance. In this backdrop, contention with regard to non-association of independent witnesses only merits rejection.

16. We find that police had taken all precautions. Even Special Report (Ex.PW-5/A) was sent to the superior Officer, which fact is evident from the testimony of ASI Shiv Ram and Constable Nazar Lal.

17. From the conjoint reading of testimonies of the aforesaid witnesses, we find their version to be clear, cogent, consistent, and there is nothing which would render their testimonies to be unbelievable. They are free from exaggerations, embellishments and major contradictions. Prosecution has been able to establish the factum of having carried out the search and seizure operations, in accordance with law, and recovered the contraband substance from the conscious possession of the accused.

18. Even on the question of link evidence, prosecution has been able to establish its case, beyond reasonable doubt. Both, SI Rattan Singh and HC Tilak Raj, have deposed that so long as the contraband substance remained in their possession, it was not tampered with. Recovery was effected on 22.2.2011 and contraband substance deposited with the SHO of the concerned Police Station the very next day. It took time for Tilak Raj to travel from Nirmand to Shimla. Upon receipt of the contraband substance, SHO Tenjing resealed the same and completed the necessary formalities. Certificate of re-sealing and impression of the seal stands proved on record.

19. Case property was entrusted to MHC HC Prakash Chand (PW-4), who made entries in the Malkhana Register (Ex. PW-4/C). Sealed parcel alongwith the road certificate (Ex.PW-4/D) was sent through HC Bhagirath (PW-9) for chemical analysis to the Forensic Science Laboratory, who deposited the same in the Laboratory at Junga. Even these witnesses, in their unrebutted testimony, have deposed that so long as the parcel remained with them it was not tampered with. Report of the Laboratory (Ex.PW-6/D) categorically establishes the seized contraband substance to be psychotropic substance, i.e. Charas.

20. Mr. Ashwani Kaundal, learned counsel for the accused, has referred to the decision rendered by the Hon'ble Supreme Court of India in *Mohinder Kumar v. State, Panaji, Goa,* (1998) 8 SCC 655, which we find not to be applicable in the given facts and circumstances. The Court was dealing with a case where the house of the accused was searched, after sunset, and with a strong suspicion that the accused had kept psychotropic substance in his house. It is in this backdrop, the Court held the prosecution not to have complied with the provisions of Sections 42, 52 and 57 of the Act.

21. On the other hand, in *Dharampal Singh v. State of Punjab,* (2010) 9 SCC 608, the Hon'ble Supreme Court of India, has held that the initial burden of proof of the possession lies on the prosecution. Once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt. However, what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution would not nail him with offence. Offences under the Act being more serious in nature, higher degree of proof is required to convict an accused.

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

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

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

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

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

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

26. On the issue in hand, one would only refer to the near recent decision rendered by the Hon'ble Supreme Court of India in *State of H.P. v. Sunil Kumar,* (2014) 4 SCC 780.

27. Significantly, in his statement, under the provisions of Section 313 of the Code of Criminal Procedure, accused does not state the name of the tailor master. He has not produced Jai Singh or any other local shop-keeper. He never protested his arrest at any point in time.

28. Now, Ramesh Chand (DW-1) claims himself to be running a tailoring shop at village Jaon. He does not state that the police arrested the accused in his presence. All that he states is that on 22.2.2011, at about 2 p.m., CID officials were talking to one Jai Singh. In the meanwhile, accused also crossed his shop and after half an hour, three officials visited him with a piece of cloth and asked him to stitch the same into a parcel, which he did. Thereafter, the police officials left towards Baghipul side. It was only lateron that he learnt that the police had arrested Sesh Ram (accused). Defence of the accused, by no stretch of imagination, can be said to have been probablized even by this witness. We do not find the testimony of this witness to be worthy of credence, for the reason that he admits to be running the shop from his residential house, and of his vocation there is no proof and also he is a close relative of the accused. He has not undergone any training in tailoring and claims to have learnt the same from his father, of which also there is no evidence. His version of the police having visited the shop for getting the parcel stitched also does not inspire confidence, for he does not name them. He admits that there is a *Karyana* shop of Chuni Lal nearby. Now, if the accused had been falsely arrested, this person being a close relative would have been the first one to have raised hue and cry. Also, he does not even remember the name of the lady Constable, who allegedly visited his shop.

29. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt, to the hilt. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of the accused. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

30. In our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

31. For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

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

Mangat Ram ....Appellant.
Versus
Dila Ram Verma ....Respondent.

RSA No.131 of 2004.
Judgment reserved on: 24th June, 2015.
Date of Decision: 30th June, 2015.

Specific Relief Act,1963- Section 38- **Torts-** Defendant started raising construction of the house and in the process stacked the construction material on the retaining wall- wall fell

down along with stones and excavated material on the house of the building causing damage of Rs.94,000/-- defendant denied the allegation made in the plaint- trial Court dismissed the suit- the decree was upheld in the appeal- held, that injunction can be granted to prevent the breach of an obligation and when there is invasion of the plaintiff's right to enjoy any property - injunction can also be granted when defendant was trustee of the property and invades the rights of enjoyment of such property where the damage caused or to be caused by such invasion cannot be measured in terms of money- collapse of retaining wall cannot be attributed to any omission or negligence on the part of the defendant, rather, plaintiff had dug pits for erection of pillars without raising any retaining wall –merely, because defendant had not obtained approval from the Town and Country Planning Department to raise construction is not sufficient- moreover, plaintiff had also not obtained the permission from Town and Country Planning Department- in these circumstances, suit was rightly dismissed. (Para-11 to 20)

For the appellant:	Mr. Bhupender Gupta, Senior Advocate, with Mr. Janesh Gupta, Advocate.
For the respondent:	Mr. Sanjeev Kuthiala, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Plaintiff is in second appeal before this Court. He is aggrieved by the judgment and decree dated 27th December, 2003, passed by learned District Judge, Shimla, in Civil Appeal No.54-S/13 of 2001, whereby the appeal has been dismissed and the judgment and decree passed by learned trial Court on 2nd June, 2001, in Case No.1/1 of 1991, affirmed.

2. The plaintiff and defendant are neighbourers. The plot of the plaintiff measuring 4 biswas, bearing Khasra No.772/451/1, situate in village Pagog, Tehsil and District Shimla, is immediately below that of defendant. The plaintiff had acquired the land hereinabove by way of sale, vide sale deed dated 7th November, 1989, Ext.PW-1/A. The defendant had started raising construction of his house in the year 1989 well before the plaintiff purchased the plot.

3. The complaint is that the defendant raised the construction of retaining wall with boulders, stones and mud. While raising the construction of his house, he used to stack the construction material on the retaining wall. On account of load on the wall, the same started sliding-down. Many cracks also developed in the retaining wall. As a result thereof, stones became loose at many places. The defendant also filled the gap in between the retaining wall and his plot with excavated material and debris. The plaintiff on seeing all this, apprised on so may occasions the defendant about such acts of omission attributed to him including issuance of the notice, but of no avail with the result that the retaining wall collapsed on 7th January, 1991 and the entire debris including stones and excavated material used for filling the gap slided-down and came on the building of the plaintiff thereby damage was caused to his building under construction. He got such damage assessed, which came to Rs.94,000/-. He suffered such damage on account of the negligence attributed to defendant. He requested the defendant to make the loss, so caused to him, good, but of no avail. It is also claimed that the defendant has been raising construction unauthorisedly without obtaining proper demarcation or sanction from the competent authority, hence the suit for permanent prohibitory and mandatory injunction

restraining thereby him from raising further construction of his house and throwing debris, stones or excavated material on the plot of the plaintiff and to remove the debris, stones or excavated material accumulated on his plot on account of collapse of the retaining wall with further direction to reconstruct the retaining wall. A decree for recovery of Rs.94,000/- against the defendant has also been sought to be passed.

4. The defendant, when put to notice, has contested the suit. In preliminary, he has raised the objections qua the maintainability of the suit, suppression of material facts, cause of action and estoppel. On merits, it is submitted that his plot, measuring 5 biswas bearing Khasra No.784/451 situate in Kufta-Dhar, is above the plot of the plaintiff. The plaintiff while starting construction of his house, dug and excavated the soil just below the retaining wall, the defendant raised to support his plot. He had also constructed a pucca tank over his plot. On account of excavation and digging of soil just below the retaining wall, the wall and pucca tank collapsed. He had already constructed the house, retaining wall and also tank when the plaintiff started digging work of his plot to raise the construction over the retaining wall of the house of the defendant. It is denied that the retaining wall was constructed by boulders with mud. It is pointed out that he constructed the retaining wall under the supervision and guidance of an expert. On account of collapse of his retaining wall and tank, he allegedly suffered with a loss of more than Rs.50,000/-. He, therefore, has filed a suit against the plaintiff for recovery of the amount in question in the Court.

5. In replication, the plaintiff has denied the contents of preliminary objections being wrong and on merits, has reiterated his case as set out in the plaint.

6. On the pleadings of the parties, the following issues were framed:

1) Whether the plaintiff is entitled to prohibitory injunction, as prayed for? OPP.
2) Whether the plaintiff is entitled to mandatory injunction, as prayed for? OPP.
3) Whether the plaintiff is entitled to the alternative relief for the recovery
of Rs.94,000/-? OPP.
4) Whether the plaintiff is estopped from filing the suit due to his own act, deeds and conducts? OPD.
5) Whether the plaintiff has suppressed material facts? OPD.
6) Relief.

7. Learned trial Court put the parties on both sides to trial on the issues so framed. On the conclusion of the trial and on appreciation of the oral as well as documentary evidence produced by the parties on both sides, the trial Court neither held the plaintiff entitled to permanent prohibitory and mandatory injunction nor for the recovery of Rs.94,000/- against the defendant. The suit was, therefore, dismissed.

8. In appeal, learned lower appellate Court has dismissed the appeal and affirmed the judgment and decree passed by learned trial Court.

9. The legality and validity of the impugned judgment has been questioned on the grounds *inter alia* that proper issues arising out of the pleadings of the parties have not been framed and by clubbing issues No.1, 2 and 3 for determination together the trial Court has committed a grave error. The evidence on record has been misread and mis-appreciated. The admission of the defendant/ respondent that he has not obtained sanction from H.P. Town and Country Planning Department required for raising construction, has been

ignored. In the absence of the sanction to raise construction, the defendant by way of decree of permanent prohibitory injunction should have been restrained from raising construction. The ingredients required for grant of permanent prohibitory injunction have neither been discussed nor taken into consideration and the suit to the contrary was determined in utter disregard of the evidence available on record. The findings that the retaining wall slided-down on account of non-providing support by the plaintiff, are not legally sustainable, as in view of the vacant space between the two properties no support could have been provided by the plaintiff to the retaining wall in question. The testimony of PW-7 has been misconstrued and the documents Exts.PW-7/A to PW7/D, he proved, have also been erroneously ignored. Both Courts below have committed a grave error in relying upon the evidence of DW-1 and DW-2, who were not the experts. The Courts below allegedly failed to understand the true import of term 'negligence'. The findings that the plaintiff has not got the plan approved from the Municipal Corporation, are not only erroneous but perverse because the area where the property is situated did not fall within the jurisdiction of Municipal Corporation, Shimla.

10. The appeal has been admitted on the following substantial question of law:

> Whether both the Courts below without discussing the necessary ingredients for grant of prohibitory injunction took an essentially wrong approach in the matter in denying the relief to the plaintiff-appellant when it was duly proved that the construction of the defendant was not in accordance with any approved plan or sanction from the HP Town and Country Planning vis-à-vis the pleadings and oral and documentary evidence which entitled the plaintiff for not only permanent injunction but also mandatory injunction?

11. Mr. Bhupender Gupta, learned Senior Advocate, while addressing arguments on behalf of the appellant-plaintiff, has drawn the attention of this Court to the evidence having come on record, particularly, by way of testimony of expert witnesses PW-7 Surjit Singh and DW-3 R.B. Saxena and has urged that the evidence so produced has not been appreciated by learned trial Court and also lower appellate Court. According to Mr. Gupta, the findings as in para-19 of the trial Court's judgment and para-15 in that of learned lower appellate Court qua the cause of collapse of retaining wall, are absolutely wrong and the result of misappreciation and misreading of evidence available on record.

12. Mr. Sanjeev Kuthiala, Advocate, learned Counsel, has come forward with the version that the respondent-defendant after acquiring the plot in the year 1984-85 raised construction thereon in the year 1989. It is the appellant-plaintiff, who acquired the plot in the year 1990 and started construction work in an unscientific manner and made the cutting of earth to erect pillars without making a provision of breast-wall and as a result thereof the retaining wall and septic tank constructed by the defendant slided–down and huge loss caused to him. Therefore, according to Mr. Kuthiala, the defendant never evaded any right of the plaintiff and it is rather the latter, who on account of his illegal act caused loss to the property of the former. The defendant, therefore, had to file a suit for recovery of the loss so caused to him by the plaintiff, which is pending disposal in the Court.

13. Learned Counsel on both sides have failed to address to this Court on the substantial question of law framed at the time of admission of the appeal and highlighted the factual aspect of the matter more during the course of arguments. Any how, the complaint is that the failure of both Courts below not to take into consideration the necessary ingredients of permanent prohibitory injunction and having dismissed the suit

without taking such ingredients into consideration has vitiated the judgment and decree under challenge.

14. In order to decide the legal question hereinabove, it is desirable to make a reference here to the provisions contained under Section 38 of the Specific Relief Act. The provisions contained under the Section *ibid* deal with perpetual/permanent prohibitory injunction. A perpetual injunction can be granted to prevent the breach of an obligation and when there is invasion of the plaintiff's right to enjoy any property at the hands of the defendant. The perpetual injunction can be granted in those cases where the defendant was trustee of the property and invades the rights of enjoyment of such property by the plaintiff, where the damage caused or likely to be caused by such invasion cannot be measured in terms of money nor payment of compensation in terms of money would afford adequate relief to the plaintiff and where the grant of such injunction is necessary to prevent the multiplicity of litigation.

15. The perpetual injunction is a discretionary and equitable relief. A person who claims equity must do equity. A person, who is not fair, cannot claim equity. It is in the light of the above legal parameters, the plaintiff's claim for the grant of decree of perpetual injunction has to be examined and determined.

16. There is no dispute so as to the defendant's acquired the plot well in time as compared to the plaintiff. It is also established not only from the own testimony of the plaintiff while in the witness-box as PW-11, but also from that of PW-6 Sohan Lal that in the year 1990-91 when the plaintiff acquired his plot and started construction of his house thereon the defendant has already constructed the retaining wall, septic tank and ground floor of his house. True it is that as per the plaintiff's claim, the defendant had raised construction of retaining wall with boulders and mud and failed to construct the same by using cement despite requests made in this regard. This part of the plaintiff's case seems to be not correct because he had acquired the plot at such a time when half of the retaining wall was already constructed, whereas as per that of defendant, the retaining wall and septic tank were already constructed well before the plaintiff acquired his plot.

17. The further grouse of the plaintiff that the defendant, during the course of raising construction, had stacked the construction material over the retaining wall, which was constructed with boulders and mud, as a result thereof the retaining wall gave way due to load thereon and collapsed also seems to be neither plausible nor reasonable for the reason that over the platform of a retaining wall construction material can not be stacked to such an extent that the same collapsed. No doubt, the plaintiff and also PW-6 Sohan Lal and for that matter PW-9 Gulaba Ram have said so, however, such evidence cannot be believed as a gospel truth, particularly when the defendant has denied the same to be wrong and as regards DW-2 Ajit Ram, the mason, the defendant engaged to raise the construction of retaining wall, he has categorically said that the retaining wall was of pucca masonry raised on hard strata after filling by ***gatka*** in the ratio of 1:5 and septic tank was also of pucca masonry. Therefore, the evidence qua this aspect of the matter is equally balanced. The plaintiff, no doubt, has examined 11 witnesses including himself, however, in sundry and many of them are the witnesses to prove the alleged damage caused to the house due to collapse of the retaining wall. The retaining wall though collapsed, however, not on account of any omission or negligence which can be attributed to the defendant and rather on account of unscientific cutting of the earth made by the plaintiff to dig pits for erection of pillars of his house over his plot including the space below the foundation of retaining wall constructed by the defendant. As a matter of fact, the plaintiff was required to have raised the construction of a breast-wall before making digging of earth below the retaining wall of the defendant. He, however, failed to do so and as a result thereof the retaining wall which

was of pucca-masonry gave way and collapsed. The stones and debris, no doubt, have fallen on the plot of the plaintiff, however, it is he who cleared the stones and debris is difficult to believe because as per his own admission, the defendant had reconstructed the retaining wall and also the septic tank obviously by using the same material, particularly stones. Otherwise also, when it is the plaintiff, the wrong-doer even if he cleared the debris cannot be heard to have any complaint in this regard.

18. True it is that the defendant had not obtained approval from the Town and Country Planning Department to raise the construction of his house, however, for that matter the plaintiff had also not obtained any approval from such Department. He, while in the witness-box, has himself stated that the Town and Country Planning Act is not applicable to the area where the properties in question are situated, however, corrected himself while stating in the same breath that the Act is applicable in that area. Anyhow, when he himself has not obtained the approval from the Town and Country Planning Department, how he could have sought such equitable relief against the defendant. True it is that injunction with regard to a construction being raised in violation of the statutory rules and bye-laws can be granted, however, at this stage and with the afflux of time when we do not know as to what is the exact position on the spot, the decree for permanent prohibitory injunction cannot otherwise be also granted. As a matter of fact, learned Counsel on both sides are also not at variance in this regard.

19. I, therefore, find the present case where the plaintiff has miserably failed to prove that there is invasion of his right of enjoyment of the property belonging to him by the defendant. It is also not proved that the plaintiff has suffered any loss on account of negligence or acts of omission and commission attributed to the defendant. On the other hand, the defendant has also filed a suit for damages against the plaintiff. Both the Courts, therefore, have rightly declined the relief sought by the plaintiff in the suit. It cannot also be said that on account of failure of the Courts below to discuss the ingredients of the perpetual injunction, the judgment and decree is vitiated. The present rather is a case where the plaintiff has failed to prove the essential ingredients for the grant of the nature of the relief sought in the plaint. The substantial question of law is answered accordingly.

20. Learned lower appellate Court has not committed any illegality or irregularity while dismissing the appeal and upholding the judgment and decree passed by the trial Court. The judgment and decree under challenge in the present appeal thus calls for no interference. Consequently, the appeal fails and the same is hereby dismissed. No order as to costs.

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