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return of plaint for presentation before an appropriate Court- appeal was preferred under Order 43 Rule 1(a) of CPC which was treated as a Civil Appeal- held, that it was not permissible for the Court to treat an appeal under Order 43 Rule 1 (a) as a Civil Appeal - only an appeal under Order 43 Rule 1 (a) lies against the order returning the plaint - matter remanded with the direction to decide the same as appeal under Order 43 Rule 1(a).

Title: Sadhu Singh & Others Vs. Mohinder Singh & Others Page-219

Code of Civil Procedure, 1908- Order 43 Rule 1(i)- Appeal under Order 22 Rule 10 read with Order 1 Rule 10 and Section 151 of CPC was filed before the Learned District Judge, which was disposed of by him in the capacity of Sessions Judge- held, that Sessions Judge cannot pass any order in civil proceedings- order should have been passed in the capacity of a District Judge- Order set aside and the case remanded to District Judge with the direction to decide the matter afresh.

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Code of Civil Procedure, 1908- Order 47 Rule 1- Petitioners claimed that they are entitled for appointment as Beldar on regular basis as per Recruitment and Promotion Rules- held, that Court had specifically held that prayer of the petitioners that they be appointed as DDT Beldars or upon any post of Class IV employee was declined- Review petition is not maintainable in relation to an order wherein, relief sought has already been negated - Review petition dismissed.

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Code of Civil Procedure, 1908- Order 47 Rule 1- Petitioners claimed that they are entitled for appointment as Beldar on regular basis as per Recruitment and Promotion Rules- held, that Court had specifically held that prayer of the petitioners that they be appointed as DDT Beldars or upon any post of Class IV employee was declined- Review petition is not maintainable in relation to an order wherein, relief sought has already been negated - Review petition dismissed.

Title: Jai Singh son of Shri Daya Ram Vs. State of H.P. and others Page-249

Code of Criminal Procedure, 1973- Section 245- Complaint was filed by the complainant for the commission of offence punishable under Sections 379, 467, 471 read with Section 34 IPC and cognizance was taken- pre-charge evidence was led- complainant did not step into witness-box- the Court drew an adverse inference and discharged the accused- held, that petitioner was the best witness to depose about the entire case but he had not stepped into witness box- evidence led by the complainant at the time of taking cognizance cannot be used for framing of charge- therefore, discharge of the accused was justified.

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Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offence punishable under Section 15 of N.D.P.S. Act- held, that investigation is complete- challan has already been filed in the Court, therefore, no useful purpose would be served by detaining the applicant in prison - bail granted.

Title: Hari Om son of Shri Bhagat Ram Vs. State of H.P. Page-358

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offence punishable under Section 392 read with Section 34 of IPC and Section 25 of Arms Act- as per prosecution case, petitioner is hardened criminal and many FIRs have been registered against him- held, that while granting the bail nature and seriousness of offence, the character of the evidence, circumstances which are peculiar to the accused, Possibility of the presence of the accused at the trial or investigation, reasonable apprehension of witnesses being tampered with and the larger interests of the public are to be seen- object of bail is to secure the appearance of the accused person at the trial- grant of bail is the rule and committal to jail is exception- challan has already been filed in the Court and, therefore, it would be futile to keep the applicant in jail- pendency of criminal cases is not a ground to decline the bail.

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Code of Criminal Procedure, 1973- Section 482- Petitioner claimed that she and her family members were meted out with brutal treatment by the police and they were kept in illegal confinement for more than 36 hours in police Station- police had lodged an FIR against the petitioners to save their skin - FIR does not disclose the commission of any cognizable offence- police had already submitted charge-sheet under Section 173 of Cr.P.C to the Magistrate after the completion of the investigation, held, that when the Magistrate is seized of the matter, High Court should not quash the FIR in exercise of its inherent powers- further, investigation cannot be transferred to CBI without any material especially when the charge-sheet had already been filed.

Title: Sandhya Bansal Vs. State of H.P. & ors. Page-353

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Constitution of India, 1950- Article 226- Loan/financial assistance was sanctioned in favour of the petitioner for the construction of agricultural go-down- 33.33% subsidy was to be given by the respondent under the scheme of Government of India- petitioner stated that he had spend Rs. 5 lacs for the construction of go-down but the respondent recalled the amount and the financial assistance after joint inspection - respondent contended that petitioner had not utilised the sanctioned amount - held, that the joint inspection report showed that

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Title: Dalip Singh Thakur Vs. The National Bank for Agriculture & Rural Development & Ors. Page-221

Constitution of India, 1950- Article 226- Petitioner and private respondent appeared for the post of water carrier- petitioner was denied the appointment as water carrier and the private respondent was appointed as water carrier- petitioner filed an original application before the Administrative Tribunal which was allowed and the petitioner was directed to be appointed - he was not given seniority and other services benefits- held, that petitioner was denied appointment illegally - had the private respondent not been appointed- respondent would have been in the employment right from that date when he was denied the appointment illegally- he is deemed to be appointed from the same day - hence, petitioner held entitled to seniority notionally from the date of appointment of private respondent.

Title: Balak Ram Vs. State of H.P. and Ors. Page-343

Constitution of India, 1950- Article 226- Petitioner and respondent No. 3 appeared in the interviews for the post of trained Dai in which respondent No. 3 was selected - petitioner filed an application before Administrative Tribunal which was transferred to the High Court- petitioner was permitted to make a representation which she did – however, representation was rejected by Medical Officer- respondent No. 3 had undergone one month's training and not six months' training - Principal Secretary (Health) passed an order holding that there was no requirement of training as per Recruitment and Promotion Rules- held, that trained Dai would mean a Dai who had undergone training and got her name registered under Section 18(2) of H.P. Nurses Registration Act- since, respondent No. 3 had not undergone 6 months' training, therefore, appointment of respondent No. 3 is quashed- respondent No. 2 directed to consider the case of the petitioner and offer her appointment in case she is found eligible .

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Constitution of India, 1950- Article 226- Petitioner appeared in the examination for the post of Assistant District Attorney, Class-I (Gazetted)- he contended that the answer of question No. 5(b) was not evaluated- examiner had given three marks to the petitioner for question 5 (a) and 3 marks to the petitioner for question 5(c)- no marks were given for question 5 (b)- examiner explained that answer given by the candidate was too brief and the candidate had failed to mention basic sections in question No. 5(b), therefore, he did not deserve any marks- reply of the respondent was not satisfactory, therefore, respondent directed to get the answer-sheet evaluated from an independent examiner.

Title: Ashok Kumar Vs. State of H.P. & ors. Page-238

Constitution of India, 1950- Article 226- Petitioner, a contractual employee, was granted 12 weeks (84 days) maternity leave, whereas female regular employee are entitled to 135 days of maternity leave -

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Title: State of H.P. Vs. Sudesh Kumari Page-337

Constitution of India, 1950- Article 226- Petitioner belongs to OBC category- she married in forward/advance caste- her candidature was rejected on the ground that she could not produce latest OBC Certificate- State contended that in view of her marriage in advance caste, she is not entitled to OBC certificate- held, that a person born in OBC caste does not lose her status by marrying in forward caste- issuance of OBC Certificate was wrongly declined by the respondent- petitioner had qualified in the examination- her candidature was rejected merely for non-production of OBC Certificate- hence, respondent directed to appoint the petitioner as clerk from the due date.

Title: Anuradhika Vs. State of H.P. & ors. Page-234

Constitution of India, 1950- Article 226- Petitioner claimed work charge status- his application before Administrative Tribunal was ordered to be treated as a representation- representation was rejected by the respondent- Learned Single Judge held that representation was wrongly rejected and directed the respondent to consider the case of the petitioner for conferring work charge status with all consequential benefits- held, that case of the petitioner was to be considered in accordance with judgment of Hon'ble Supreme Court of India in **Mool Raj Upadhyaya vs. State of H.P. and others, 1994 Supp.(2) SCC 316** the direction was rightly passed by Learned Judge- Appeal dismissed.

Title: H.P. State Electricity Board Limited and others Vs. Jagmohan Singh Page-349

Constitution of India, 1950- Article 226- Petitioner had applied for the post of Lower Division Clerk as general category candidate - she applied for change of category from general to schedule caste on the ground that she could not submit her certificate earlier- application was allowed and it was held that petitioner is entitled for the benefits of reservation from the date of joining but she shall not consume the reserved point for initial appointment in the recruitment roster - held, that petitioner had not taken any benefit at the time of recruitment by not declaring herself to be a member of Scheduled Caste- she had joined as general category without availing the benefit of the relaxed standard - since, she is scheduled caste by birth, therefore, she is entitled to all the benefits of scheduled caste.

Title: Inder Jyoti Chauhan Vs. Union of India and Ors. Page-305

Constitution of India, 1950- Article 226- Petitioner was regularized as a conductor and was asked to discharge the duty as clerk/typist - petitioner sought change of designation for appointment as clerk with retrospective effect- respondent had not denied the fact that petitioner was discharging the duty as a typist- respondent asserted that there was no post of clerk but they had a discretion to take the work of any nature

from the petitioner- held, that when the petitioner is discharging the duty of clerk, he is entitled for the wages and appointment as a clerk.

Title: Tara Chand Verma Vs. Himachal Pradesh State Transport Corporation & another Page-225

Constitution of India, 1950- Article 226- Petitioners were appointed with requisite qualification of matriculation- Rules were changed for the post of Superintendent Grade-II on 18.7.1996 – petitioners were duly promoted to the said post and were entitled to be promoted to the post of B.D.O.- Government changed the rules on 7.10.2003 and restricted the quota of Superintendent Grade-II who were matriculate to 10%- quota was changed to 15% on 6.4.2012 and the qualification was changed to graduate- held, that amendment has deprived the petitioner of their right of promotion- some of the matriculate Superintendent are holding the post of BDO, this aspect was not taken into consideration while amending the rules - writ petitioners had experience and they had legal and legitimate expectation to get promotion- therefore, respondent directed to consider the case of petitioners for regularization.

Title: Raj Kumar-II and Ors. Vs. State of H.P. and Ors. Page-323

Constitution of India, 1950- Article 226- Respondent No. 3 had issued an advertisement on 13.12.2011 for filling up the post of PGT (Informatics Practices) - petitioner was called for viva-voce - petitioner stated that he had answered question No. 155 correctly- respondent had changed the answer from A to C - dictionary showed that answer to question 155 was A- respondent directed to revise the list and to recommend the name of the petitioner in case he was found eligible.

Title: Deepak Verma vs. State of H.P. & ors. Page-204

Constitution of India, 1950- Article 226- Respondent No. 3 submitted an application asserting that the land was recorded in the joint ownership of his mother and the name of father of Respondent No. 4 as per jamabandi for the year 1954-55- mother of the respondent No. 3 was allotted the land to the extent of 4 kanals and 1 marla towards the western side and it was wrongly recorded in the map/tatima that the land was given towards eastern side- application was allowed and the land was allotted to respondent No. 3- appeals were preferred which were dismissed- held, that respondents No. 4 and 5 had admitted the case of the respondent No. 3 and, therefore, it is not permissible for the petitioner to assail the same.

Title: Krishan Chand Vs. State of H.P. & Ors. Page-352

'H'

Hindu Marriage Act, 1955- Section 24- Petitioner claimed that she is pursuing her studies of Ph.D. and is residing in girl's hostel of Kurukshetra, University- she had no source of income- Court awarded maintenance @ Rs. 2,500/- per month and Rs. 5,000/- as litigation expenses- held, that the husband is bound to maintain his wife - husband had not declared his income and had not denied the averments of the wife that his income was Rs. 35,000/- per month- As per the pay scale uploaded on the official website of the school, the TGT was getting Rs. 35,000/- as salary- teachers and administrative staff are entitled to

free food and accommodation, therefore, in these circumstances, the maintenance of Rs. 2,500/- per month and litigation expenses of Rs. 5,000/- cannot be said to be excessive, rather, wife held entitled for maintenance @ Rs.10,000/- per month.

Title: Poonam Vs. Virender Chauhan Page-375

H.P. Land Revenue Act, 1954- Section 129 read with 171- Plaintiff had raised question of the title before the Revenue Officer- Revenue Officer observed that relief can be sought from an appropriate Civil Court- held, that Revenue Officer should have decided the question by converting himself into civil court or he should have relegated the parties to approach the civil court -he should not have proceeded with the matter, thus, order passed by Revenue Officer was not in accordance with law.

Title: Giano Devi and others Vs. Bishan Singh and ors. Page-205

'I'

Income Tax Act, 1961- Section 80 (IB)2- Assessing Officer conducted a status inquiry and found that the assessee had employed 13 person who had worked for 3-4 months except for the two employees - he further found that most of the employees had left the job and only three workers were working with the assessee- he held that the requirement of 10 workers was not fulfilled and, therefore, deduction was not permissible to the assessee- held, that when the employees were not employed during the substantial part of the year, assessee is not entitled to the deduction.

Title: Commissioner of Income tax, Shimla Vs. M/s. Indus Cosmeceuticals Page-276

Income Tax Act, 1961- Section 80 (IB)iv- Assessee was converting henna leaves into herbal powder by the process of mixing and grinding - raw material was first collected, dried with the use of mixture of various acids and thereafter ground by putting the definite quantity (in percentage) and the end product was the result of many transformations carried out with the help of various materials, manpower and machines and was commercially a different items- henna leaves only constitute about 40% of the raw material, -held that the activity of the assessee would fall within the definition of manufacture and the assessee is entitled to the benefit of Section 80(IB) iv.

Title: Commissioner of Income tax, Shimla Vs. M/s. Indus Cosmeceuticals Page-276

Indian Evidence Act, 1872- Section 114- Magistrate relied upon Section 114 to draw an inference that the petitioner had caused disturbance in the proceedings of the Panchayat- he relied upon the facts that proceeding was conducted before Gram Panchayat, there was no allegation of ill-will against the respondent and the appellant had not led any evidence to prove that he had not caused any interruption- held, that the Court hearing an appeal has to record the findings duly supported by reason on all points and there has to be a conscious application of mind - support could not have been drawn from Section 114 of Indian Evidence Act.

Title: Surinder Kumar Vs. Parkash Chand Page-254

Indian Penal Code,1860 - Sections 376 (2) (f) and 84- Prosecutrix aged four and half years was raped by the accused- Accused pleaded that he was suffering from sehizophrenia- he was examined by the Doctor and was declared fit for trial- held, that crucial point of time at which the unsoundness of mind has to be established is when the offence was committed, the 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 what have he was doing was contrary to the law, therefore, accused is not entitled to the acquittal on the ground of unsoundness of mind.

Title: Gopal Singh Vs. State of H.P. Page-185

Indian Penal Code, 1860- Section 498-A and 306- deceased was married to the accused- a daughter aged 3 years old and son aged 9 months were born out of wedlock- accused started beating the deceased and denied maintenance to her- matter was reported to Panchayat- the deceased committed suicide- held, that prosecution witnesses had made improvements in their testimonies -no specific instance was given when the beatings were given to the deceased- father of the deceased had never made any complaint regarding the beating given to his daughter - no application for maintenance was made by the deceased- hence, version of the prosecution that deceased was forced to commit suicide by accused was not reliable- in order to prove cruelty, there has to be series of events which were not proved- accused acquitted.

Title: State of Himachal Pradesh Vs. Soni Kumar and another Page-181

Industrial Disputes Act, 1947- Section 25-B (2) read with Section 25-F- Workman was appointed in the year 1980 and his services was dispensed with in the year 1990- he had worked for 240 days in calendar years 1980, 1981, 1982 and 1986 to 1989 and he had not completed 240 days of services in the year of his retrenchment - held, that workman is entitled to the benefit of Section 25-B(1) if he had worked continuously or uninterruptedly for a period of 12 consecutive months and it is not necessary that he should have worked continuously or uninterruptedly from January to December in a particular year - if a workman has worked for more than 240 days during the period of 10 months prior to his retrenchment, he would be deemed to be in continuous service for a year.

Title: Mohd. Ali Vs. The State of Himachal Pradesh and others Page-311

Industrial Dispute Act, 1947- Section 25- Delay- State contended that claimant had made a reference before the Industrial Tribunal which was barred by limitation- held, that question of limitation is to be decided by an appropriate Govt. and once a reference was not questioned- award on such reference cannot be questioned on the ground of delay.

Title: State of H.P. and ors. Vs. Inder Singh Page-210

Industrial Dispute Act, 1947- Section 25(f)- petitioner was engaged as a daily wage workman - he was retrenched and made a reference to Learned Labour Court-cum-Industrial Tribunal, which held that the retrenchment was bad and was liable to be set aside- held, that if

workman had completed 240 days of service with or without interruptions, it constitutes completion of 240 days of service and the employer is under an obligation to comply with Section 25(f) of Industrial Dispute Act.

Title: State of H.P. and ors. Vs. Inder Singh Page-210

'L'

Land Acquisition Act, 1894- Section 18- District Judge had assessed different rates of compensation for different categories of land- land was acquired for construction of the road- held, that it is not permissible for the Court to apply the different rates and the Court has to assess uniform rates of compensation for different pieces of land.

Title: State of H.P. & others Vs. Hukmi Ram and ors. Page-331

Land Acquisition Act, 1894- Section 18- Land of the claimant was acquired for the construction of road- he relied upon the sale deed for determination of the market value of the land- held, that sale deed relied upon by the claimants was for the construction of the colonies for housing people which had a profit motive - the land of the claimants was acquired for constructing the road which had no profit motive - asking the State to pay compensation would defeat the purpose of acquisition - given the distinction in the purpose of acquisition of the land, sale deed could not be relied upon to determine the compensation.

Title: Hari Chand & Ors. Vs. Land Acquisition Collector, Hamirpur Page-300

Land Acquisition Act, 1894- Section 18- Land of the petitioner was acquired for construction of the Kayartu-Thaila road**-** A.D.J. relied upon the sale deed to determine the market value as on January, 2000 and thereafter provided a hike of 10% per annum to determine the market value- held, that in view of judgment of Hon'ble Supreme Court of India in **Ahsanul Hoda vs. State of Bihar, (2013)14 SCC 59-** it is permissible for land acquisition collector or court of law to provide a hike per year.

Title: State of H.P. & others Vs. Hukmi Ram and ors. Page-331

Land Acquisition Act, 1894- Section 18- Possession of the land was taken in the year 1964 whereas the land was acquired in the year 1998- held, that when the possession has been taken prior to the acquisition of the land- land owners are not entitled to compensation from the date of possession but from the date of acquisition- claimants are entitled to file a civil suit for damages.

Title: Hari Chand & Ors. Vs. Land Acquisition Collector, Hamirpur Page-300

'M'

Motor Vehicle Act, 1988- Section 149- A cover note was issued which was valid from 16.9.2005 till 15.9.2005- insurer pleaded that cover note was issued without the payment of premium and the cover note was cancelled – held, that there is no evidence that cancellation of the policy was conveyed to the insured in absence of which the Insurance Company will be liable to satisfy the award.

Title: United India Insurance Company Ltd. Vs. Sh. Mohan Lal & others
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Motor Vehicle Act, 1988- Section 149- Deceased and two labrourers sustained injuries in an accident of the tractor- Tribunal held that insurance company liable to pay compensation with the right of recovery- held, that as per registration certificate and the insurance policy tractor was meant for agricultural purposes of the insured and not for any other purposes- deceased and two labrourers were employees and had loaded bricks in the tractor- they were travelling in the vehicle as labourers and had sustained injury-therefore, it was duly proved that insured had violated the terms and conditions of the insurance policy- appeal dismissed.

Title: Jaswant Singh Vs. Sh. Jagat Ram and others Page-362

Motor Vehicle Act, 1988- Section 149- Driving License of the driver was fake but it was renewed from time to time- held, that the insured is not supposed to take any steps to verify the license from the licensing authority to determine the validity- hence, insurer cannot be absolved the liability on the ground that driving license was fake.

Title: United India Insurance Co. Ltd. Vs. Akash Babu and others
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Motor Vehicle Act, 1988- Section 149- Driving license was renewed at Nalagarh at least six times- insurer had examined the witness of the licencing authority who proved the renewal of licence - held, that it is for the insurer to plead and prove that insured had committed willful breach of the terms and conditions of the Insurance policy- insured is not supposed to verify the licence- in these circumstances, insurer was rightly held liable.

Title: Salim Vs. Shashi Kala & another Page-223

Motor Vehicle Act, 1988- Section 149- Insurer pleaded that driver did not have a valid driving license to drive transport vehicle – he was driving a vehicle whose unladen weight was 1690 kgs. and gross vehicle weight was 2820 kgs- held, that there was no necessity to have the endorsement of transport vehicle on the license in such a situation- further, insurer had not pleaded and proved that owner had committed any willful breach of the terms and conditions of the policy- appeal dismissed.

Title: Smt. Bhowmick Arti and anr. Vs. Smt. Shiksha Rani and others
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Motor Vehicle Act, 1988- Section 149- MACT had held after placing reliance on the FIR that driver was charge-sheeted for the commission of offence punishable under Section 185 of M.V. Act and the insured had committed the breach of the terms and conditions of the insurance policy- however, driver was acquitted of the commission punishable under Section 185 after the trial- held, that the insured had not committed any breach of the terms and conditions of the policy and the Insurance Company was wrongly granted the right of recovery.

the owner/driver of the bus and, therefore, it was not permissible for insurer to claim that the accident was not outcome of rash and negligent driving of the bus driver.

Title: New India Assurance Company Ltd. Vs. Randeep Singh Rana and others. Page-369

Motor Vehicle Act, 1988- Section 166- When the injured is seeking compensation for the injury sustained by him, no amount is to be deducted towards his personal expenses.

Title: United India Insurance Company Ltd. Vs. Lalit Chauhan and another. Page-226

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N.D.P.S. Act, 1985- Section 20- Accused was driving the Tata Sumo- accused S was occupying front seat while other accused were occupying the rear seats- search of the vehicle and the persons of the accused were conducted leading to the recovery of the charas- held, that the testimonies of the prosecution contradicted each other regarding the time of their arrival at the place of incident- regarding the manner of taking the accused to the police station- no independent witness was associated- link evidence was not established, therefore, in these circumstances, acquittal of the accuses was justified.

Title: State of H.P. Vs. Rajesh Kumar & Ors. Page-270

NDPS Act, 1985- Section 20- Accused was found in possession of 400 grams of charas- independent witness had turned hostile - I.O admitted in his cross- examination that school, shop, panchyat ghar and houses of independent persons were situated near the place of incident- no person was called from the shop or school, but independent witnesses were called from a far off place- held, that in these circumstances, prosecution version could not be relied upon- acquittal of the accused was justified.

Title: State of Himachal Pradesh Vs. Siri Ram Page-197

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3 kg 800 grams charas concealed in a bag under his left arm pit- no independent witness was associated during the search, seizure and sampling process- prosecution witnesses admitted that police party had checked 20-25 vehicles and the place where the accused was apprehended was a national highway- they further admitted that there were 4-5 hotel and restaurants between the police Station and the place of incident, therefore, place of the incident was not isolated place where no independent witness was available- police had not made any efforts to associate independent witness- there were contradictions in the testimonies of eye-witness regarding the time of sending ruqqa and the time spent in taking photographs- held that in these circumstances, prosecution case was doubtful- accused acquitted.

Title: Dalbir Singh Vs. State of Himachal Pradesh Page-259

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Union of India and others vs. Anil Kumar and others (1999) 5 SCC 743
United India Insurance Co. Ltd. versus Laxmamma & Ors., reported in 2012 AIR SCW 2657

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

Naresh Kumari .....Petitioner.
Versus
State of H.P. & others. .....Respondents.

CWP No. 4334 of 2012.
Reserved on: 16.9.2014.
Decided on: 3.11.2014.

Constitution of India, 1950- Article 226- Petitioner and respondent No. 3 appeared in the interviews for the post of trained Dai in which respondent No. 3 was selected - petitioner filed an application before Administrative Tribunal which was transferred to the High Court- petitioner was permitted to make a representation which she did – however, representation was rejected by Medical Officer- respondent No. 3 had undergone one month's training and not six months' training - Principal Secretary (Health) passed an order holding that there was no requirement of training as per Recruitment and Promotion Rules- held, that trained Dai would mean a Dai who had undergone training and got her name registered under Section 18(2) of H.P. Nurses Registration Act- since, respondent No. 3 had not undergone 6 months' training, therefore, appointment of respondent No. 3 is quashed- respondent No. 2 directed to consider the case of the petitioner and offer her appointment in case she is found eligible . (Para- 14 to 16)

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Parmod Thakur, Addl. Advocate General for respondents-State.
Mr. K.S.Banyal, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The Civil Writ Petition was allowed by this Court vide judgment dated 12.3.2013. The appointment of respondent No. 3 as 'Dai' was quashed and set aside. The respondent No. 3 filed LPA bearing No. 4007 of 2013. The matter was remanded to this Court by setting aside the judgment dated 12.3.2013 in view of the decision taken by the Principal Secretary (Health) to the Government of Himachal Pradesh dated 11.3.2013.

2. Key facts. Interviews for the post of trained Dai were held on 6.8.1997. The petitioner and respondent No. 3 participated in the selection process. The then Medical Officer, Kangra at Dharamshala, vide letter No. Estt./VI/95-6516 dated 12.8.1997 appointed respondent No. 3 as 'Dai'. The petitioner challenged the appointment of respondent No. 3 by filing O.A. before the erstwhile H.P. State Administrative Tribunal. The same was transferred to this Court and assigned CWP-T No. 4528 of 2011. It was decided on 20.10.2010. The petitioner was permitted to make a representation. The petitioner made representation on 12.9.2011. The same was rejected by the Medical Officer Kangra at Dharamshala on 13.10.2011. It is in these circumstances, the petitioner has filed the present petition assailing the appointment of respondent No. 3 being not eligible as per the Recruitment and Promotion Rules, governing the conditions of service of post in question.

3. The petitioner has sought information under R.T.I. about the time duration of the course held at C.H.C. Thural w.e.f. 1986 to 1992 and name wise

list of trainees of the course. The information was supplied to the petitioner by the C.M.O.-cum-P.I.O., District Kangra, vide Annexure P-4 dated 12.1.2012. The name of the petitioner is mentioned at Sr. No. 11 for undergoing training at C.H.C. Thural alongwith other candidates w.e.f. 20.9.1985 to 19.3.1986. The name of respondent No. 3 is not mentioned in this communication. The name of respondent No. 3 has been registered vide Annexure P-5, by the H.P. Nurses Registration Council on 30.4.1997. According to Annexure P-5, respondent No. 3 has undergone training of 'Dai' at C.H.C., Thural from 5.8.1988 to 5.3.1989.

4. Respondents No. 1 & 2 have filed the reply. According to them, respondent No. 3 was fully eligible and qualified to be considered for the post of trained 'Dai' on having been selected by the Selection Committee on the basis of certificate issued by the Block Medical Officer, C.H.C., Thural as also the certificate of her registration issued by the Registrar, H.P. Nursing Registration Council vide Annexure P-5. It has been admitted in the reply that respondent No. 3 has not got her name renewed till date.

5. Respondent No. 3 has also filed the reply. According to her, she has done training of 'Dai' at C.H.C. Thural from 5.8.1988 to 5.3.1989 vide NHRC No. 7428 'Dai' dated 30.4.1997.

6. The parties have also placed on record information supplied by the B.D.O. at page 39 of the Paper Book. According to the information placed on record, respondent No. 3 has undergone one month's training w.e.f. 1.2.1989 to 8.3.1989. Her name was at Sr. No. 19 as per page 40 of the paper book. The Registrar, H.P. Nurses Registration Council, Shimla has also sent communication to P.I.O., Directorate of Medical Education, Kasumpti, Shimla specifically stating therein that the registration of respondent No. 3 was on the basis of 6 months training course, which she has completed from C.H.C. Thural w.e.f. 5.8.1988 to 5.3.1989. As per the record available in the HPNRC in old register on page No. 222. Accordingly, the Block Medical Officer, Thural was directed to file supplementary affidavit as to the variance in the information under the RTI Act and subsequent communication/affidavit filed by the B.M.O. on 11.12.2013. According to the averments contained in the supplementary affidavit, the Block Medical Officer, Thural, received a letter dated 5.1.2012 from the Chief Medical Officer, Kangra alongwith the photocopy of the certificate dated 2.6.1995 issued in favour of respondent No. 3 for verifying the contents of the certificate. The record of the Community Health Centre, Thural was again scrutinized and an old file with regard to the training course of TBAs was traced out also containing therein an award roll of 3 number of TBAs having undergone 30 working days training w.e.f. 1.2.1989 to 8.3.1989 including respondent No. 3. This factual position was also conveyed to the Chief Medical Officer by the Block Medical Officer, vide Annexure P-4 dated 27.1.2012.

7. Thus, it is evident from the annexures at page 39 & 40 that respondent No. 3 has only undergone one month's training w.e.f. 1.2.1989 to 8.3.1989 and not 6 months training. This Court has also directed respondent No. 1 to look into the matter. The Principal Secretary (Health), passed the order on 11.3.2013. According to him, there was no requirement of training as per the Recruitment and Promotion Rules framed on 15.10.1973 in the Health Department.

8. The Registrar H.P. Nurses Registration Council, filed the affidavit in compliance to the orders passed by this Court. According to the affidavit filed on 16.1.2014, it was found that the original copy of the application for registration submitted by respondent No. 3 was verified by Block Medical Officer, Thural Kangra and countersigned by C.M.O, Kangra at Dharamshala on 30.4.1997. According to Annexure-'B', respondent No. 3 had made a representation for registering as trained 'Dai' who have completed 6 months said course at CHC Thural, Kangra, H.P. w.e.f. 5.8.1988 to 5.3.1989. Thus,

according to the Registrar, H.P. Nurses Registration Council, Shimla, the name of respondent No. 3 has rightly been registered as per the H.P. N.R.C. Act.

9. Mr. K.S.Banyal, Advocate, appearing for respondent No. 3 has also filed written submission on behalf of respondent No. 3. Alongwith the written submissions, he placed on record the copy of R & P Rules for Class-IV, Subordinate Service (Non-Gazetted) of the Medical and Public Health Department framed on 15.10.1973. According to these rules, the minimum educational qualification for appointment as 'trained Dai' was primary pass.

10. The Legislative Assembly of Himachal Pradesh has enacted the Himachal Pradesh Nurses Registration Act, 1977, (hereinafter referred to as the Act for brevity) to provide for the registration of nurses, health visitors, midwives, auxiliary nurse midwives and dais in Himachal Pradesh. Section 2(d) defines "dai" to mean any person, whether following a hereditary occupation or not, who ordinarily practices midwifery for gain and who has not passed any of the examinations in midwifery recognized by the Council. As per Section 2(o), "trained dai" means a dai who has been granted a training certificate under the bye-laws made by the Council or one who has been registered under sub-section (2) of Section 18. The detailed procedure has been given, the manner in which the registration of nurses, health visitors, midwives, auxiliary nurse midwives, nurse dais, trained dais and dais has to be made as per Section 18(2) of the Act.

11. I have heard the learned Advocates and gone through the records of the case very carefully.

12. What emerges from the facts enumerated hereinabove, is that the interviews for the post of 'trained Dai' were held on 6.8.1997. Respondent No. 3 was appointed on 20.10.1997. The representation was made by the petitioner pursuant to the judgment rendered by this Court in CWP(T) No. 4528 of 2010 on 20.10.2010. The representation was decided without passing a speaking order on 13.10.2011, vide Annexure P-3. It is evident from the information placed on the record by the petitioner vide Annexure P-4, that the name of respondent No. 3 was not included in the list supplied to the petitioner on 12.1.2012 of 'trained dai' who have undergone training w.e.f. 20.9.1985 to 1992. Respondent No. 3 has got her name registered with the Registrar H.P. Nurses Registration Council vide Annexure P-5 dated 30.4.1997. It is specifically stated in the certificate that respondent No. 3 had undergone training of 'Dai; at C.H.C. Thural w.e.f. 5.8.1988 to 5.3.1989.

13. Respondents No. 1 & 2 have filed the reply. According to the reply filed by respondents No. 1 & 2, respondent No. 3 has undergone the necessary training for six months. They have justified the appointment of respondent No. 3. The additional information was placed on record at page 40 & 42. According to this information, respondent No. 3 had only undergone one month's training w.e.f. 1.2.1989 to 8.3.1989. Her name was at Sr. No. 19. The stand of the Registrar H.P. Nurses Registration Council, as noticed hereinabove, is that respondent No. 3 was registered on the basis of 6 months training course which she has completed at C,H.C. Thural, Kangra, H.P. w.e.f. 5.8.1988 to 5.3.1989. Confronted with this situation, the Court permitted the B.M.O. to file supplementary affidavit explaining the variance. The B.M.O. filed the detailed affidavit on 11.12.2013. He has admitted categorically in his affidavit that respondent No. 3 had only undergone one month's training w.e.f. 1.2.1989 to 8.3.1989. This information was supplied by him to C.M.O, also. Respondent No. 3 has only undergone one month's training. The Court has also directed the Secretary (Health) to look into the matter. He looked into the matter without going into the entire gamut of the matter and decided against the petitioner on 11.3.2013.

14. The petitioner has also challenged Annexure P-9 dated 11.3.2013. There is no merit in the contention of Mr. K.S.Banyal, Advocate that respondent

No. 3 was eligible as per R & P Rules notified on 15.3.1973. The expression used is 'trained Dai'. The minimum qualification prescribed is primary pass. The expression 'trained Dai' would mean as per Recruitment and Promotion Rules, the 'Dai' who has undergone training and subsequently got her name registered under sub section 2 of Section 18 of the H.P. Nurses Registration Act, 1977. According to Section 2(o) of the H.P. Nurses Registration Act, 1977, only those 'trained Dais' could be registered who have been granted training certificate under the bye-laws made by the Council or one who has been registered under sub section (2) of Section 18. The specific stand of respondent No. 3 throughout was that she has done six months training w.e.f. 5.8.1988 to 5.3.1989, on the basis of which certificate was issued to her dated 30.4.1997, vide Annexure P-5.

15. According to the material placed on record, respondent No. 3 had only undergone 30 days training w.e.f. 1.2.1989 to 8.3.1989. The affidavits filed by respondents No. 1 & 2 to the contrary were apparently false. A definite attempt has been made by respondents No. 1 & 2 to mislead this Court by not placing the true facts before it. The B.D.O. in his supplementary affidavit has clearly stated that respondent No. 3 has only undergone 30 days training. The registration of respondent No. 3 by respondent No. 4 i.e. Registrar H.P. Nurses Registration Council was illegal and wrong in the eyes of law. Respondent No. 3 has never undergone six months training, as claimed by her. She could not have been registered by the H.P. Nurses Registration Council.

16. Accordingly, Writ Petition is allowed. Annexure P-9 dated 11.3.2013 is quashed and set aside. The appointment of respondent No. 3 dated 20.10.1997 is quashed and set aside. Respondent No. 2 is directed that in case the petitioner was found suitable in the interview held on 6.8.1997, she be offered appointment as 'Dai' within 8 weeks from today. It is made clear that in the eventuality of the petitioner being offered appointment, she will not be entitled to arrears of salary but the entire period shall be counted for the purpose of increments and pension. The disciplinary proceedings be initiated against respondent No. 3 for obtaining the appointment as 'Dai' in breach of the mandatory provisions of Recruitment and Promotion Rules. The registration of respondent No. 3 vide annexure P-5 dated 30.4.1997, by respondent No. 4 is set aside. It shall be open to respondents No. 1 & 2 to make recovery from the salary of respondent No. 3 from her initial date of appointment i.e. from 20.10.1997 till date.

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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
Soni Kumar and another .....Respondents

Cr. Appeal No. 592/2008
Reserved on: 30.10.2014
Decided on : 3.11.2014

Indian Penal Code, 1860- Section 498-A and 306- deceased was married to the accused- a daughter aged 3 years old and son aged 9 months were born out of wedlock- accused started beating the deceased and denied maintenance to her- matter was reported to Panchayat- the deceased committed suicide- held, that prosecution witnesses had made improvements in their testimonies -no specific instance was given when the beatings were given to the deceased- father of the deceased had never

made any complaint regarding the beating given to his daughter - no application for maintenance was made by the deceased- hence, version of the prosecution that deceased was forced to commit suicide by accused was not reliable- in order to prove cruelty, there has to be series of events which were not proved- accused acquitted. (Para-15 and 16)

For the Appellant : Mr. Ramesh Thakur, Asstt. AG.
For the Respondents : Mr. N.S. Chandel, Advocate

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted by the State against the judgment dated 28.5.2008, rendered by learned Addl. Sessions Judge (II) Kangra at Dharamshala, HP, in Sessions Case No. 4-G/VII/2006, whereby the respondents-accused (herein after referred to as "the accused" for convenience sake), who were charged with and tried for offences punishable under Sections 498-A and 306 read with section 34 IPC, have been acquitted.

2. The case of the prosecution in a nutshell is that the statement of PW-1 Amar Singh was recorded under Section 154 Cr.P.C. vide Ext. PW-1/C. According to him, his daughter Kalpana was married about 4 years back with accused Soni Kumar son of Munshi Ram, resident of Village Saloha. His daughter had one daughter aged 3 years and 1 son aged nine months. He has given sufficient dowry to his daughter. After some days of marriage, accused started giving beatings to Kalpana Devi. They used to harass her. His daughter disclosed these facts to him as well as to her mother and brothers whenever she visited their house. False acquisitions were made against his daughter. She was denied maintenance. He had taken up the matter with the Panchayat. On 19.6.2005, at about 8.30 PM, he received telephonic information from Pradhan that his daughter had died by drowning while washing the clothes. He went to the house alongwith the co-villagers and members of Gram Panchayat. He found the dead body of Kalpana Devi lying on the rock in the Nallah. She had received injuries. The In-laws of his daughter were talking about second marriage of Sonu. FIR was registered on the basis of Ext. PW-1/C. The police visited the spot. The dead body was sent for post mortem examination. The police also took into possession one pair of Chappal, one Thapi, one bucket containing clothes including clothes which were lying at the spot. The police had also taken the photographs of the spot. The police had also taken into possession compromise mentioned as "*Bahami Razinama*". The report of the FSL was obtained and thereafter, the matter was investigated. The police on completion of the investigation, put up the challan before the Court after completing all the codal formalities.

3. The prosecution has examined as many as 11 witnesses to prove its case. Statement under section 313 of the Cr.P.C. of the accused persons was recorded. The accused have denied the prosecution allegations. According to them they were falsely implicated. The learned trial Court acquitted the accused vide judgment dated 28.5.2008.

4. Mr. Ramesh Thakur, learned Assistant Advocate General has vehemently argued that the prosecution has proved its case against the accused persons. On the other hand, Mr. N.S. Chandel, Advocate, appearing for the accused, has supported the judgment dated 28.5.2008.

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

6. PW-1 Amar Singh has deposed that his daughter was married to the accused Soni Kumar in the year 2001. She was maintained properly for 2 ½ years. Thereafter, no maintenance was given to her. She was given beatings. He has taken up the matter with the Panchayat. He had sent his son on 19.6.2005 to enquire about the welfare of his daughter. The son came back at 1.30/2.00 PM. He disclosed that his daughter was apprehending danger to her life. On 19.6.2005, at 8.30/9.00 PM, he received information from the Ward Member Smt. Bhago Devi that his daughter had died by drowning. She further informed that the body of his daughter was lying on the rock. There was no member from her in-laws present on the spot. He has noticed injuries over eye and there was bleeding from her nose. Her arm was found fractured. There were other injuries on the back side of the body. In his cross examination he has deposed that he disclosed to the police that he had sent his son to the house of his daughter on 19.6.2005. Volunteered that the police did not hear their version. He was confronted with statement recorded under Section 154 Cr.P.C. Ext. PW-1/C, where it is not so recorded. He also admitted in his cross examination that accused used to go early in the morning to the shop and come back late in the evening. He used to visit the house of his daughter after some interval to enquire about her welfare. He has admitted that his daughter has never moved any application for maintenance against the accused before any authority. He has never made any complaint before any authority of giving beatings to his daughter.

7. PW-2 Sudha Kaundal, deposed that she visited the spot and found that the deceased was lying dead on the rock. There were injuries on the forehead and arm of the deceased. She was bleeding from her nose. The police have taken into possession, one washing soap, and wooden plank "Thapi'. These were taken into possession vide memo Ext. PW-2/A.

8. PW-3 Susheel Kumar deposed that whenever his sister Kalpana visited her parental house, she used to disclose that she was being beaten up by her husband and mother-in-law and even sometimes, she was denied food and the matter was reported to the Panchayat. On 19.6.2005, he went to the house of his sister Kalpana to find out about her welfare. She disclosed that she has been threatened by the accused. The accused used to give her beatings. When he visited the house of his sister, he also visited the water source. He came back to the house at 1.30. A telephonic message was received disclosing that his sister Kalpana had died. His family members, including villagers went to the spot and found the dead body of his sister in the Nallah. In his cross examination he admitted that he and his brother as well as his father were frequent visitors to the house of the deceased. He also admitted that accused Soni Kumar had filed complaint before the Panchayat against his sister and his brother Lekh Raj, in which the compromise had been arrived at.

9. PW-4 Pritma Devi deposed that they had taken the matter before Gram Panchayat and representatives of Gram Panchayat went to the accused where the compromise had been arrived at. She disclosed that on 19.6.2005, she sent her son to find out the welfare of her daughter in her in-laws house. He told her that he met his sister while she was going to bring water. He disclosed that his sister was apprehending threat to her life. They were informed that their daughter had died. In her cross examination, she admitted that they never made any application or complaint before any authority against the accused.

10. PW-5 Dr. Puran Chand has conducted post mortem on the dead body of the deceased. He issued post mortem report Ext. PW-5/D. According to him, the injuries were ante mortem in nature caused by blunt weapon within a duration of 24 hours. According to his opinion, the deceased died to ante mortem drowning.

11. PW-6 Bhago Devi stated that she received a telephonic information from Pradhan Gram Panchayat Gummer to the effect that Kalpana

Devi had died. She informed the police and also parents of the deceased. Thereafter, she went to the village Saloha. In her cross-examination she admitted that the close relationship with the parents of the deceased.

12. PW-7 Ram Lok deposed that after the marriage, accused Soni Kumar started giving beatings to Kalpana Devi as the father of deceased had told him 3-4 times about the beatings. He went on 27.5.2004 to Gram Panchayat Haroli and Razinama (compromise) had taken place. The compromise is Ext. PW-6/A. In his cross examination he admitted that deceased Kalpana had never made any written complaint against the accused before their Gram Panchayat.

13. Statements of PW-8 HC Ravi Kumar, PW-9 HHC Thakru Ram and PW-10 Rakesh Kumar are formal in nature.

14. PW-11 SI Ranjeet Singh has carried out the investigation of the case. He visited the spot on 20.6.2005. He recorded the statement of PW-1 Amar Singh under Section 154 Cr.P.C. He took photographs of the dead body. He prepared inquest reports Ext. PW-5/B and Ext. PW-5/C. He got the post mortem conducted. He took into possession "Thapi" (wooden plank) and clothes of the deceased. He also took into possession one application for 'Razinama' Ext. PW-1/B. In his cross-examination he deposed that when he reached the spot, the dead body had already been lying on the rock. He was told that the dead body was taken out from the water and depth of the water was 15 feet from where the dead body was taken out. He also admitted that Bihari Lal had disclosed in his statement that accused Soni Kumar had taken out dead body of deceased from water. He has also admitted that Kultar Singh deposed in his presence that accused Soni Kumar had been locating the dead body of the deceased. The water was deep.

15. What emerges from the facts enumerated herein above is that the marriage between Soni Kumar and Kalpana Devi was solemnized in the year 2001. The relations between them were cordial for 2 ½ years. Thereafter, accused started giving beatings to deceased Kalpana Devi. The statement of PW-1 Amar Singh was recorded under section 154 Cr.P.C. He deposed that he had sent his son Susheel Kumar on 19.6.2005 to enquire about the welfare of his daughter. PW-3 Susheel Kumar has also deposed that he went to his sister's house on 19.6.2005 to enquire about her welfare. PW-4 Pritma Devi, mother of deceased deposed that on 19.6.2005, she sent her son to find out the welfare of her daughter. There is no such averment contained in Ext. PW-1/C. In case PW-3, Susheel Kumar was sent to visit the house of Kalpana Devi, it should have been stated in Ext. PW-1/C. PW-1 Amar Singh, PW-3 Susheel Kumar and PW-4 Pritma Devi have made improvements in their statements. According to PW-1 Amar Singh there are no specific instances given when the accused has given beatings to deceased Kalpana Devi. The averments made are vague. PW-1 Amar Singh has admitted in his cross-examination that he has never made any complaint before any authority against the accused about the beatings given to his daughter. He has also admitted that his daughter has never made any application seeking maintenance against the accused. PW-4 Pritma Devi has also deposed that they never made any application /complaint before any authority against the accused.

16. PW-6 Bhago Devi is closely related to the family of the deceased. PW-7 Ram Lok has admitted that Kalpana Devi has never made any written complaint against the accused before their Panchayat. The deceased has died due to drowning. The drowning was ante mortem. The deceased has received certain injuries. But these injuries could be attributed by falling into the water, as per the statement of PW-5 Dr. Puran Chand. She had gone to wash clothes. The water at the spot was very deep. The possibility of her slipping into the water cannot be ruled out. The Prosecution has failed to prove that the accused have treated the deceased with cruelty. The deceased has never moved an

application for maintenance etc. before any authority. Thus, it can safely be presumed that the deceased was never driven to commit suicide by the accused. In order to prove cruelty, there has to be series of events. However, in the instant case, the prosecution has failed to prove that the deceased was meted out cruelty by the accused.

17. Accordingly, the prosecution has failed to prove the case against the accused persons. The accused persons have been acquitted by a well reasoned judgment dated 28.5.2008 of the learned trial Court.

18. Consequently, there is no merit in the appeal and the same is dismissed.

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

Gopal Singh. ...Appellant.

Versus

State of Himachal Pradesh. ...Respondent.

Cr.A.No. 120 of 2011
Reserved on: 3.11.2104
Decided on: 4.11.2014

Indian Penal Code,1860 - Sections 376 (2) (f) and 84- Prosecutrix aged four and half years was raped by the accused- Accused pleaded that he was suffering from sehizophrenia- he was examined by the Doctor and was declared fit for trial- held, that crucial point of time at which the unsoundness of mind has to be established is when the offence was committed, the 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 what have he was doing was contrary to the law, therefore, accused is not entitled to the acquittal on the ground of unsoundness of mind. (Para-22 to 32)

Cases referred:

State of Madhya Pradesh v. Ahmadulla, AIR 1961 SC 998
Dahyabhai Chhaganbhai Thakkar vs. State of Gujarat, AIR 1964 SC 1563
Ratan Lal v. The State of Madhya Pradesh, AIR 1971 SC 778
Sheralli Wali Mohammed v. State of Maharashtra, AIR 1972 SC 2443
Elavarasan vs. State represented by Inspector of Police, (2011) 7 SCC 110
Surendra Mishra vs. State of Jharkhand, (2011) 11 SCC 495
Mariappan vs. State of Tamil Nadu, (2013) 12 SCC 270

For the Appellant: Mr. Gurdev Singh Thakur, Advocate.
For the Respondent: Mr. M.A. Khan, Addl. A.G.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 21.12.2009 rendered by the Additional Sessions Judge, Sirmaur, District at Nahan in Sessions Trial No. 18-N/7 of 2002, whereby the appellant-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and

tried for offence punishable under section 376 (2) (f) of the Indian Penal Code has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.10,000/- and in default of payment of fine, he was further ordered to undergo rigorous imprisonment for a period of one year. Hence, the present appeal.

2. Case of the prosecution, in a nutshell, is that on 21.8.2002, prosecutrix (PW-3) daughter of PW-1 Kunta Devi, aged about 4½ years, at about 2.30 P.M. was playing outside her house alongwith other children at village Uttamwala. Accused took the prosecutrix to the field on the pretext to bring maize. He committed sexual intercourse with the prosecutrix. Prosecutrix cried. The cries were heard by PW-2 Uma Devi. PW-2 Uma Devi informed PW-1 Kunta Devi, mother of prosecutrix about the same. PW-1 Kunta Devi went to the spot and saw the accused committing sexual assault upon the prosecutrix in the filed. She was laid down on the ground. She lifted the prosecutrix from the lap of the accused and snatched her from the accused. Prosecutrix was naked. She was brought alongwith her clothes to the house. Blood was oozing out from the private parts of the prosecutrix. The Pajami of the prosecutrix was stained with blood. Husband of PW-1 Kunta Devi, who was out of house was called and told about the occurrence. PW-1 Kunta Devi and her husband Babu Ram went to the Police Station, Nahan. They lodged FIR Ext.PW.1/A. PW-4 Dr. Nirmla Vaish examined the prosecutrix. She issued MLC Ext.PW-4/A. She preserved Pajami Ext.P-1 and Ext.P-2 of the prosecutrix and prepared three slides of the fluid taken from the posterior fornix. She also preserved blood samples of the prosecutrix. All the articles were handed over to the police for chemical examination. The prosecutrix remained admitted in the hospital. She was discharged on 31.8.2002. Accused was medically examined by PW-8 Dr. S.C. Goel. Site plan was prepared. Date of birth certificate Ext.PW-9/A of the prosecutrix was obtained. Statements of the witnesses were recorded. Police investigated the case and the challan was put up in the court after completing all the codal formalities.

3. The defence counsel intimated the court on 6.3.2003 that accused was suffering from major mental disorder, namely, schizophrenia. Dr. Ramesh Kumar, Assistant Professor, Department of Psychiatry, I.G.M.C., Shimla opined that accused appeared to be suffering from major mental disorder, i.e. schizophrenia. He was examined as CW-1. Accused was ordered to be examined by the Board of senior doctors of the Department of Psychiatry, I.G.M.C., Shimla, vide order dated 17.6.2003. Dr. Hardyal Chauhan, Senior Medical Superintendent, I.G.M.C., Shimla was appointed as Chairman. He constituted a Medical Board of doctors. He was examined as CW-2. He opined that accused appeared to be suffering from mental disorder, as such, he was not capable of defending himself of criminal charge against him. Direction was issued to the Superintendent, Model Central Jail, Nahan and also to the Superintendent of Police, Sirmaur District at Nahan to get the accused examined from the fresh Board. Dr. Ravi Sharma, Professor and Head, Department of Psychiatric, I.G.M.C., Shimla was examined in the Court on 16.12.2003. The Board suggested that the accused should be referred to the Department of Psychiatric, P.G.I., Chandigarh for second psychiatric opinion. The Court directed the accused to be examined from another Medical Board of senior psychiatric, P.G.I., Chandigarh. The Medical Board examination report dated 17.2.2004 was received from P.G.I., Chandigarh. The Board opined that the accused was suffering from paranoid schizophrenia.

4. Accused moved an application under Section 330 of the Code of Criminal Procedure. The Court vide order dated 27.3.2004, ordered the detention of the accused in Psychiatric Department, I.G.M.C., Shimla. Reports of the Himachal Hospital of Mental Health and Rehabilitation, Shimla were received from time to time qua the mental health of the accused. As per report dated 26.9.2008, accused was opined to be capable of making his defence in the

Court. He did not have features of active mental disorder. Senior Medical Superintendent vide letter dated 17.12.2008 declared that patient was fit to be discharged from the hospital for facing the trial. On 2.1.2009, accused was found to be fit for trial. Charge under Section 376 (2) (f) of the Indian Penal Code was framed. He pleaded not guilty.

5. Prosecution examined as many as 12 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. According to him, he is suffering from mental disorder. Learned trial Court convicted and sentenced the accused as noticed hereinabove.

6. Mr. Gurdev Singh Thakur, learned counsel for the appellant has vehemently argued that the prosecution has failed to prove its case against the accused.

7. Mr. M.A. Khan, leaned Additional Advocate General has supported the judgment passed by the trial Court.

8. We have heard the learned counsel for the parties and have gone through the record meticulously.

9. PW-1 Kunta Devi is the mother of prosecutrix. According to her on 21.8.2002, she was at her home. Her sister-in-law (Jethani) and parents-in-law were also in the house. Her youngest daughter was playing outside the house. She was 4½ years old. At about 2.30 P.M., her sister-in-law Uma Devi called her from the roof of the house and told that her daughter was crying in the fields. She went to the spot. It was at a distance of 100-150 meters from the house. She saw that her daughter was laid on the ground by the accused. He was committing sexual assault upon her daughter. When she reached there, accused lifted her daughter and took her into his lap. She snatched her daughter from the accused. Her daughter was naked. She took her daughter to the house alongwith her clothes. Blood was oozing out from the private part of her daughter. She narrated the occurrence to other family members. They also examined the prosecutrix. Pajama of prosecutrix was having blood stains on it. Her husband was out of house. She called him and narrated the occurrence. They went to the Police Station, Nahan. They lodged FIR. Prosecutrix was medically examined in the hospital at Nahan. She remained admitted in the hospital. She was discharged on 31.8.2002 vide Ex.PW-1/B. She has identified Pajami Ex.P-1 and P-2. In her cross-examination, she has denied the suggestion that accused was suffering from mental ailment since his childhood. He used to work as labourer. She has also denied the suggestion that there was dispute between her family and family of the accused.

10. PW-2 Uma Devi has deposed that Kunta Devi is her Devrani. On 21.8.2002, she was on the roof of her house at about 2 – 2.30 P.M. She heard the cries of daughter of Kunta from the field of maize. She informed Kunta Devi about the crying of her daughter. Kunta Devi went to the field and brought her daughter from the field to the house. The victim was naked and she was bleeding from her private part. Her salwar was having blood on it. Kunta Devi told that accused was in the field. He committed sexual act with her daughter. She has also denied the suggestion that accused was suffering from mental disorder. Volunteered that he was mentally sound at that time. She did not know that father of accused used to take him for medical treatment to Dharampur.

11. PW-3 is the prosecutrix. Her statement was recorded without oath. She has deposed that she was taken away from her house to the fields by the accused. She was playing outside in her house alongwith other children. Accused stated that they will bring maize from the field. Maize field was near the house. She did not know what accused did with her as she was small kid at that time and was not capable of understanding the things. She cried in the

field. Her mother came there on hearing her cries. She was brought to Nahan. She remained admitted in the hospital for some days. She has denied the suggestion that she has named the accused at the instance of her parents.

12. PW-4 Dr. Nirmal Vaish has medically examined the prosecutrix. She has issued MLC Ex.PW-4/A. According to her, rape was done and the probable duration was within 12 hours. She identified Pajami Ex. P-1 and P-2. There were marks of injury on the private parts. There was second degree perineal tear in the vagina. There was one scratch mark over the right side of the thigh lying obliquely. There were three or four nail marks over left side of the thigh. The patient was admitted for stitching of tear (perineal). Treatment was given and the patient was discharged after 3-4 days.

13. PW-5 Balbir Singh has deposed that on 22.8.2002 Constable Suresh Kumar deposited two sealed parcels sealed with seal impression 'ZH' and LC Raksha Devi deposed four sealed parcels with seal impression 'ZH' with him. He made entries in the register of Malkhana at Sr. No. 269 and 270. He forwarded all the parcels vide RC No. 185/2002 for F.S.L. Bharari through Constable Inder Dutt.

14. PW-6 Constable Inder Dutt has deposed that on 26.8.2002 MHC Balbir Singh handed over to him six sealed parcels for chemical examination vide RC 185/02. He deposited the same at F.S.L. Bharari on 26.8.2002.

15. PW-7 Dr. Ranjana Oberoi has examined the prosecutrix. She issued discharge slip Ex.PW-1/B. According to her, prosecutrix was having injuries perineal and tear was present. It was stitched by Dr. Nirmal Vaish.

16. PW-8 Dr. S.C. Goel has examined the accused on 22.8.2002. He has issued MLC Ext. PW-8/A. According to him, there was a big contusion mark reddish blue on left arm, lower part on anterior aspect. Clothes were preserved. There was no suggestion that the patient was not able to perform coitus.

17. PW-9 Kailash Kataria has issued birth certificate of prosecutrix PW-9/A.

18. PW-10 H.C. Daleep Singh has taken the photographs of the spot on 22.8.2002.

19. PW-11 Narveer Singh Rathour has deposed that he remained posted as S.H.O. Police Station Nahan. On 21.8.2002 Kanta Devi alongwith prosecutrix came to the police station. She got FIR Ext. PW-1/A registered. In order to get prosecutrix medically examined she moved an application to M.O. Zonal Hospital, Nahan vide Ext. PW-11/A. MLC of the prosecutrix was procured. Prosecutrix remained admitted in the hospital. Discharge certificate was Ex. PW-1/B. Accused was arrested on 21.8.2002. He was also got medically examined and MLC Ext. PW-8/A was obtained. On 22.8.2002, he visited the spot and prepared site plan Ext. PW-11/B. He has denied the suggestion that accused was suffering from acute mental disorder. He has also denied the suggestion that when the occurrence took place; accused was suffering from mental disorder.

20. PW-12 Dr. Ramesh Kumar has deposed that accused was under treatment. He has issued report Ext. PA. It was found on examination of the accused that presently, he did not have feature of active mental disorder. Thus, he was fit to be discharged from the hospital for facing the trial. However, patient was required to be continuously supervised.

21. Mr. Gurdev Singh Thakur has vehemently argued that accused was suffering from schizophrenia at the time of commission of offence. PW-1 Kunta Devi, in her statement, has categorically deposed that on 21.8.2002, she was told by PW-2 Uma Devi that her daughter was crying in the field. She went to the spot and recovered the girl and she saw accused committing sexual

assault upon her daughter. She was naked. She was brought to the house. She was admitted in the hospital. She was discharged from the hospital on 31.8.2002 vide Ex.PW-1/B. PW-2 Uma Devi has supported the version of PW-1 Kunta Devi. She informed PW-1 Kunta Devi about the crying of her daughter. Kunta Devi went to the field and brought her daughter from the field. She has denied the suggestion that accused was suffering from mental disorder. Volunteered that he was mentally sound at that time. PW-3 prosecutrix was only 4½ years. Her evidence inspires confidence. She has stated that she did not know what accused did with her. She was young girl of 4½ years. She cried in the field and her mother came there. She remained admitted in the hospital. She has denied the suggestion that she has named the accused at the instance of her parents. PW-4 Dr. Nirmal Vaish has issued MLC Ex.PW-4/A. According to her, rape was committed and the probable duration was within 12 hours. Hymen was torn. There was second degree perineal tear. Stitching was undertaken. PW-7 Dr. Ranjana Oberoi has issued discharge slip Ex.PW-1/B. She has noticed injuries on perineal tear, which was stitched by Dr. Nirmal Vaish. She was discharged on 31.8.2002. PW-8 Dr. S.C. Goel has also denied the suggestion that the accused was suffering from any mental ailment. As per version of PW-12 Dr. Ramesh Kumar in view of report dated 26.9.2008 received from Senior Medical Superintendent, Himachal Hospital Mental Health and Rehabilitation, Shimla, accused was opined to be capable of making his defence in the Court. He did not have features of active mental disorder. He was declared fit to be discharged from the hospital for facing the trial. PW-12 Dr. Ramesh Kumar has also declared that accused was fit to be discharge from the hospital for facing trial as per report Ex.PA. He has not noticed any active mental disorder.

22. What emerges from the statements of PW-1 Kunta Devi and PW-2 Uma Devi read in conjunction with statement of PW-7 Dr. Ranjana Oberoi that accused has committed forcibly rape on the young girl. She was only 4½ years old. She remained admitted in hospital for about ten days. There was second perineal tear in the vagina. Hymen was torn. The injury was stitched by Dr. Nirmal Vaish. Mr. Gurdev Singh Thakur has argued that there was enmity between the families. However, no evidence has been led to this effect. Accused was closely related with the family of victim. Thus, there was no occasion for impleading the accused in the case.

23. Their Lordships of the Hon'ble Supreme Court in ***State of Madhya Pradesh*** v. ***Ahmadulla***, AIR 1961 SC 998 have held that the crucial point of time at which the unsoundness of mind as defined in section 84 has to be established is when the act was committed. Their Lordships have held as under:

> **"2. There is very little dispute about the facts or even about the construction of S. 84 of the Code because both the learned Sessions Judge as well as the learned Judges of the High Court on appeal have held that the crucial point of time at which the unsoundness of mind, as defined in that section, has to be established is when the act was committed. It is the application of this principle to the facts established by the evidence that is the ground of complaint by the appellant-State before us.**
>
> **8. In this connection we might refer to the decision of the Court of Criminal Appeal in England in Henry Perry 14 Cri App Rep 48 where also the defence was that the accused had been prone to have fits of epileptic insanity. During the course of the argument Reading. C. J., observed :**
>
> > **"The crux of the whole question is whether this man was suffering from epilepsy at the time he committed the crime. Otherwise it would be a most dangerous doctrine if a man**

could say.' "I once had an epileptic fit, and everything that happens hereafter must be put down to that."

In dismissing the appeal the learned Chief Justice said :

"Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. To establish insanity it must be clearly proved that at the time of committing the act the party is labouring under such defect of reason as not to know the nature and quality of the act which he is committing - that is, the physical nature and quality as distinguished from the moral - or, if he does know the nature and quality of the act he is committing, that he does not know that he is doing wrong ..... There is, however, evidence of a medical character before the jury, and there are statements made by the prisoner himself, that he has suffered from epileptic fits. The Court has had further evidence, especially in the prison records, of his having had attacks of epilepsy. But to establish that is only one step; it must be shown that the man was suffering from an epileptic seizure at the time when he committed the murders; and that has not been proved."

We consider that the situation in the present case is very similar and the observations extracted apply with appositeness. We consider that there was no basis in the evidence before the Court for the finding by the Sessions Judge that at the crucial moment when the accused cut the throat of his mother-in-law and severed her head, he was suffering from unsoundness of mind incapable of knowing that what he was doing was wrong. Even the evidence of the father does not support such a finding. In this connection the Courts below have failed to take into account the circumstances in which the killing was compassed. The accused bore ill will to Bismilla and the act was committed at dead of night when he would not be seen, the accused taking a torch with him, access to the house of the deceased being obtained by stealth by scaling over a wall. Then again, there was the mood of exaltation which the accused exhibited after he had put her out of her life. It was a crime committed not in a sudden mood of insanity but one that was preceded by careful planning and exhibiting cool calculation in execution and directed against a person who was considered to be the enemy."

24. Their Lordships of the Hon'ble Supreme Court in ***Dahyabhai Chhaganbhai Thakkar*** vs. ***State of Gujarat***, AIR 1964 SC 1563 have held that that when a plea of legal insanity is set up, the 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 when the offence was committed. Their Lordships have held as under:

"9. When a plea of legal insanity is set up, the 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 when the offence was committed. Whether the 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 the crime.

14. The subsequent events leading up to the trial make it abundantly clear that the plea of insanity was a belated afterthought and a false case. After the accused came out of the room, he was taken to the chora and was confined in a room in the chora. P. W. 16, the police sub-inspector reached Bherai at about 9.30 a.m. He interrogated the accused; recorded his statement and arrested him at about 10.30 a.m. According to him, as the accused was willing to make a confession, he was sent to the judicial magistrate. This witnesses described the condition of the accused when he met him thus:

> **"When I went in the Chora he had saluted me and he was completely sane. There was absolutely no sign of insanity and he was not behaving as an insane man. He was not abusing. He had replied to my questions understanding them and was giving relevant replies. And therefore I had sent him to the Magistrate for confession as he wanted to confess."**

There is no reason to disbelive this evidence, particularly when this is consistent with the subsequent conduct of the accused. But P. W. 9, who attested the panchanama, Ex. 19, recording the condition of the accused's body and his clothes, deposed that the accused was murmuring and laughing. But no mention of his condition was described in the panchnama. Thereafter, the accused was sent to the Medical Officer, Matar, for examination and treatment of his injuries. The doctor examined the accused at 9.30 p.m. and gave his evidence as P. W. 11. He proved the certificate issued by him, Ex. 23. Nothing about the mental condition of the accused was noted in that certificate. Not a single question was put to this witnesses in the cross-examination about the mental condition of the accused. On the same day, the accused was sent to the Judicial Magistrate, First Class, for making a confession. On the next day he was produced before the said Magistrate, who asked him the necessary questions and gave him the warning that his confession would be used against him at the trial. The accused was given time for reflection and was produced before the Magistrate on April 13, 1959. On that date he refused to make the confession. His conduct before the Magistrate, as recorded in Ex. 31 indicates that he was in a fit condition to appreciate the questions put to him and finally to make up his mind not to make the confession which he had earlier offered to do. During the enquiry proceedings under Ch. XVIII of the Code of Criminal Procedure, no suggestion was made on behalf of the accused that he was insane. For the first time on June 27, 1959, at the commencement of the trial in the sessions court an application was filed on behalf of the accused alleging that he was suffering from an attack of insanity. On June 29, 1959, the Sessions Judge sent the accused to the Civil Surgeon, Khaira, for observation. On receiving his report, the learned Sessions Judge, by his order dated July 13, 1959, found the accused insane and incapable of making his defence. On August 28, 1959, the court directed the accused to be sent to the Superintendent of Mental Hospital, Baroda, for keeping him under observation with a direction to send his report on or before September 18, 1959. The said Superintendent sent his report on August 27, 1960 to the effect that the accused was capable of understanding the proceedings of the court and of making his defence in the court. On enquiry the court held that the accused could understand the proceedings of the case and was capable of making his defence. At the commencement of the trial, the pleader for the accused stated that the accused could understand the proceedings. The proceedings before the

Sessions Judge only show that for a short time after the case had commenced before him the accused was insane. But that fact would not establish that the accused was having fits of insanity for 4 or 5 years before the incident and that at the time he killed his wife he had such a fit of insanity as to give him the benefit of S. 84 of the Indian Penal Code. The said entire conduct of the accused from the time he killed his wife upto the time the sessions proceedings commenced is inconsistent with the fact that he had a fit of insanity when he killed his wife."

25. In the instant case, it cannot be said that accused was incapable of knowing the nature of act or that he was doing what was either wrong or contrary to law.

26. Their Lordships of the Hon'ble Supreme Court in ***Ratan Lal*** v. ***The State of Madhya Pradesh***, AIR 1971 SC 778 have held that the crucial point of time at which unsoundness of mind has to be proved is the time when the crime is actually committed. The burden of proving this can be discharged by the accused from the circumstances which preceded, attended and followed the crime. their Lordships have held as under:

"2. It is now well settled that the crucial point of time at which unsoundness of mind should be established is the time when the crime is actually committed and the burden of proving this lies on the accused. (See State of Madhya Pradesh v. Ahmadullah, (1961) 3 SCR 583 = (AIR 1961 SC 998). In D. C. Thakkar v. State of Gujarat, (1964) 7 SCR 361 = (AIR 1964 SC 1563); it was laid down that "there is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 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 which rests upon a party to civil proceedings." It was further observed:

"The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of Section 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed the crime."

27. In the instant case there is no evidence or circumstance that accused was having unsoundness of mind at the time of commission of offence. There is no evidence that accused was having unsoundness of mind before the occurrence and at the time of commission of crime.

28. Their Lordships of the Hon'ble Supreme Court in ***Sheralli Wali Mohammed*** v. ***State of Maharashtra***, AIR 1972 SC 2443 have held that 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 broken open would not indicate that he was insane or that he did not have the necessary *mens rea* for the commission of the offence. 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

> **"(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."

29. Their Lordships of the Hon'ble Supreme Court in ***Elavarasan*** vs. ***State represented by Inspector of Police***, (2011) 7 SCC 110 have held that the burden of bringing his/her case under section 84 of the Indian Penal Code lies upon person claiming benefit thereof. Standard of proof which accused has to satisfy for discharge of burden under section 105 is not same as is expected of prosecution. It is enough for accused to establish his defence on preponderance of probabilities as in a civil case. Their Lordships have held as under:

"22. The question, however, is whether the appellant was entitled to the benefit of Section 84 of Indian Penal Code which provides that 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 who is incapable of knowing that what he is doing, is either wrong or contrary to law. Before adverting to the evidence on record as regards the plea of insanity set up by the appellant, we consider it necessary to refer to two aspects that bear relevance to cases where a plea of insanity is raised in defence by a person accused of a crime. The first aspect concerns the burden of proving the existence of circumstances that would bring the case within the purview of Section 84 of the I.P.C. It is trite that the burden of proving the commission of an offence is always on the prosecution and that the same never shifts. Equally well settled is the proposition that if intention is an essential ingredient of the offence alleged against the accused the prosecution must establish that ingredient also.

23. There is no gainsaying that intention or the state of mind of a person is ordinarily inferred from the circumstances of the case. This implies that, if a person deliberately assaults another and causes an injury to him then depending upon the weapon used and the part of the body on which it is struck, it would be reasonable to assume that the accused had the intention to cause the kind of injury which he inflicted. Having said that, Section 84 can be invoked by the accused for nullifying the effect of the evidence adduced by the prosecution. He can do so by proving that he was incapable of knowing the nature of the act or of knowing that what he was doing was either wrong or contrary to law. But what is important is that the burden of bringing his/her case under Section 84 of the IPC lies squarely upon the person claiming the benefit of that provision.

24. Section 105 of the Evidence Act is in this regard relevant and may be extracted:

> **"105. Burden of proving that case of accused comes within exceptions.-When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, (45 of 1860) or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."**

25. A careful reading of the above would show that not only is the burden to prove an exception cast upon the accused but the Court shall presume the absence of circumstances which may bring

his case within any of the general exceptions in the Indian Penal Code or within any special exception or provision contained in any part of the said Code or in law defining the offence. The following passage from the decision of this Court in Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, (1964) 7 SCR 361 may serve as a timely reminder of the principles governing burden of proof in cases where the accused pleads an exception:

> **"The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions:**
>
> **(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 Section 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."**

26. The second aspect which we need to mention is that the standard of proof which the accused has to satisfy for the discharge of the burden cast upon him under Section 105 (supra) is not the same as is expected of the prosecution. A long line of decisions of this Court have authoritatively settled the legal proposition on the subject. Reference in this connection to the decision of this Court in State of U.P. v. Ram Swarup and Anr., (1974) 4 SCC 764 should suffice where this court observed:

> **"The burden which rests on the accused to prove the exception is not of the same rigour as the burden of the prosecution to prove the charge beyond a reasonable doubt. It is enough for the accused to show, as in a civil case, that the preponderance of probabilities is in his favour."**

To the same effect is the decision of this Court in Bhikari v. State of Uttar Pradesh (AIR 1966 SC 1)."

30. Their Lordships of the Hon'ble Supreme Court in ***Surendra Mishra*** vs. ***State of Jharkhand***, (2011) 11 SCC 495 have held that to discharge the onus under section 84, accused must prove his conduct prior to offence, at the time or immediately after offence, with reference to his medical condition. Whether accused knew that what he was doing was wrong or that it was contrary to law is of great importance and may attract culpability despite mental unsoundness having been established. Their Lordships have held as under:

> **"13. In law, the presumption is that every person is sane to the extent that he knows the natural consequences of his act. The burden of proof in the face of Section 105 of the Evidence Act is on**

the accused. Though the burden is on the accused but he is not required to prove the same beyond all reasonable doubt, but merely satisfy the preponderance of probabilities. The onus has to be discharged by producing evidence as to the conduct of the accused prior to the offence, his conduct at the time or immediately after the offence with reference to his medical condition by production of medical evidence and other relevant factors. Even if the accused establishes unsoundness of mind, Section 84 of the Indian Penal Code will not come to its rescue, in case it is found that the accused knew that what he was doing was wrong or that it was contrary to law. In order to ascertain that, it is imperative to take into consideration the circumstances and the behaviour preceding, attending and following the crime. Behaviour of an accused pertaining to a desire for concealment of the weapon of offence and conduct to avoid detection of crime go a long way to ascertain as to whether, he knew the consequences of the act done by him.

14. Reference in this connection can be made to a decision of this Court in the case of T.N. Lakshmaiah v. State of Karnataka, (2002) 1 SCC 219, in which it has been held as follows:

> **"9. Under the Evidence Act, the onus of proving any of the exceptions mentioned in the Chapter lies on the accused though the requisite standard of proof is not the same as expected from the prosecution. It is sufficient if an accused is able to bring his case within the ambit of any of the general exceptions by the standard of preponderance of probabilities, as a result of which he may succeed not because that he proves his case to the hilt but because the version given by him casts a doubt on the prosecution case.**
>
> **10. In State of M.P. v. Ahmadull,AIR 1961 SC 998, this Court held that the burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by the section, lies on the accused who claims the benefit of this exemption vide Section 105 of the Evidence Act [Illustration (a)]. The settled position of law is that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. Mere ipse dixit of the accused is not enough for availing of the benefit of the exceptions under Chapter IV.**
>
> **11. In a case where the exception under Section 84 of the Indian Penal Code is claimed, the 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 is doing what is either wrong or contrary to law. The entire conduct of the accused, from the time of the commission of the offence up to the time the sessions proceedings commenced, is relevant for the purpose of ascertaining as to whether plea raised was genuine, bona fide or an afterthought."**

31. Their Lordships of the Hon'ble Supreme Court in ***Mariappan*** vs. ***State of Tamil Nadu***, (2013) 12 SCC 270 have held that burden of proving the case of accused comes within exceptions under section 105 of the Evidence Act, 1872 lies on the accused. Their Lordships have held as under:

> **"13. The evidence of PWs 1 and 2 - the eye-witnesses, the evidence of PWs 3 and 4, who saw the accused running after the occurrence with Aruval (M.O.I) and the recovery of the weapon at the instance**

of the accused which was found to be stained with human blood of "O" group, as per the serologist report (Ex.P.12), tallied with the blood group of the deceased as the clothes of the deceased viz., M.O.s 1 to 4 were also stained with human blood "O" group clearly prove the case of the prosecution. Further, the medical evidence through PW-9-the Doctor, who conducted the post-mortem and issued the report (Ex.P-3) strengthened the version of PWs 1 and 2.

14. From the materials analyzed, discussed and concluded by the trial Court and the High Court, it clearly establishes that it was the accused-appellant who committed the murder."

32. Learned trial court has correctly appreciated the evidence while convicting the accused. We need not interfere with the well reasoned judgment rendered by the trial court.

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

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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.
Vs.
Siri Ram .....Respondent.

Cr. Appeal No. 343 of 2008.
Reserved on: October 31, 2014.
Decided on: November 04, 2014.

NDPS Act, 1985- Section 20- Accused was found in possession of 400 grams of charas- independent witness had turned hostile - I.O admitted in his cross- examination that school, shop, panchyat ghar and houses of independent persons were situated near the place of incident- no person was called from the shop or school, but independent witnesses were called from a far off place- held, that in these circumstances, prosecution version could not be relied upon- acquittal of the accused was justified. (Para- 13 to 17)

For the appellant: Mr. Ashok Chaudhary, Addl. Advocate General.
For the respondent: Mr. Raj Kumar Negi, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The State has come up in appeal against the judgment rendered by the learned Sessions Judge, Solan, H.P. in case No. 6-S/7 of 2007 dated 19.2.2008, whereby the respondent-accused (hereinafter referred to as the accused) who was charged with and tried for offence under Section 20 (b)(B) of the Narcotic Drugs and Psychotropic Substances Act, 1985, was acquitted.

2. The case of the prosecution, in a nut shell, is that on 17.1.2007, Deep Ram S.I/S.H.O. Police Station, Kasauli alongwith other police officials had come to Bhoguri. At about 6:00 PM, they were present at Bhoguri Chowk. The accused was also there. The accused, on seeing the police party tried to run away. He was apprehended. He disclosed his name. The S.H.O. then sent Constable Jaswant Singh to call for the independent witnesses. He brought

Chint Ram and Ram Dass and in their presence, the packet which the accused was carrying in his hand was checked. It was found to be containing charas. The same was weighed. It weighed 400 gms. He took two samples of 25 gms each out of the recovered substance and put in two cigarette packets and sealed in two cloth parcels. The identification memo was prepared and NCB forms were filled in. The bulk substance was taken into possession in the presence of the independent witnesses. *'Rukka'* was prepared by the S.H.O. and sent to the Police Station through Constable Jaswant Singh, on the basis of which FIR was registered. The spot map was prepared. The contraband was sent to FSL. The challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 11 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. He denied the allegations of charas recovery from him. He examined DW-1 Ram Lal as defence witness. The learned Trial Court acquitted the accused, as stated hereinabove. Hence, the present appeal at the instance of the State.

4. Mr. Ashok Chaudhary, Addl. Advocate General, has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. Raj Kumar Negi, Advocate, has supported the judgment dated 19.2.2008, of the learned Sessions Judge, Solan.

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

6. PW-1, ASI Ram Asra, deposed that on 17.1.2007 he was accompanying S.H.O. Deep Ram, P.S. Kasauli alongwith other police officials. Accused was found standing at Bhaugari Chowk at 6:00 PM. He tired to run away. He was apprehended. He disclosed his name. Two independent witnesses were brought namely, Chint Ram and Ram Dass by Constable Jaswant Singh. S.H.O. checked the packet which was being carried by the accused. It contained black substance. It was found to be charas. It weighed 400 gms. Two samples of 25 gms each were taken from it. The remaining charas was sealed alongwith the packets in separate cloth parcels. All the parcels were sealed with seal 'T'. The sample parcel was Ext. P-1 and bulk parcel was Ext. P-2. The NCB forms were also filled in. In his cross-examination, he admitted that there was one shop of Tarun Gupta at the Chowk. The school from the Chowk was about 70 meters. The house of Amar Lal was at a distance of 25-30 meters. He also admitted that besides Bhaugri Chowk, they also went to Banalgi and Bandh, which comes on the way.

7. PW-2 Tarun Gupta, deposed that the police officials had taken weights and scale from him.

8. PW-3 Chint Ram, deposed that he was called to Bhaugari chowk. The accused was with the police. His search was effected and a substance in the form of wicks was recovered from him. It was weighed. It weighed 400 gms. The sampling process was completed. The substance was taken into possession vide seizure memo Ext. PW-1/B. It was signed by him and Ram Dass as well as the accused. In his cross-examination, he specifically deposed that the police did not recover the packet from the accused in his presence and when he reached the spot, the packet was lying on the ground which was stated to have been recovered from the accused. His signatures were also obtained on the spot.

9. PW-4 Constable Jaswant Singh, deposed that he was sent by S.H.O. to bring independent witnesses. He called Chint Ram and Ram Dass to the spot. After their arrival, checking of the accused was done. The bag which the accused was carrying was examined. It was found to be containing charas in the form of wicks. It was weighed. It weighed 400 gms. '*Rukka'* was handed over to MHC by him. Then he returned to the spot. In his cross-examination,

he admitted that there were shops on both sides near the spot. He did not know there is also a bus stop but there was School and Panchayat Ghar. No person except the accused had run away on seeing them. No person was called from the shop or School. He returned to the spot with the witnesses in half an hour time. He did not remember as to who brought the weights and scale.

10. PW-5 HC Ved Parkash, deposed that on 18.1.2007, S.H.O. Deep Ram deposited one parcel containing 350 gms of charas sealed with four seal impressions 'T'. NCB forms, sample impressions of seal used were entered by him in the *Malkhana* register at Sr. No. 255. He sent one sample parcel, NCB form, copy of seizure memo, copy of FIR and sample impression to CFSL, Chandigarh through Constable HHC Jai Kishan vide RC No. 1/07. He also proved the copy of the *Malkhana* register Ext. PW-5/A. He admitted in his cross-examination that there is no entry in the *Malkhana* register about deposit of NCB form. According to him, there were two sample seal impressions, one with the sample and another with the bulk parcel. Only one sample impression was sent to CFSL, Chandigarh. He also admitted that he did not enter the sample and documents received by separate entry. He made endorsement against the original entry.

11. Statements of PW-6 HC Yoginder Dutt, PW-7 ASI Gita Ram, PW-8 Bharat Ram and PW-9 Constable Madan Kishore are formal in nature.

12. PW-10 Dr. Sidharth Vats, has examined ASI Ram Asra and HHC Ramesh Chand. He issued MLCs Ext. PW-10/A and Ext. PW-10/B.

13. PW-11 SI Deep Ram, has carried out the investigation of the case. He deposed the manner in which the accused was apprehended, sampling and seizure process was completed. According to him, in the presence of the police officials and independent witnesses, the accused was questioned. The bag in his hand was searched in the presence of police personnel and independent witnesses. The charas was taken into possession vide memo Ext. PW-1/B. FIR was registered on the basis of *'Rukka'* Ext. PW-11/B. In his cross-examination, he admitted that the School, Shop, Panchayat Ghar and house of Amar Nath was near the place from where the accused was apprehended. The accused had also sustained injuries. The bag was having polythene packet. It contained nothing but charas.

14. The independent witness PW-3 Chint Ram has not supported the case of the prosecution. In his cross-examination, he specifically deposed that the police did not recover the packet from the accused in his presence and when he reached the spot, the packet was lying on the ground which was stated to have been recovered from the accused. According to PW-1 ASI Ram Asra and PW-11 Deep Ram, the accused on seeing the police tried to run away. He jumped down. He was apprehended. He was carrying charas in his hands. It is not believable that accused who had run away after seeing the police would carry contraband in his hand. His first natural reaction would have been to throw away the contraband.

15. The prosecution has associated PW-3 Chint Ram and one Ram Dass as independent witnesses during the investigation. Ram Dass has not been produced by the police. According to PW-1 Ram Asra, the S.H.O.had sent Constable Jaswant Singh to bring independent witnesses. He brought Chint Ram (PW-3) and one Ram Dass and in their presence S.H.O. checked the packet which was carried in his hands. It has come in the statement of PW-4 Constable Jaswant Singh that there were shops besides School near the spot and no person was called from the shops or School. He returned with the witnesses after about half an hour. PW-11 SHO Deep Ram, has also admitted that there was School, shops and Panchayat Ghar near the place where the accused was apprehended. When the independent witnesses were readily

available from the shop as well as the School, there was no occasion to bring two independent witnesses from a far off place.

16. PW-4 Constable Jaswant Singh came back with independent witnesses after half an hour. According to him also after their arrival, checking of the accused was done and the packet was examined. However, as noticed by us hereinabove, PW-3 Chint Ram has deposed that the police did not recover the packet from the accused in his presence. There is no entry in the *malkhana* register about the deposit of NCB forms as per the statement of PW-5 Ved Parkash.

17. The prosecution has failed to prove that the contraband was recovered from the exclusive and conscious possession of the accused. The learned trial Court has correctly appreciated the evidence on record and acquitted the accused. There is no justification for us to interfere with the well reasoned judgment passed by the learned trial Court.

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

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

Amit Sood & ors. .....Petitioners.
Versus
Sandala & ors. .....Respondents.

CMPMO No. 207 of 2014.
Decided on: 05.11.2014.

Code of Civil Procedure, 1908- Order 1 Rule 10- An application was moved for impleadment as defendants by the petitioners which was dismissed- held, that the application was filed belatedly and allowing the application for impleadment would amount to relegating the parties to 2004 position- presence of the petitioners is not necessary to adjudicate upon the real controversy between the parties. (Para-3 and 4)

Case referred:
Kasturi vs. Iyyamperumal reported in (2005(6) SCC 733

For the petitioners: Mr. Dheeraj K. Vashista, Advocate.
For the respondents: Mr. Rakesh Kumar Thakur, Advocate for respondents No. 3 to 7.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J. (oral)

This petition is instituted against the order passed by the learned Civil Judge (Sr. Divn.) Court No. 1, Amb, Distt. Una, in case No. 33 of 2006 passed on 3.3.2014.

2. Key facts, necessary for the adjudication of this petition are that the respondents-plaintiffs (hereinafter referred to as the plaintiffs for convenience sake) have filed a civil suit for issuance of permanent injunction restraining the respondents-defendants No. 3 to 7 (hereinafter referred to as the defendants) from raising any sort of construction, changing the nature and dismantling or damaging any room/building existing over the land measuring 1409-33 sq.

decimeters, comprised in *Khewat* No. 257 *Khatoni* No. 397, *Khasra* Nos. 1914/1718, 1916/1719, 1848, 1849, 1850, 1851, 1852 and 1853, as per *jamabandi* for the year 1999-2000, situated in *Up-Mohal* Dev Nagar, *Mauja* Gagret, Tehsil Amb, District Una, H.P. Defendants No. 3 to 7 have also filed a suit against the plaintiffs, namely, Sandla Devi and Shivi Sud for separate possession by partition of the share of *abadi* site measuring 1409-33 sq. decimeters bearing *Khewat* No. 257 min, *Khatoni* No. 397, *Khasra* Nos. 1914/1718, 1916/1719, 1848, 1849, 1850, 1851, 1852 and 1853, as per *jamabandi* for the year 1999-2000. The petitioners have also filed suit for declaration against the plaintiffs as well as the defendants.

3. The suit has been instituted by the plaintiffs against defendants No. 3 to 7 in the year 2004. The petitioners have moved an application under Order 1 Rule 10 CPC for impleadment as defendants. The application was resisted and contested by the plaintiffs as well as defendants by filing replies. The Court has already noticed that the Civil Suit No. 145 of 2004 was filed by the plaintiffs for permanent injunction restraining the defendants No. 3 to 7 from raising any sort of construction, changing the nature and dismantling or damaging any room/building existing over the land denoted in the plaint. Defendants No. 3 to 7 have also filed the suit against the plaintiffs for partition. These two suits have been clubbed. The petitioners have filed the suit No. 33 of 2007 for declaration of their title on the suit land by challenging right, title or interest of plaintiffs and defendants. Infact, the petitioners are challenging the title of the plaintiffs as well as the defendants over the suit land. The learned Civil Judge (Sr. Divn.), Court No. 1, Amb has rightly come to the conclusion that even after the partition of the suit land between the plaintiffs and defendants, they would be bound by the judgment and decree in Civil Suit No. 33 of 2007 filed by the petitioners. Mr. Dheeraj K. Vashista, Advocate, has failed to convince the Court as to what prejudice would be caused to the petitioners if they are not permitted to participate in the suit for injunction and partition filed by the plaintiffs and defendants against each other. The application has been filed under Order 1 Rule 10 CPC belatedly. The act of allowing the application filed by the petitioners, at this belated stage for impleadment, would amount to relegate the parties to 2004 position.

4. The presence of petitioners is not necessary to adjudicate upon the real controversy *inter se* the parties. The considerable prejudice would be caused to the existing parties if the petitioners are ordered to be added as new party.

5. Their lordships of the Hon'ble Supreme Court in the case of ***Kasturi vs Iyyamperumal*** reported in ***(2005(6) SCC 733,*** have laid down the following test for impleadment under Order 1 Rule 10 CPC:

> "11. As noted herein earlier, two tests are required to be satisfied to determine the question who is a necessary party, let us now consider who is a proper party in a suit for specific performance of a contract for sale. For deciding the question who is a proper party in a suit for specific performance the guiding principle is that the presence of such a party is necessary to adjudicate the controversies involved in the suit for specific performance of the contract for sale. Thus, the question is to be decided keeping in mind the scope of the suit. The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract. If the person seeking addition is added in such a suit, the scope of the suit for specific performance would be enlarged and it would be practically converted into a suit for title. Therefore, for effective adjudication of the controversies involved in the suit, presence of such parties cannot be said to be necessary at all. Lord Chancellor Cottenham in Tasker v. Small, 1834 (40) English Report 848 made the following observations:

> "It is not disputed that, generally, to a bill for a specific performance of a contract for sale, the parties to the contract only are the proper parties: and, when the ground of the jurisdiction of Courts of Equity in suits of that kind is considered it could not properly be otherwise. The Court assumes jurisdiction in such cases, because a Court of law, giving damages only for the non-performance of the contract, in many cases does not afford an adequate remedy. But, in equity, as well as in law, the contract constitutes the right and regulates the liabilities of the parties: and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it. are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it."

15. As discussed herein earlier, whether respondent Nos. 1 and 4 to 11 were proper parties or not the governing principle for deciding the question would be that the presence of respondent Nos. 1 and 4 to 11 before the Court would be necessary to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. As noted hereinearlier, in a suit for specific performance of a contract for sale, the issue to be decided is the enforce-ability of the contract entered into between the appellant and the respondent Nos. 2 and 3 and whether contract was executed by the appellant and the respondent Nos. 2 and 3 for sale of the contracted property, whether the plaintiffs were ready and willing to perform their part of the contract and whether the appellant is entitled to a decree for specific performance of a contract for sale against the respondent Nos. 2 and 3. It is an admitted position that the respondent Nos. 1 and 4 to 11 did not seek their addition in the suit on the strength of the contract in respect of which the suit for specific performance of the contract for sale has been filed. Admittedly, they based their claim on independent title and possession of the contracted property. It is, therefore, obvious as noted hereinearlier that in the event, the respondent Nos. 1 and 4 to 11 are added or impleaded in the suit, the scope of the suit for specific performance of the contract for sale shall be enlarged from the suit for specific performance to a suit for title and possession which is not permissible in law. In the case of Vijay Pratap & others v. Sambhu Saran Sinha & others reported, in 1996(10) SCC 53, this Court had taken the same view which is being taken by us in this judgment as discussed above. This Court in that decision clearly held that to decide the right, title and interest in the suit property of the stranger to the contract is beyond the scope of the suit for specific performance of the contract and the same cannot be turned into a regular title suit. Therefore, in our view, a third party or a stranger to the contract cannot be added so as to convert a suit of one character into a suit of different character. As discussed above, in the event any decree is passed against the respondent Nos. 2 and 3 and in favour of the appellant for specific performance of the contract for sale in respect of the contracted property, the decree that would be passed in the said suit, obviously, cannot bind the respondent Nos. 1 and 4 to 11. It may also be observed that in the event, the appellant obtains a decree for specific performance of the contracted property against the respondent Nos. 2 and 3, then, the Court shall direct execution of deed of sale in favour of the appellant in the event respondent Nos. 2 and 3 refusing to execute the deed of sale and to obtain possession of the contracted property he has to put the decree in execution. As noted hereinearlier, since the respondent Nos. 1 and 4 to 11 were not parties in the suit for specific performance of

a contract for sale of the contracted, property, a decree passed in such a suit shall not bind them and in that case, the respondent Nos. 1 and 4 to 11 would be at liberty either to obstruct execution in order to protect their possession by taking recourse to the relevant provisions of the CPC, if they are available to them, or to file an independent suit for declaration of title and possession against the appellant or respondent No.3. On the other hand, if the decree is passed in favour of the appellant and sale deed is executed, the stranger to the contract being the respondent Nos. 1 and 4 to 11 have to be sued for taking possession if they are in possession of the decretal property.

16. That apart, from a plain reading of the expression used in sub-rule (2), Order 1, Rule 10 of the CPC "all the questions involved in the suit" it is abundantly clear that the legislature clearly meant that the controversies raised as between the parties to the litigation must be gone into only, that is to say, controversies with regard to the right which is set up and the relief claimed on one side and denied on the other and not the controversies which may arise between the plaintiff/ appellant and the defendants inter se or questions between the parties to the suit and a third party. In our view, therefore, the court cannot allow adjudication of collateral matters so as to convert a suit for specific performance of contract for sale into a complicated suit for title between the plaintiff/appellant on one hand and Respondent Nos. 2 & 3 and Respondent Nos. 1 and 4 to 11 on the other. This addition, if allowed, would lead to a complicated litigation by which the trial and decision of serious questions which are totally outside the scope of the suit would have to be gone into. As the decree of a suit for specific performance of the contract for sale, if passed, cannot, at all, affect the right, title and interest of the respondent Nos. 1 and 4 to 11 in respect of the contracted property and in view of the detailed discussion made hereinearlier, the respondent Nos. 1 and 4 to 11 would, not, at all, be necessary to be added in the instant suit for specific performance of the contract for sale.

17. It is difficult to conceive that while deciding the question as to who is in possession of the contracted property, it would not be open to the Court to decide the question of possession of a third party/ or a stranger as first the lis to be decided is the enforceability of the contract entered into between the appellant and the respondent No.3 and whether contract was executed by the appellant and the respondent Nos. 2 and 3 for sale of the contracted property, whether the plaintiffs were ready and willing to perform their part of the contract and whether the appellant is entitled to a decree for specific performance of a contract for sale against the respondent Nos. 2 and 3. Secondly in that case, whoever asserts his independent possession of the contracted property has to be added in the suit, then this process may continue without a final decision of the suit. Apart from that, the intervener must be directly and legally interested in the answers to the controversies involved in the suit for specific performance of the contract for sale. In Amol v. Rasheed Tuck and Sons Ltd. (1956(1) All Eng. Reporter, 273) it has been held that a person is legally interested in the answers to the controversies only if he can satisfy the Court that it may lead to a result that will effect him legally.

19. The learned counsel appearing for the respondent Nos. 1 and 4 to 11, however, contended that since the respondent Nos. 1 and 4 to 11 claimed to be in possession of the suit property on the basis of their independent title to the same, and as the appellant had also claimed the relief of possession in the plaint, the issue with regard to possession is common to the parties including respondent Nos. 1 and 4 to 11, therefore, the same can be settled in the present suit itself. Accordingly, it was submitted that the presence of respondent Nos. 1 and 4 to 11 would be necessary for proper adjudication of such dispute. This argument

which also weighed with the two courts below although at the first blush appeared to be of substance but on careful consideration of all the aspects as indicated hereinearlier, including the scope of the suit, we are of the view that it lacks merit. Merely, in order to find out who is in possession of the contracted property, a third party or a stranger to the contract cannot be added in a suit for specific performance of the contract for sale because the respondent Nos. 1 and 4 to 11 are not necessary parties as there was no semblance of right to some relief against the respondent No.3 to the contract. In our view, the third party to the agreement for sale without challenging the title of the respondent No.3, even assuming they are in possession of the contracted property, cannot protect their possession without filing a separate suit for title and possession against the vendor. It is well settled that in a suit for specific performance of a contract for sale the lis between the appellant and the respondent Nos. 2 and 3 shall only be gone into and it is also not open to the Court to decide whether the respondent Nos. 1 and 4 to 11 have acquired any title and possession of the contracted property as that would not be germane for decision in the suit for specific performance of the contract for sale, that is to say in a suit for specific performance of the contract for sale the controversy to be decided raised by the appellant against respondent Nos. 2 and 3 can only be adjudicated upon, and in such a lis the Court cannot decide the question of title and possession of the respondent Nos. 1 and 4 to 11 relating to the contracted property."

6. There is no illegality or perversity in the order passed by the learned Civil Judge (Sr. Divn.), Court No. 1, Amb dated 3.3.2014. Accordingly, the petition is dismissed.

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

Deepak Verma .....Petitioner.

Versus

State of H.P. & ors. .....Respondents.

CWP No.8020 of 2014.
Decided on: 5.11.2014.

Constitution of India, 1950- Article 226- Respondent No. 3 had issued an advertisement on 13.12.2011 for filling up the post of PGT (Informatics Practices) - petitioner was called for viva-voce - petitioner stated that he had answered question No. 155 correctly- respondent had changed the answer from A to C - dictionary showed that answer to question 155 was A- respondent directed to revise the list and to recommend the name of the petitioner in case he was found eligible. (Para-4)

For the petitioner: Mr.Sanjeev Bhushan, Advocate.
For the respondents: Mr. M.A.Khan, Addl. AG, for the respondent-State.
Ms. Archna Dutt, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Short reply not filed. The right to file reply is closed.

2. Respondent No. 3 issued an advertisement on 13.12.2011 for filling up the post of PGT (Informatics Practices). The petitioner also participated in the selection process. He appeared in the written test on 5.8.2012. The petitioner was called for viva-voce on 26.6.2013. According to the petitioner, he has answered question No. 155 by giving option 'A' correctly. Question No. 155 reads as under:

> "155. Choose the correct spellings from the alternative A, B, C & D each of the following questions:
>
> (A) Supersede (B) Superseed
> (C) Supercede (D) Superceed."

3. We have gone through Annexure P-5, Answer-key. The petitioner has opted for 'A', however, in the revised answer key, the answer has been changed from 'A' to 'C'. The standard spelling is 'supersede' rather than 'supercede'. The action of the respondents of revising the key answer from 'A' to 'C' was palpably wrong.

4. Accordingly, the writ petition is allowed. The answer to question No. 155 in revised answer key Annexure P-6, i.e. from 'A' to 'C' is quashed and set aside. It is declared that the correct answer was 'A' as per Annexure P-5. Respondent No. 3 is directed to revise the result within a period of two weeks from today and thereafter to recommend the name of the petitioner for the post of PGT (Informatics Practices), within one week thereafter. The appointment letter shall be issued by respondent-State within one week after the receipt of the recommendation from respondent No. 3, if necessary, by creating supernumerary post.

5. Pending application(s), if any shall also stand disposed of.

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

Giano Devi and others. …Appellants.

Versus

Bishan Singh and others. …Respondents.

RSA No. 513 of 2014
Decided on: 5.11.2014

H.P. Land Revenue Act, 1954- Section 129 read with 171- Plaintiff had raised question of the title before the Revenue Officer- Revenue Officer observed that relief can be sought from an appropriate Civil Court- held, that Revenue Officer should have decided the question by converting himself into civil court or he should have relegated the parties to approach the civil court -he should not have proceeded with the matter, thus, order passed by Revenue Officer was not in accordance with law. (Para-19 and 22)

Case referred:
Leetho vs. Chamelo and others, 2001 (2) S.L.C. 238

For the Appellants: Mr. V.D. Khidtta, Advocate.
For the Respondents: Nemo.

The following judgment of the Court was delivered:

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

This Regular Second Appeal is directed against the judgment and decree dated 13.6.2014 rendered by the Additional District Judge, Sirmaur District at Nahan in Civil Appeal No. 30-N/13 of 2014/12.

2. "Key facts" necessary for the adjudication of this Regular Second Appeal are that respondent-plaintiff (hereinafter referred to as the "plaintiff" for convenience sake) has filed a suit for declaration to the effect that he alongwith proforma defendants No. 4 to 13 were only co-owners in possession of land comprised in Khasra No. 15 measuring 12-18 bighas and Khasra No. 62 measuring 2-12 bighas, kita 2 total land measuring 15-10 bighas situated in Mauza Shyampur-Gorkhuwala, Tehsil Paonta Sahib, District Sirmaur (hereinafter referred to as the "suit land" for brevity sake) and the appellants-defendants (hereinafter referred to as 'defendants' for convenience sake) have no right, title and interest in the property of late Sh. Mehru. Earlier Mangta son of Kharku was owner in possession of the suit land and after his death, suit land was inherited by plaintiff and proforma defendants No.4 to 9 vide mutation No. 208. Mehru son of Mangta was unmarried who died issueless. Defendants in connivance with the revenue staff got recorded themselves as legal heirs of Mehru, whereas they were the legal heirs of Tultu resident of village Sataun. Defendants were not related with the plaintiff and proforma defendants. Defendant Daulat Ram sold his land of village Sataun to Sh. Uday Ram son of Layak Ram, resident of village Poka vide sale deeds dated 13.2.1997 and 26.12.1998. Giano Devi had relinquished her share in favour of defendant Daulat Ram vide release deed dated 12.3.1996. In these documents defendants have been shown son and daughter of Tultu resident of village Sataun. In the year 2002, contesting defendant filed an application for partition before the Assistant Collector 1st Grade, Paonta Sahib. Plaintiff and proforma defendants being illiterate could not engage any counsel and their statements were recorded to partition the land. When the plaintiff and proforma defendants came to know about the land under partition and status of defendants, they engaged the counsel and came to know that defendants were claiming the share of late Sh. Mehru by showing themselves to be the legal heirs of late Sh. Mehru. Plaintiff and proforma defendants filed objections before the Assistant Collector 1st Grade, Paonta Sahib that defendants were not the legal heirs of late Sh. Mehru. However, the objections were rejected in an illegal manner by the Assistant Collector 1st Grade, Paonta Sahib vide order dated 13.10.2003 and 20.10.2003. He sanctioned the partition vide order dated 27.12.2003. Cause of action had arisen to the plaintiff on 12.8.2004 when defendants tried to dispossess the plaintiff and proforma defendants from the suit land. Defendant Daulat during the pendency of the suit has alienated his share in the suit land through registered sale deed No. 1416 dated 1.12.2007 to Naresh Kumar son of Ram Darshan, resident of Gorkhuwala, Tehsil Paonta Sahib. Defendants Giano Devi and Nirmala Devi have alienated their shares in the suit land through registered sale deed No. 1195 dated 11.10.2007 to Rajender Singh son of Gian Chand, resident of Mehal Dhabon, Tehsil Nahan, District Sirmaur. According to the plaintiff, defendants were sons and daughter of late Sh. Tultu son of Nandu, resident of village Sataun, Tehsil Paonta Sahib. The succession of Mehru of his land in favour of defendants and subsequent sale of the suit land by defendants No.1 to 3 to defendants No.13 and 14 through registered sale deeds No.1406 and 1195 dated 1.12.2007 and 11.10.2007 were illegal and fraudulent.

3. Defendants No.2 and 3, namely, Giano Devi and Nirmala Devi have filed written statement. They have taken plea under section 11 of the Code of Civil Procedure. According to them, Revenue Officer has already decided all the questions involved in the suit in the partition case No. 71/2002. Mode of partition was framed by the Assistant Collector 1st Grade. After framing of the mode of partition, the Assistant Collector 1st Grade ordered the lower Revenue Staff to partition the land in accordance with the share, kind and quality of the land and on the basis of the order of Revenue Officer, partition of the suit land was effected on the spot. Khatauni alongwith tatimas of the land allotted to each of the co-sharer of the Khata were prepared by the revenue staff. All the co-sharers were present before Revenue Officer. They made their statements of the correctness of the partition on the spot. Bishan Singh, Durga Ram,

Shakuntla filed objections about the non-acceptance of the partition. Their objections were dismissed on 20.10.2003. Thereafter, instrument of partition was ordered on 27.12.2003. According to them, instrument of partition was framed. Plaintiff and proforma defendants did not file any appeal against the order of Revenue Officer nor challenged the order before District Judge. It was stated that Mehru son of Mangta was married with Smt. Jamni .Defendants No.1 to 3 were born from the loin of Mehru son of Mangta and after the death of Mehru son of Mangta, mutation No. 1083 dated 2.12.1989 was attested in favour of defendants No.1 to 3 and Smt. Jamni Devi, being son, daughters and widow of late Sh. Mehru. Revenue entries incorporated in the revenue record in favour of defendants No.1 to 3 were legal and correct. It was admitted that defendant No.2 had relinquished her share in favour of defendant No.1. It was further stated that Jamni Devi, mother of defendants No.1 to 3 was married to one Tultu resident of village Sataun and after his death, she married to Mehru son of Mangta, father of answering defendants.

4. Defendants No.4 and 7 to 9 have also filed written statement. They have admitted paras 1 to 9 of the plaint.

5. Proforma defendants No.10 to 12 have also filed separate written statement. According to them, they became owners by registered sale deed executed by Bishan Singh, plaintiff and his brother, namely, Ranjeet Singh on 17.7.1997 and sale deeds dated 21.1.1996, 11.4.1996 and 24.10.2003. They were in exclusive possession as per their share of land sold by plaintiff and his brother Ranjeet Singh.

6. Defendant No.5 has also filed written statement stating therein that after the death of Mehru son of Mangta, plaintiff Durga Ram and answering defendant were cultivating their shares separately. Defendants No.1 to 3 have no right, title and interest in the suit land and their names as legal heirs of deceased Mehru have wrongly been entered in the revenue record.

7. Plaintiff has filed replication to the written statement filed by defendants. Issues were framed by the Civil Judge (Senior Division) on 19.1.2007 and 11.9.2009. Learned Civil Judge (Senior Division) decreed the suit vide judgment and decree dated 31.1.2012. Defendants filed an appeal before the District Judge, Sirmaur District at Nahan. He dismissed the same on 13.6.2014. Hence, the present Regular Second Appeal.

8. Mr. V.D. Khidtta, learned counsel for the appellants, on the basis of substantial questions of law framed, has vehemently argued that jurisdiction of civil court was barred under section 171 of the Himachal Pradesh Land Revenue Act, 1954. He has also contended that both the courts below have not correctly appreciated the documents Ex.PW-1/A, Ex.PW-2/B and Ex.PW-2/E. He has also referred to documents Ex.DW-1/A to Ex.DW-1/P and Ex.DW-2/B to Ex.DW-2/E. According to him, defendants were legal heirs of Mehru.

9. I have heard the learned counsel for the parties and have gone through the judgments passed by both the courts below.

10. Since all the substantial questions of law are interconnected and interlinked, the same are taken together for determination to avoid repetition of discussion of evidence.

11. According to Ex.PW-2/C, Jamabandi for the year 1962-1963, mutation of inheritance of the property of Mangta bearing No.208 was attested on 3.6.1967 in favour of Mehru, Rania, Durga Ram, Bishan Singh, Phool Singh and daughter Smt. Shakuntla Devi and Narda Devi. They have inherited the property of Mangta after his death.

12. PW-1 Ramesh Kumar has brought the summoned record and copy of certificate Ex.PW-1/A.

13. PW-2 Bishan Singh, plaintiff, has tendered his evidence by way of affidavit Ex.PW-2/A. He came to know that Daulat Ram sold his land to Naresh and Giano Devi and Nirmala sold the land to Rajender. They could not sell the land because they were not the owners of the land. He and Durga Ram were the owners. Defendants were sons of Tultu. He has proved copy of sale deed Ex.PW-2/K vide which Daulat Ram has sold land to Naresh Kumar and copy of sale deed Ex.PW-2/L vide which Giano Devi and Nirmala Devi have sold their land to Rajinder Singh. He has admitted that Giano Devi and Nirmala Devi had filed an application before Tehsildar for partition of land. He has denied that on 7.8.2002, he appeared before the Tehsildar and deposed that he has no objection with regard to partition.

14. DW-1 Deep Chand Sharma, Senior Assistant from Tehsil Office has brought the summoned record and certified copies were Ex.DW-1/A to Ex.DW-1/P. He has admitted that he has seen the objections filed by Bishan Singh in the summoned file vide Ex.PW-2/J.

15. DW-2 Giano Devi has led her evidence by way of affidavit Ex.DW-2/A. She has furnished documents Ex.DW-2/B to Ex.DW-2/E. She has denied that Jamni was the wife of Tultu. She has denied that from the loin of Jamni and Tultu, Daulat, Ginao and Nirmala were born. She has denied that Tultu died in the year 1972. Volunteered that he died about 45 years back. She did not know that after the death of Tultu, mutation of his property was attested in favour of Sundlu, Daulat Ram, Kamla, Satya and Giano and her mother Jamni on 8.3.1972. She has admitted that the land of Tultu was inherited by her. She by preparing relinquish deed on 12.3.1996 has given this land to her brother Daulat Ram.

16. DW-3 Naresh Kumar has purchased 18 biswas of land from Daulat Ram situated in Mauza Shyampur Gorkhuwala for consideration of Rs.1,00,000/- through sale deed Ex.PW-2/K. According to him, the land was inherited by Daulat Ram from his father Mehar Singh. In his cross-examination, he has admitted that Mehar Singh belonged to Shyampur-Gorkhuwala and name of his father was Mangta. He has also admitted that name of mother of Daulat Ram was Jamni. He has denied that Jamni was the wife of Tultu. Volunteered that she was the wife of Mehru. He did not know when Tultu died and the mutation of inheritance of his property was attested in favour of his sons Sundlu, Daulat Ram, daughters Kamla, Satya and Giano Devi and his wife Jamni Devi dated 8.3.1972 vide mutation No. 598.

17. DW-4 Daulat Ram has deposed that his mother's name was Jamni Devi. She was married with Tultu. After the death of Tultu, Jamni was married with Mehar Singh. His mother Jamni Devi was having two children from loin with Tultu such as Sundlu and Satya Devi. His mother was having three children from Mehar Singh such as Giano Devi, Nirmala Devi and he himself. His father Mehar Singh was working in P.W.D. He died on 13.10.1989. He performed the last rites of his father. After the death of his father, all benefits were taken by his mother Jamni and he took the job at the place of his father. Case of partition was filed in the court of Tehsildar, Paonta Sahib. He received 18 biswas of land by way of partition. He has sold the land to Naresh Kumar by way of registered sale deed for consideration of Rs. 1,00,000/-. He has delivered the possession of the land to Naresh Kumar. He has no relation with Tultu. He was born on 15.11.1967. He has denied that Tultu died in the year 1971. Volunteered that he died prior to 1965. He did not know whether mutation of inheritance of property of Tultu was attested on 14.2.1972. He has admitted that Giano Devi vide relinquishment deed Ex.PW-2/G relinquished her share in his favour of the land.

18. PW-5 Ramesh Kumar has proved copy of Pariwar register Ex.PW-5/A. He has admitted in his cross-examination that Jamni Devi was recorded the wife of Mehar Singh after his death. He has prepared Ex.PW-1/A.

19. The core issue involved in this Regular Second Appeal is whether the defendants are sons and daughter of Mehar Singh or they are sons and daughter of Tultu. According to Sajra Nasab Ex.PW-2/E, Tultu was having sons and daughters Daulat Ram, Sundlu, Kamla, Satya, Giano Devi and his wife was Jamni Devi. According to copy of Pariwar Register of Tultu of Gram Panchayat Sataun Ex.PW-1/A, Jamni Devi was the wife of Tultu and Kamla, Sundlu, Satya and Daulat Ram were shown sons and daughters. In sale deed Ex.PW-2/F, qua the land of Tultu in favour of Uday Ram, Daulat Ram has written his parentage in the name of Tultu. Similarly, Giano Devi has also relinquished her share received by her of the land of Tultu in favour of her brother Daulat Ram vide release deed Ex.PW-2/G in the year 1996. It also shows Giano Devi as the daughter of Tultu. In her examination-in-chief, DW-2 Giano Devi has deposed that she did not know Tultu. However, in her cross-examination, she has admitted that the property of Tultu which she received has been released by her in favour of Daulat Ram on 12.3.1996. Defendants have produced copy of Pariwar register Ex.DW-5/A wherein Jamni Devi has been shown as wife of Mehar Singh vide resolution No.4 dated 6.11.1989. However, Mehar Singh has been shown as dead on 13.10.1989. This document also reflects that Jamni Devi in the first column was wife of Tultu. PW-1 Ramesh Kumar did not know how Mehar Singh's name was recorded in Ex.DW-5/A and how Jamni Devi was shown as wife of Mehar Singh when he has died on 13.10.1989. According to Ex.DW-2/D, land of Tultu was inherited by Jamni Devi as his wife, vide mutation No.598. Mutation was attested on 8.3.1972. Defendants have not produced any documents on the basis of which Jamni Devi is proved to be married to Mehar Singh vide Ex.DW-5/A. Plaintiff and proforma defendants have appeared before the Assistant Collector 1st Grade and raised the question of title and despite that Assistant Collector 1st Grade has passed the order of partition. It is evident from section 129 of the Himachal Pradesh Land Revenue Act, 1954 when there is a question as to title in any of the property of which partition is sought, the Revenue Officer may decline to grant the application for partition until the question has been determined by a competent court or he may himself proceed to determine the question as though he were such a court. The Assistant Collector 1st Grade has not converted himself to civil court after the question of title was raised. According to section 171 (2) (xvii) of the Himachal Pradesh Land Revenue Act, 1954 any claim for partition of an estate, holding or tenancy or any question connection with or arising out of proceedings for partition not being a question as to title in any of the property of which partition is sought. In the instant case, since question of title was raised, jurisdiction of civil court would not be ousted as per section 171 (2) (xvii) of the Himachal Pradesh Land Revenue Act, 1954. According to document Ex.PW-2/H, Ex.DW-1/B, Ex.DW-1/C, Ex.DW-1/D and Ex.DW-1/E, Bishan Singh, Durga Ram etc. had preferred objections before the Assistant Collector 1st Grade stating that contesting defendants were legal heirs of Tultu and not of Mehar Singh. However, surprisingly, Assistant Grade 1st Grade in his order vide Ex.DW-1/N and Ex.DW-2/H has observed that relief could be sought from the appropriate competent civil court. He should have decided the question by converting himself into civil court when the question of title was raised or in the alternate he should not have proceeded with the matter and should have relegated the parties to approach the civil court before passing order. Thus, order passed by Assistant Collector 1st Grade dated 13.10.2003, 20.10.2003 and 27.12.2003 were bad in law.

20. This Court in ***Leetho*** vs. ***Chamelo and others***, 2001 (2) S.L.C. 238 has held as under:

> **"11. Therefore, in the light of settled legal position this Court has no hesitation to hold that in the facts and circumstances of the present case the Civil Court had the jurisdiction, as question of title was raised by the plaintiff by making; allegations that the land in dispute stood partitioned long back, as a result of which he was**

holding the land comprised of four Khasra numbers (1632/ 406, 1636/407, 425 and 1646/472) allotted to him, to the exclusion of other co-sharers. There was additional reason for invoking the jurisdiction of the Civil Court on the allegations that the impugned order dated 21.9.1983 partitioning the land in dispute was passed ex parte without proper service on the plaintiff; in violation of the principles of natural justice and without following the procedure laid down under H.P. Land Revenue Act. In this view of the matter, the findings of the first appellate Court that the Civil Court had no jurisdiction to entertain the suit of the plaintiff are set aside and substantial question of law No. 1 is answered accordingly."

21. According to Ex.DW-2/D, Jamabandi for the year 1970-71 and mutation No. 598, the property of Tultu was inherited by Jamni Devi as wife, his sons Sandlu, Daulat Ram and daughters Kamla and Satya. The mutation was attested on 8.3.1972. Defendant Daulat Ram while appearing as DW-4 has stated that the land of Tultu Ram was sold by him to Uday Ram through registered sale deed Ex.PW-1/F. Defendant Daulat Ram during the pendency of the suit has alienated his share vide Ex.PW-2/K. Defendants No.2 and 3 have alienated the land through registered sale deed Ex.PW-2/L. They have not sought permission of the Court before selling their respective shares to defendant Nos. 13 and 14. Thus, sale deed Nos. 1416 and 1195 dated 1.12.2007 and 11.10.2007, i.e. Ex.PW-2/K and Ex.PW-2/L have rightly been declared illegal and void by both the courts below. Accordingly, it is held that the civil court had jurisdiction to decide the suit.

22. Order of partition and subsequent preparation of instruction of partition were illegal since Assistant Collector 1st Grade has not decided the issue in accordance with law either by converting himself as civil court or asking the parties to approach the civil court.

23. Both the courts below have correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgments passed by both the courts below.

24. Accordingly, in view of the analysis and discussion made hereinabove, no question of law much less to say substantial of law is involved in the Regular Second Appeal and the same is dismissed. Pending application, if any, also stands disposed of. No costs.

****

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

State of Himachal Pradesh & others .....Petitioners.

Versus

Sh. Inder Singh .....Respondent.

CWP No. 2648 of 2013.

Reserved on: 31st October, 2014.

Date of Decision :5th November, 2014.

Industrial Dispute Act, 1947- Section 25(f)- petitioner was engaged as a daily wage workman - he was retrenched and made a reference to Learned Labour Court-cum-Industrial Tribunal, which held that the retrenchment was bad and was liable to be set aside- held, that if workman had completed 240 days of service with or without interruptions, it constitutes completion of 240 days of service and the employer is under an obligation to comply with Section 25(f) of Industrial Dispute Act. (Para-5)

Industrial Dispute Act, 1947- Section 25- Delay- State contended that claimant had made a reference before the Industrial Tribunal which was barred by limitation- held, that question of limitation is to be decided by an appropriate Govt. and once a reference was not questioned- award on such reference cannot be questioned on the ground of delay. (Para-8)

Cases referred:

Surendranagar District Panchayat versus Dahyabhai Amarsinh (2005)8 SCC 750

General Manager, Harayana Roadways Vs. Rudhan Singh (2005)5 SCC 591

Karan Singh versus Executive Engineer, Haryana State Marketing Board, (2007)14 SCC 291

For the Petitioners: Mr. Vivek Singh Attri, Deputy Advocate General.
For the respondent: Mr. Rahul Mahajan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The respondent in the writ petition was engaged as a daily waged workman by the petitioners herein. He claimed that though, he had rendered "continuous service" under the petitioners herein for not less than one year, yet he was retrenched in blatant transgression of the mandate of Section 25-F(a) of the Industrial Disputes Act, 1947 envisaging therein an enshrined mandatory obligation upon the employer to, preceding retrenchment of the workman, as also, to render it valid, serve one month's notice in writing upon him indicating therein the reasons for retrenchment or the employer defraying to him in lieu of notice, wages for the period of notice, besides in case one month's notice in writing has come to be served upon the workman, a valid retrenchment/disengagement would occur only when the period of notice has expired. Therefore, he contends that his retrenchment/disengagement at the instance of the petitioners is non est and is liable to be quashed and set aside. The grievance aforesaid of the respondent constrained the "appropriate government" to formulate a reference for adjudication by the Labour Court-com-Industrial Tribunal, Dharamshala. The reference which was to be adjudicated upon by the Labour Court-cum-Industrial Tribunal Dharamshala was couched in the hereinafter extracted phraseology:-

> "Whether termination of the services of Sh. Inder Singh s/o Shri Jagat Ram by the Executive Engineer, HPPWD Division No.-II, Kullu, District Kullu, H.P. w.e.f. 30.10.19099 without following the provisions of the Industrial Disputes Act, 1947 as alleged by the workman is proper and justified? If not, what relief of service benefits including seniority and compensation the above workman is entitled to?"

2. The learned Labour Court-cum-Industrial Tribunal, on a consideration of the material as it was seized with comprised in the mandays chart divulging the period of service rendered by the workman/respondent herein with the petitioners herein/his employers, inasmuch as its displaying that he had in the year preceding to his retrenchment rendered 240 days of service under the petitioners/his employers, was constrained to conclude that despite his having rendered the requisite period of "continuous service" within the ambit of Section 25-F of the Industrial Dispute Act, his retrenchment having not been preceded by compliance by the petitioners/his employers with the mandatory obligation envisaged under Section 25-F(a) of the Industrial Disputes Act, rendered his disengagement/retrenchment to be liable to be quashed and

set aside. The relevant provisions of Section 25-F of the Industrial Disputes Act read as under:

> "S.25-F. Conditions precedent to retrenchment of workmen- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-
>
> (a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:
>
> (b).....
>
> (c)....."

3. The import of the phraseology "continuous service" existing in Section 25-F of the Industrial Dispute Act has to be fathomed as well as grasped, as comprehension of its signification would facilitate this Court to render a determination qua the factum of the respondent having or having not rendered "continuous service" within the ambit of the phrase "continuous service" existing in Section 25-F of the Industrial Disputes Act so as to then concomitantly make it incumbent upon the employers/the petitioners herein, to further for rendering his disengagement to be valid, comply with the provisions of Section 25-F of the Industrial Disputes Act.

4. The definition of the phrase "continuous service" exists in Section 25-B of the Industrial Disputes Act which provisions are extracted hereinbelow:-

> "**25-B. Definition of continuous service**:- For the purpose of this chapter,-
>
> (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
>
> (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
>
> (a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
>
> (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
>
> (ii) two hundred and forty days, in any other case;
>
> ....."

5. The learned Deputy Advocate General contends on the strength of the definition of "continuous service" existing in Section 25-B(1) of the Industrial Disputes Act, that when the provisions thereof define "continuous service" to be a period of continuous service uncircumscribed qua its duration/time, rather with sub section (1) of Section 25-B of the Industrial Disputes Act, treating and construing "continuous service" to be only a period of uninterrupted service and interruptions in "continuous service" of a workman under his employers sequeled by sickness, authorized leave or an accident or a strike or a lock out or a cessation of work which is not due to any fault on the part of the workman, not constituting any break or cessation in the continuity in service of a workman under his employer, the mandate therein is to be imported into the definition of "continuous service" existing in sub section

(2) of Section 25-B of the Industrial Disputes Act, besides he contends that both sub sections (1) and (2) of Section 25-B of the Industrial Disputes Act have to be read in harmony or conjunctively. In the above manner in which he reads the provisions of Section 25-B of the Industrial Disputes Act, he contends that though it is displayed by the mandays chart of the respondent herein comprised in Annexure P-2, that he in the year preceding his retrenchment had rendered 240 days of service, nonetheless, when as also disclosed therein of his in the months of October, 1998 and July, 1999, having omitted to perform duty under the petitioners/his employers and when such interruption in his "continuous service" under the respondents is not sequeled by proof of existence of the prescribed statutory reasons engrafted in sub section (1) of Section 25-B of the Industrial Disputes Act, such breaks in his continuity of service or such interruptions in his continuity of service under the petitioners herein being, hence, statutorily uncondonable, do not render his service under his employers to be constituting "continuous service", within the ambit of Section 25-F of the Industrial disputes Act, even if, otherwise the respondent herein has rendered 240 days of service under the petitioners herein/his employers. In fathoming the vigour of the contention of the learned Deputy Advocate General, it is necessary initially to dwell upon the factum whether sub section (1) and sub section (2) of Section 25-B of the Industrial Disputes Act ought to be read in harmony or in conjunction or the provisions aforesaid stand in mutual exclusion to each other and as such they are to be construed disconjunctively. Only on this Court construing that both sub sections (1) and (2) of Section 25-B of the Industrial Disputes Act stand in mutual exclusion to each other or are to be read disconjunctively, that the contention of the learned Deputy Advocate General would stand dispelled. The fact that both sub sections (1) and (2) of Section 25-B of the Industrial Disputes Act stand in mutual exclusivity to each other, is apparent on a plain reading of the two provisions which exist in contradistinct sub sections. On a plain literal construction of sub section (1) of Section 25-B of the Industrial Disputes Act, it is apparent that it is mandatorily enjoined therein that "continuous service" as envisaged therein is for a period un-fettered in duration, yet it prescribes conditions or valid statutory grounds which when proved, do not, even if, they occur during the period of service of a workman/employee, sequel a break in the "continuous service" of a workman under his employer. However, when sub section 2 commences with the phraseology that where a workman is not in "continuous service" within the meaning of sub section (1), yet by a statutory fiction shall be deemed to be in "continuous service" under his employer in case during the 12 calendar months preceding the date with reference to which calculation is to be made, he has rendered 190 days in case of a workman employed below ground in a mine and 240 days in any other case, as is the case of the petitioner, his not being employed below the ground in a mine, as such it procreates a provisions direly contradistinct to the provision existing in the preceding sub section or hence it constitutes exception to the definition of "continuous service" existing in the prior sub section. When on a plain reading of sub section (1) and sub section (2) of Section 25-F of the Industrial Dispute Act defining "continuous service" it is neither apparent nor clear that the provisions therein either envisage or contemplate a harmonious reading of sub section (1) and sub section (2), so as to accept the submission of the learned Deputy Advocate General, rather when qua a workman not falling in the category of a workman qua whom 'continuous" service is to be reckoned in a distinct manner as enshrined in sub section (1), rather the reckoning of rendition of "continuous service" qua such workman is to be made in a starkly distinct manner and fashion exclusively defined in sub section (2). Cumulatively, besides when workmen falling in the category qua whom computation of "continuous service" is to be made in the specific manner enshrined in sub section (1) of Section 25-B of the Industrial Disputes Act, comprise a category distinct from the category of workmen falling in the category qua whom reckoning of "continuous service" is to be made in a distinct fashion, as enunciated in sub section (2) of Section 25-B of the Industrial

Disputes Act, in sequel, both sub sections (1) and (2) of Section 25-B of the Industrial Disputes Act stand in exclusion to each other, especially when they mandate the reckoning of "continuous service" qua distinctly spelt categories of workmen in a distinctly enunciated manner. Consequently, for reiteration when, hence, sub section (2) is in exclusion to sub section (1), the provisions of sub section (2) are to be read independently to the provisions of sub section (1). As a concomitant then for the reckoning of the period of "continuous service" qua the respondent herein, inasmuch as qua the factum of computation of his having rendered 240 days of 'continuous service" under his employer for his, hence, being entitled to the protection as envisaged under the provisions of Section 25-F(a) of the Industrial Disputes Act, there is no necessity of any interruptions or cessations, if any, in his service of 240 days under his employer in the year preceding his retrenchment being enjoined to be proven to be validated by the statutory prescriptions enunciated in Section 25-B(1) of the Industrial Disputes Act. Rather, when it is suffice that in case his mandays chart reflect his having rendered 240 days of service under his employers, even if, with or without interruptions or with or without breaks, it constitutes completion of 240 days of service under his employers, so as to then entail upon the obligation to comply with the mandate of Section 25-F(a) of the Industrial Disputes Act. Consequently, the submission made by the learned Deputy Advocate General that when the interruptions in his service under his employer is not on account of proven/existence of statutory prescriptions occurring in sub section (1) of Section 25-B of the Industrial Disputes Act, hence, even if, he rendered 240 days of service under his employers before his retrenchment, it does not constitute "continuous service" under his employers for the purpose of giving him the protection of Section 25-F(a) of the Industrial Dispute Act is rendered rudderless. At this stage, it is apt to cite a judgment of the Hon'ble Apex Court reported in ***Surendranagar District Panchayat versus Dahyabhai Amarsinh (2005)8 SCC 750***, the relevant paragraph No.8 of which is extracted hereinafter, which sustains and gives succor to the interpretation rendered by this Court on sub sections (1) and (2) of Section 25-B of the Industrial Disputes Act defining "continuous service", as also, gives fillip to the conclusion formed by this Court that the import of "continuous service" as existing in sub Section 2 of Section 25-B of the Industrial Disputes Act qua workmen of the category to which the respondent herein belongs, is of his having rendered at least 240 days period of work under his employers, irrespective of whether he has not worked throughout the year under his employer and irrespective of the fact that his breaks or interruptions in service are proven to be validly authorized by the statutory prescriptions enshrined in sub section (1) of Section 25-B of the Industrial Disputes Act. Relevant paragraph No.8 of the judgment reads as under:-

> "8. To attract the provisions of Section 25F, one of the condition required is that the workman is employed in any industry for a continuous period which would not be not less than one year. Section 25B of the Act defines continuous service for the purposes of Chapter V-A "Lay-off and Retrenchment". The purport of this Section is that if a workman has put in an uninterrupted service of the establishment, including the service which may be interrupted on account of sickness, authorized leave, an accident, a strike which is not illegal, a lock-out or cessation of work, that is not due to any fault on the part of the workman, shall be said to be a continuous service, for that period. Thus the workmen shall be said to be in continuous service for one year i.e., 12 months irrespective of the number of days he has actually worked with interrupted service, permissible under Section 25B. However, the workmen must have been in service during the period, i.e., not only on the date when he actually worked but also on the days he could not work under the circumstances set out in Sub-Section (1). The workmen must be in the employment of the employer concerned on the days he

has actually worked but also on the days on which he has not worked. The import of Sub Section(1) of Section 25B is that the workmen should be in the employment of the employer for the continuous, uninterrupted period for one year except the period the absence is permissible as mentioned hereinabove. Sub-section (2) of Section 25B introduces the fiction to the effect that even if the workman is not in continuous service within the meaning of Clause (i) of Section 25-B for the period of one year or six months he shall be deemed to be in continuous service for that period under an employer if he has actually worked for the days specified in clause (a) and (b) of Sub-s(2). By the legal fiction of Sub-s2(a)(i), the workmen shall be deemed to be in continuous service for one year if he is employed underground in a mine for 190 days or 240 days in any other case. Provisions of the Section postulate that if the workmen has put in at least 240 days with his employer, immediately prior to the date of retrenchment, he shall be deemed to have served with the employer for a period of one year to get the benefit of Section 25F."

6. Further fortification to the view aforesaid is lent by the mandate of the Hon'ble Supreme Court enshrined in ***General Manager, Harayana Roadways Vs. Rudhan Singh (2005)5 SCC 591,*** the relevant paragraph No.5 is extracted hereinbelow:-

"5. Learned counsel for the appellant has next submitted that according to the own case of the respondent he was appointed on 16.3.1988 and his services were terminated on 28.2.1989 and thus he had not worked for one year and consequently Section 25-F of the Act would not apply to his case. In support of this submission reliance has been placed on Sur Enamel and Stamping Works Ltd. vs. The Workmen [AIR 1963 SC 1914], wherein it was held that under Section 25-F of the Act only a workman, who has been in continuous service for not less than one year under an employer, is entitled to its benefit. Before a workman can be considered to have completed one year of continuous service in an industry it must be shown first that he was employed for a period of not less than 12 calendar months and next that during those 12 calendar months he had worked for not less than 240 days. It was further held that a workman, who has not at all been employed for a period of 12 months, would not satisfy the requirements of Section 25-B of the Act and would not be entitled to the benefit under Section 25-F of the Act. It is important to note that Section 25-B of the Act, which contains the definition of 'continuous service' was amended by Act No. 36 of 1964 and the relevant part thereof reads as under: -

"25-B. Definition of continuous service.- For the purpose of this Chapter, -

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

Explanation. - (omitted as not relevant for the present case)"

This amended provision has been considered in Surendra Kumar Verma vs. The Central Government Industrial Tribunal-cum- Labour Court [AIR 1981 SC 422], where after noticing the ratio of Sur Enamel and Stamping Works Ltd. vs. The Workmen (AIR 1963 SC 1914), it was held as under: -

> "Act 36 of 1964 has drastically changed the position. S. 2(eee) has been repealed and S. 25-B(2) now begins with the clause "where a workman is not in continuous service ..... for a period of one year". These changes brought about by Act 36 of 1964 appear to be clearly designed to provide that a workman who has actually worked under the employer for not less than 240 days during a period of twelve months shall be deemed to have been in continuous service for a period of one year whether or not he has in fact been in such continuous service for a period of one year. It is enough that he has worked for 240 days in a period of 12 months; it is not necessary that he should have been in the service of the employer for one whole year. ....."

In view of this authoritative pronouncement the requirements of Section 25-F of the Act would be satisfied if a workman has worked for 240 days in a period of 12 months and it is not necessary that he should have been in the service of employer for complete one year. The Industrial Tribunal-cum-Labour Court has recorded a finding that the respondent has worked for 264 days and this finding has not been challenged before the High Court. In this view of the matter the provisions of Section 25-F of the Act are clearly applicable and as neither any notice or wages in lieu of the period of notice nor any retrenchment compensation was paid to the respondent, his termination of service has to be held to be invalid."

7. In aftermath it is invincibly concluded that the findings and conclusions arrived at by the learned Labour Court-cum-Industrial Tribunal, Dharmshala qua the factum of the respondent herein having rendered 240 days of continuous service under the petitioner herein/his employers is sustainable, also as a corollary the submission of the learned Deputy Advocate General stands discountenanced.

8. The learned Deputy Advocate General has concerted to also contend that given the factum that the respondent stood retrenched from service in the year 1999, his having raised an industrial dispute qua his illegal retrenchment in the year 2010, consequently, the reference was stale and ought to have entailed dismissal. The above submission does not warrant acceptance in the face of the fact that the "appropriate government" had while formulating the reference couched/framed in the hereinabefore extracted phraseology had transmitted it to the Labour Court-cum-Industrial Tribunal, Dharamshala for adjudication thereon by the latter. It was for the "appropriate government" before making the reference to consider the fact whether the dispute raised by the workman/respondent herein constituted a stale claim or the claim was barred by delay and laches, hence, was un-referable. However, though the "appropriate government" applied its mind to the dispute as raised by the respondent herein, but it appears to have overlooked the factum of the purported staleness of the claim as raised by the workman. As a natural

corollary, when it then, hence, overlooked the fact of the purported staleness of the claim as raised by the workman, as such, it is to be construed to have, hence, abandoned the factum of the purported staleness of the claim raised by the workman and its having vitiated the impugned award. As a corollary when the petitioners herein constitute a part of the "appropriate government" are estopped from concerting or agitating before this Court that the claim raised by the workman is stale and necessitates dismissal. Besides, the petitioners herein are estopped from forestalling an adjudication by the learned Labour Court-cum-Industrial Tribunal, Dharamshala on the reference formulated in the phraseology extracted hereinabove. The natural inference which ensues is that dehors the factum of the purported staleness of the claim as raised by the workman, it having been omitted to be gone into rather having been overlooked as well as abandoned, the mere factum of delay, if any, does not constitute a valid ground for this Court to interfere with the adjudication by the Labour Court-cum-Industrial Tribunal on the reference made to it by the "appropriate government" especially when given the reference of the dispute to it by the "appropriate government, it was vested with the jurisdiction to decide it. Even if, the petitioners herein were aggrieved by the factum of the formulation of the reference comprising the industrial dispute formulated by the "appropriate government" carrying the stench of vitiation, inasmuch as its having omitted to apply its mind to the factum of the demand as raised by the workman being stale, hence, the demand or claim raised by the workman being un-referable for adjudication, the appropriate remedy was then available with the petitioners herein to approach the Writ Court for setting aside the reference. The petitioners having omitted to approach the writ Court for quashing of the reference on the ground of its comprising a stale claim, are now estopped from seeking relief from this Court that the award of the learned Labour Court-cum-Industrial Tribunal is permeated with a vice, inasmuch as it has adjudicated upon a reference which was unreferable being barred by time. In coming to the above conclusion, I am supported by the judgment of the Hon'ble Apex Court reported in **Karan Singh versus Executive Engineer, Haryana State Marketing Board, (2007)14 SCC 291**, the relevant paragraphs No.13 to 15 of which are extracted hereinbelow:-

> "13. In the present case, the Industrial Tribunal has held that the employer has violated Section 25F. If so, the order of termination is bad in law. It has to be struck down. In the present case, it has been struck down. However, the Tribunal had refused to grant any relief on the ground of delay. The Tribunal has no authority to invalidate the reference, particularly when it has found that the order of termination violates Section 25F of the Industrial Disputes Act, 1947.
>
> 14. In Sapan Kumar Pandit v. U.P. State Electricity Board and Ors., {(2001) 6 SCC 222}, it has been held, vide para 15, as follows: (SCC p.228)
>
> > "There are cases in which lapse of time had caused fading or even eclipse of the dispute. If nobody had kept the dispute alive during the long interval, it is reasonably possible to conclude in a particular case that the dispute ceased to exist after some time. But when the dispute remained alive though not galvanized by the workmen or the Union on account of other justified reasons, it does not cause the dispute to wane into total eclipse. In this case, when the Government have chosen to refer the dispute for adjudication under Section 4-K of the U.P. Act the High Court should not have quashed the reference merely on the ground of delay. Of course, the long delay for making the adjudication could be considered by the adjudicating authorities while moulding its reliefs. That is a different matter altogether. The High Court has obviously gone wrong in axing down the order of reference made

> by the Government for adjudication. Let the adjudicatory process reach its legal culmination."

15. “10. So far as delay in seeking the reference is concerned, no formula of universal application can be laid down. It would depend on facts of each individual case.

11. However, certain observations made by this Court need to be noted. In Nedungadi Bank Ltd. v. K.P. Madhavankutty and Ors. {2000 (2) SCC 455} it was noted at para 6 as follows: (SCC pp.459-60)

> "6. Law does not prescribe any time-limit for the appropriate Government to exercise its powers under Section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after a lapse of about seven years of the order dismissing the respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference under Section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under Section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made. The only ground advanced by the respondent was that two other employees who were dismissed from service were reinstated. Under what circumstances they were dismissed and subsequently reinstated is nowhere mentioned. Demand raised by the respondent for raising an industrial dispute was ex-facie bad and incompetent."

12. In S.M. Nilajkar and Ors. v. Telecom District Manager, Karnataka (2003 (4) SCC 27) the position was reiterated as follows: (SCC pp.39-40, para 17)

> "17. It was submitted on behalf of the respondent that on account of delay in raising the dispute by the appellants the High Court was justified in denying relief to the appellants. We cannot agree. It is true, as held in M/s. Shalimar Works Ltd. v. Their Workmen (supra) (AIR 1959 SC 1217), that merely because the Industrial Disputes Act does not provide for a limitation for raising the dispute it does not mean that the dispute can be raised at any time and without regard to the delay and reasons therefor. There is no limitation prescribed for reference of disputes to an industrial tribunal, even so it is only reasonable that the disputes should be referred as soon as possible after they have arisen and after conciliation proceedings have failed particularly so when disputes relate to discharge of workmen wholesale. A delay of 4 years in raising the dispute after even reemployment of the most of the old workmen was held to be fatal in M/s. Shalimar Works Limited v. Their Workmen (supra) (AIR 1959 SC 1217), In Nedungadi Bank Ltd. v. K.P. Madhavankutty and others (supra) AIR 2000 SC 839, a delay of 7 years was held to be fatal and disentitled to workmen to any relief. In Ratan Chandra Sammanta and others v. Union of India and others (supra) (1993 Supp (4) SCC 67), it was held that a casual labourer retrenched by the employer deprives himself of remedy available in law by delay itself, lapse of time results in losing the remedy and the

right as well. The delay would certainly be fatal if it has resulted in material evidence relevant to adjudication being lost and rendered not available. However, we do not think that the delay in the case at hand has been so culpable as to disentitle the appellants for any relief. Although the High Court has opined that there was a delay of 7 to 9 years in raising the dispute before the Tribunal but we find the High Court factually not correct. The employment of the appellants was terminated sometime in 1985-86 or 1986-87. Pursuant to the judgment in Daily Rated Casual Employees Under P&T Department v. Union of India (supra) (AIR 1987 SC 2342), the department was formulating a scheme to accommodate casual labourers and the appellants were justified in awaiting the outcome thereof. On 16-1-1990 they were refused to be accommodated in the scheme. On 28-12-1990 they initiated the proceedings under the Industrial Disputes Act followed by conciliation proceedings and then the dispute was referred to the Industrial Tribunal cum-Labour Court. We do not think that the appellants deserve to be non suited on the ground of delay."

The above position was highlighted recently in Sudamdih Colliery of Bharat Coking Coal Ltd. v. Workmen, { (2006)2 SCC 329}, SCC pp.334-36, paras 10-12 and Chief Engineer, Ranjit Sagar Dam v. Sham Lal, {(2006)9 SCC 124}"

9. For the foregoing reasons, there is no merit in this petition which is accordingly dismissed and the impugned award of the learned Labour Court-cum-Industrial Tribunal Dharamshala is affirmed and maintained. No costs.

10. The pending application(s), if any, also stand disposed of.

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

RSA Nos. 193 & 254 of 2014.
Decided on: 12th November, 2014

1. RSA No. 193 of 2014.

Sadhu Singh & Others .....Appellants.

Versus

Mohinder Singh & Others ...Respondents.

2. RSA No. 254 of 2014.

Sadhu Singh & Others .....Appellants.

Versus

Surjit Singh & Others ...Respondents.

Code of Civil Procedure, 1908- Order 43 Rule 1- Trial Court held that it had no jurisdiction to hear and entertain the matter and ordered the return of plaint for presentation before an appropriate Court- appeal was preferred under Order 43 Rule 1(a) of CPC which was treated as a Civil Appeal- held, that it was not permissible for the Court to treat an appeal under Order 43 Rule 1 (a) as a Civil Appeal - only an appeal under Order 43 Rule 1 (a) lies against the order returning the plaint - matter remanded with the direction to decide the same as appeal under Order 43 Rule 1(a). (Para-6 to 9)

For the appellants : Mr. Jyotsna Rewal Dua, Advocate.

For the respondents : Mr. R.K. Gautam, Senior Advocate with Mr. Gaurav Gautam, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

This judgment shall dispose of the present appeal and also connected one involving similar questions of law and facts for adjudication.

2. As a matter of fact, it is the plaintiffs, who are in second appeal before this Court in these appeals. Plaintiffs are common; however, the defendants are different in both the appeals.

3. In this appeal (RSA No. 193 of 2014) the subject matter of dispute is land entered in Khata Khatauni No. 25/118, Khasra No.300, measuring 1045 square meters, situated at Mauza Shubkhera, Tehsil Paonta Sahib, District Sirmaur, H.P. Plaintiffs claim themselves to be owners-in-possession of the suit land. Similarly, in the connected appeal (RSA No. 254 of 2014), they claim themselves to be the owners-in-possession of the land entered in Khata Khatauni No. 25/117, Khasra No.299, measuring 892.95 square meters, situated at Mauza Shubkhera, Tehsil Paonta Sahib, District Sirmaur, H.P. The predecessors of the plaintiffs had family relations with one Gita Ram S/o Shri Chuni Lal, a rich and influential person having business at Paonta Sahib, therefore, their predecessors had given land, the subject matter of dispute in both suits, to said Shri Gita Ram, on license basis. Said Shri Gita Ram started cultivation of the suit land through S/Shri Sohan Singh and Arjun Singh. They managed the entries of the suit land in their names irrespective of having no right, title and interest therein and are now cultivating the suit land.

4. Learned trial Court on the completion of the pleadings of the parties and holding full trial after framing issues, ordered to return the plaint to the plaintiffs for want of jurisdiction with a direction to adjudicate the matter before competent authority i.e. Assistant Collector 1st Grade-cum-Land Reforms Officer, Paonta Sahib vide judgment dated 24.7.2012. The plaintiffs instead of opting to submit to the jurisdiction of Assistant Collector 1st Grade-cum-Land Reforms Officer Paonta Sahib, had assailed the judgment passed by the trial Court in appeal under Order 43 Rule 1(a) CPC. The same before learned lower appellate Court was initially registered as Civil Misc. Appeals, however, subsequently were re-registered as civil appeal Nos.3-N/13 of 2014/12 and 2-N/13 of 2014/12.

5. Learned Lower appellate Court on reappraisal of the judgment passed by the trial Court has partly decreed the suit and also drawn the decree sheet accordingly. This has led in filing these appeals under Section 100 of the Code of Civil Procedure for quashing the same.

6. On behalf of the respondents question of maintainability of these appeals has been raised at the very outset. Learned counsel representing the appellants-plaintiffs is fair enough in conceding that against an order of return of plaint, the only remedy available is to have filed a Civil Misc. Appeal under Order 43 Rule 1(a) of the Code of Civil Procedure. Not only this, according to her, the plaintiffs even preferred appeals under Order 43 Rule 1(a) CPC against the judgment passed by the trial Court qua return of the plaint in the lower appellate Court, which, however, were entertained and registered as civil appeals and decided vide judgment and decree under challenge in these appeals. Learned counsel is again fair enough in conceding that the second appeal is not maintainable, however, she had to file these appeals only on account of lower appellate Court having entertained the appeals preferred before it as civil appeals and drawn decree sheet also.

7. Mr. R.K. Gautam, learned Senior Advocate, representing the respondents-defendants does not dispute the submissions so made on behalf of the appellants-plaintiffs and rightly so because against the judgment whereby the trial Court has ordered to return the plaint to the plaintiffs for agitating the matter in issue before appropriate authority, appeal under Order 43 Rule 1(a) was only maintainable and not an appeal under Section 96 of the Code of Civil Procedure as there was no decree drawn by learned trial Court being not required for the reason that the suit was neither decreed nor dismissed and rather plaint was ordered to be returned to the plaintiffs.

8. In view of what has been said hereinabove and also that irrespective of the appeals preferred under Order 43 Rule 1(a) CPC and even initially registered also as Civil Misc. Appeals could have not been entertained as civil appeals under Section 96 CPC nor any decree passed. Learned lower appellate Court has, therefore, not only committed irregularity but illegality also while entertaining the appeals preferred against the judgment passed by trial Court as Civil Appeals and drawn decree sheet also. The appropriate course available to the lower appellate Court would have been to entertain and treat the appeals as Civil Misc. Appeals and in the event of the order passed by the trial Court qua return of the plaint having been found not legally sustainable, to have remanded the cases for decision, in accordance with law. Decreeing the suit vide judgment and decree under challenge in these appeals, the lower appellate Court has deprived the parties on both sides from their valuable right of filing first appeal before learned lower appellate Court.

9. The judgment and decree under challenge in both appeals are thus not legally and factually sustainable. The same are hereby quashed and set aside and the case remanded to learned lower appellate Court to treat the appeals preferred by the plaintiffs against the order of return of plaint passed by the trial Court in both suits, under Order 43 Rule 1(a) CPC as Civil Misc. Appeals and decide the same afresh, in accordance with law, as expeditiously as possible, but not later than the quarter ending March 31, 2015. Parties through learned counsel representing them are directed to appear before the lower appellate Court on ***29th November, 2014***. The record be sent back forthwith so as to reach in the lower appellate Court well before the date fixed. Both the appeals are accordingly allowed and finally disposed of. Pending applications, if any shall also stand disposed of.

10. No order so as to costs.

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

Dalip Singh Thakur .....Petitioner.

Vs.

The National Bank for Agriculture & Rural Development & Ors.

...Respondents.

CWP No.2722 of 2014.
Reserved on:31.10.2014.
Decided on: 13.11.2014.

Constitution of India, 1950- Article 226- Loan/financial assistance was sanctioned in favour of the petitioner for the construction of agricultural go-down- 33.33% subsidy was to be given by the respondent under the scheme of Government of India- petitioner stated that he had spend Rs. 5 lacs for the construction of go-down but the respondent recalled the amount and the financial assistance after joint

inspection - respondent contended that petitioner had not utilised the sanctioned amount - held, that the joint inspection report showed that the petitioner had constructed a house instead of a go-down- therefore, he was not entitled for the benefit of subsidy-petition dismissed.

(Para-3)

For the Petitioner: Mr.Adarsh K.Vashishta, Advocate.

For the respondents: Mr.Sanjay Dalmia, Advocate for respondents No.1 & 2.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The facts necessary for rendering a decision on this petition are of respondent No.1 having sanctioned loan/financial assistance in favour of the petitioner for construction of agricultural go-down at village Shamna (Dungi), Tehsil Sangrah, District Sirmour, H.P. At the time contemporaneous to the sanctioning of financial assistance/loan to the petitioner by the respondent for the purpose aforesaid, a scheme floated by the Government of India, Ministry of Agriculture, Department of Agriculture and Co-operation, Krishi Bhawan, New Delhi was in vogue. The scheme envisaged 33.33% subsidy of the capital cost up to a maximum limit of Rs.50,00,000/-. Before completion of the project, a sum of Rs.68,000/- was released by the respondents in favour of the petitioner as first installment of subsidy. The petitioner avers that he had spent an amount of Rs.5 lacs for completion or the construction of the agricultural go-down. However, on a joint inspection of his purported go-down having been carried out by the respondents, the respondents not only withdrew the first installment of subsidy of Rs.68,000/- as advanced to him but also refused to afford him the balance of the subsidy releasable to him in proportion to the cost incurred by him for the construction of the agricultural go-down. A prayer is made in the writ petition that the action of the respondents in withdrawing the release of the first installment of the subsidy in the sum of Rs.68,000/- be set aside, besides directions are sought against the respondents that the subsidy amount in the per centum as now releasable to him be ordered to be released in his favour.

2. The respondents in the reply have tersely urged that the release of the subsidy on completion of the project is subject to eligibility and the coverage of the project under the scheme, besides on assessment of the project on its completion, in case it does not fall within the prescribed norms as also does not fulfill the contemplated terms and conditions, hence, it is within the domain of the respondents to reject the claim of the petitioner for the release of the subsidy.

3. Now for testing whether the petitioner had utilized the financial assistance advanced to him by the respondents for the purpose for which he had obtained it, inasmuch as whether he had utilized it for construction of an agricultural go-down and as such had complied with the terms and conditions for his seeking a direction from this Court to the respondent that not only the order of recalling of advance subsidy to him by the respondents is untenable, besides his being also entitled to the release of the balance amount of subsidy, it is necessary to advert to the joint inspection report appended with the reply of the respondents comprised in Annexure R-3. A perusal of Annexure R-3 as also, a perusal of the photographs appended to it which uncontrovertedly are of the purported agricultural go-down as raised/constructed by the petitioner from the financial assistance afforded to him by the respondents, forthrightly disclose that the petitioner has utilized the financial assistance for constructing a dwelling house for himself. Consequently, when the financial assistance, as advanced to him by the respondents, was for construction of agricultural

storage/go-down by him, besides when he could tenably claim release of the subsidy in his favour by the respondents only in case he had been eligible to seek its disbursement in his favour, inasmuch as his having utilized the financial assistance for construction of a go-down. However, when uncontrovertedly, the inspection report as also the photographs appended to it portray that he has contrary to the terms and conditions of the scheme raised/constructed a dwelling house for himself. Consequently, when the terms and conditions, governing the release of subsidy in his favour, stand contravened, hence, the petitioner does not acquire any legal leverage to claim a direction from this Court that the respondents be directed to release the balance subsidy in his favour nor also he can claim a direction from this Court that the respondents be directed to withdraw the order calling upon him to reimburse the first installment of subsidy in the sum of Rs.68,000/-.

4. For the foregoing reasons, there is no merit in this petition which is accordingly dismissed. All pending applications, if any, also stand disposed of. No costs.

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

Salim .....Appellant
Versus
Shashi Kala & another .....Respondents

FAO No.73 of 2014
Date of decision: 13.11.2014

Motor Vehicle Act, 1988- Section 149- Driving license was renewed at Nalagarh at least six times- insurer had examined the witness of the licencing authority who proved the renewal of licence - held, that it is for the insurer to plead and prove that insured had committed willful breach of the terms and conditions of the Insurance policy- insured is not supposed to verify the licence- in these circumstances, insurer was rightly held liable. (Para-8)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, reported in AIR 2004 Supreme Court 1531

Pepsu Road Transport Corporation versus National Insurance Company, reported in (2013) 10 Supreme Court Cases 21

For the appellant: Mr. Neeraj Gupta, Advocate.
For the respondents: Mr. Malay Kaushal, Advocate, for respondent No.1.
Ms. Devyani Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Challenge in this appeal is to the award dated 18th December, 2013, passed by the Motor Accident Claims Tribunal, Bilaspur, H.P. (for short, "the Tribunal") in M.A.C. No.24 of 2010, titled Shashi Kala vs. Salim & another, whereby compensation to the tune of Rs.4,75,000/- alongwith interest at the rate of 7.5% per annum came to be awarded in favour of the claimants and against the owner-insured (for short "the impugned award").

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

3. The only question, which is to be determined in this appeal is, whether the Tribunal has rightly discharged the insurer and saddled the owner with the liability? The answer is in the negative for the following reasons.

4. Admittedly, the driver, namely, Prem Sagar Basi, of truck bearing registration No.HP-64-7486 was having valid driving licence to drive the heavy motor vehicle, renewed at Nalagarh at least six times. The insurer has examined the witnesses of the concerned Licensing Authority and proved that the licence was issued in favour of the driver renewed at least six times..

5. The owner/appellant engaged the driver who was having the driving lincence duly renewed by the authority concerned. The renewal is not in dispute. Thus, it cannot be held that the driver was not having valid driving licence.

6. It was for the insurer to plead and prove that the owner has committed willful breach, which it failed to do so. The Apex Court in ***National Insurance Co. Ltd. versus Swaran Singh & others, reported in AIR 2004 Supreme Court 1531***, held that it is for the insurer to prove and plead that the insured-owner has committed willful breach in terms of Section 149 of the Motor Vehicles Act, 1988 (for short "the M.V. Act") read with the terms and conditions of the insurance policy and driver was not having the valid and effective driving licence. It is apt to reproduce relevant portion of para 105(iii) of the judgment hereinbelow:

> *"105. (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".*

7. The Apex Court in ***Pepsu Road Transport Corporation versus National Insurance Company***, reported in ***(2013) 10 Supreme Court Cases 21*** held that the insurer has to prove that the insured has committed willful breach of the insurance policy and it is not for the insured to move here and there. It is apt to reproduce para 10 of the judgment:

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

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

8. Having said so, the Tribunal has fallen in error in saddling the insured-owner with the liability. Accordingly, the appeal is allowed and the impugned award is modified by providing that the insurer has to satisfy the impugned award. The insurer is directed to deposit the awarded amount within eight weeks from today before the Registry of this Court. On deposition, the Registry is directed to release the awarded amount in favour of the claimant, strictly as per the terms and conditions contained in the impugned award, through payee's account cheque, after proper identification. Thereafter, the amount deposited by the owner/appellant be released in his favour alongwith interest through payee's account cheque, after proper identification.

9. Send down the record.

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

Tara Chand Verma .....Petitioner.

Vs.

Himachal Pradesh State Transport Corporation & another ...Respondents.

CWP No.5561 of 2014.
Reserved on:03.11.2014.
Decided on: 13.11.2014.

Constitution of India, 1950- Article 226- Petitioner was regularized as a conductor and was asked to discharge the duty as clerk/typist - petitioner sought change of designation for appointment as clerk with retrospective effect- respondent had not denied the fact that petitioner was discharging the duty as a typist- respondent asserted that there was no post of clerk but they had a discretion to take the work of any nature from the petitioner- held, that when the petitioner is discharging the duty of clerk, he is entitled for the wages and appointment as a clerk.

(Para- 2 and 3)

For the Petitioner: Ms.Veena Sharma, Advocate and Ms.Nevadita Sharma, Advocate.
For Respondent No.1: Mr.B.N. Sharma, Advocate.
For Respondent No.2: Mr.Anup Rattan, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

In the instant writ petition, the petitioner prays for rendering direction to the respondents to consider his case by change of designation for appointment as clerk with retrospective effect from the date he was

rendering/performing duties in the aforesaid capacity in the respondent department. The petitioner was regularized against the post of conductor by the respondent-Corporation on 8.1.1983. However, under office memo No.EO 98-1084/87 (O), the petitioner was directed to be placed in the Regional Office, Rampur for the purpose of discharging the duties of a clerk/typist as he was found efficient as a typist. The protracted correspondence at the instance of the petitioner having been taken up with the respondent-corporation and the recommendation sent by the Regional Manager, HRTC Rampur Bushahar to the Managing Director, HRTC, Shimla under letter No. HRTC-(RMP)-1-1-Estt.(207) 189-90-9206 for considering the case of the petitioner for regularization against the post of clerk/typist, proved abortive as no provision exists under the R & P Rules of the respondent-Corporation for vindicating the claim of the petitioner. Even a representation in the year 2001 by the petitioner to the Managing Director, HRTC, Shimla containing therein the grievances para-materia to the grievances earlier ventilated by the petitioner, bore no fruitful results. Lastly, on 21.4.2008, the respondent-Corporation issued a Work Order directing the petitioner to join duties at Regional Office, Recongpeo and perform the duties of typist.

2. Even the respondents in the reply have not controverted the factum of the petitioner not being asked to perform the duties of a Clerk/Typist. Rather, they vindicate their office orders wherein the petitioner was directed to perform the duties of Clerk/Typist on the score that a discretion vested in them to take work of any nature from any employee. The contended relief of the petitioner for appointment as Clerk or Typist by change of designation is contended to be not available to be afforded to the petitioner in the face of non-existence of any apposite provision in the R & P Rules. However, the imminent fact which emerges from the reply of the respondents is of their being no repudiation or denial by the respondents to the factum of the petitioner having as averred by him in the writ petition work rendered or performed the duties of Clerk or Typist even though he was regularized as a Conductor. Consequently, when the respondents acquiesce to the said averment in the writ petition, obviously then the respondents are required to be not only defraying wages to the petitioner in tandem with the nature of work and duties performed by him, besides even if no provision exists in the R & P Rules qua change of designation, nonetheless, even in absence thereof the respondents are directed to consider the case of the petitioner especially when given the protracted period for which he is performing the duties of Clerk/Typist under them, for his appointment in the capacity, aforesaid by change of designation.

3. Consequently, the writ petition is allowed the respondents are directed to defray to the petitioner wages equivalent to the one drawn by Clerk/Typist from the date he was rendering the duties in the said capacity under the respondents. Also the respondents are directed to consider the case of the petitioner for appointment as Clerk/Typist by change of designation. All the pending applications, if any, also stand disposed of. No costs.

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

FAOs No.110 and 111 of 2010
Decided on: November 13, 2014.

1. FAO No.110 of 2010.

United India Insurance Company Ltd. ...Appellant.

VERSUS

Lalit Chauhan and another. ...Respondents.

1. FAO No.111 of 2010.

Lalit Chauhan. ...Appellant.

VERSUS

Kewal Singh and another. ...Respondents.

Motor Vehicle Act, 1988- Section 166- When the injured is seeking compensation for the injury sustained by him, no amount is to be deducted towards his personal expenses. (Para- 24)

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

Raj Kumar versus Ajay Kumar and another, (2011) 1 Supreme Court Cases 343

For the Appellant(s):	Mr. Ashwani K. Sharma, Advocate, for the appellant in FAO No.110 of 2010 and Mr. B.M. Chauhan, Advocate, for the appellant in FAO No.111 of 2010.
For the Respondents:	Mr. B.M. Chauhan, Advocate, for respondent No.1 in FAO No.110 of 2010 and Mr. Ashwani K. Sharma, Advocate, for respondent No.2 in FAO No.111 of 2010.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

By means of FAO No.110 of 2010, the appellant/insurer has challenged the award, dated 30.12.2009, passed by Motor Accident Claims Tribunal, Shimla, Himachal Pradesh, in Claim Petition No.10-S/2 of 2007, titled as Lalit Chauhan vs. Kewal Singh and another, whereby compensation to the tune of 23.00 lacs, with interest at the rate of 9% per annum from the date of filing of petition till its deposit was awarded in favour of the claimant and against the appellant/insurer, (for short, 'the impugned award').

2. The claimant has also challenged the impugned award by the medium of FAO No.111 of 2010, on the ground of adequacy of compensation.

3. Thus, both the appeals are being disposed of by this common judgment.

Brief Facts

4. The claimant, namely, Lalit Chauhan, became victim of a vehicular accident on 12th September, 2006, while he was traveling in Truck No.HP-38-6065 as owner of 217 apple boxes. The said vehicle was being driven by the driver, namely, Kewal Singh rashly and negligently and caused the accident near Victory Petrol Pump, Solan. The claimant sustained injuries, was taken to Government Hospital, Solan, fromwhere he was referred to Indira Gandhi Medical College, Shimla and was thereafter taken to Indian Spinal Injuries Centre, Delhi. As a result of the injuries, the clamant became permanently disabled. The petitioner is undergoing physiotherapy at Indian Spinal Injuries Centre, Delhi regularly. The claimant filed the claim petition claiming compensation to the tune of Rs.30.00 lacs, as per the break-ups given in the claim petition.

5. Notice was issued to the driver and the insurer. The driver opted not to contest the Claim Petition, while the insurer resisted the same.

6. On the pleadings of the parties, following issues were framed by the Tribunal:

> "i). Whether the petitioner/claimant sustained injuries on account of the rash and negligent driving of truck No.HP-38-6065 by respondent No.1, as alleged? OPP.
>
> ii). Whether the petitioner/claimant is entitled to compensation, if so, to which amount and from which of the respondents? OPP.
>
> iii). Whether the petition is not maintainable? OPR.
>
> iv). Whether the vehicle in question was being driven in violation of the terms and conditions of the Insurance Policy, as alleged? OPR.
>
> v). Whether the petitioner was an unauthorized passenger traveling in the vehicle at the time of accident? OPR.
>
> vi). Whether the driver of the vehicle was not having valid and effective driving licence at the time of accident, as alleged? OPR.
>
> vii). Relief."

7. In order to prove his claim, the claimant examined Madan Singh, Rakesh Kumar, Dr. Akshay Kumar, Ramesh Sharma, Jatinder Singh, Dr. Brij Bhan Singh, Sandeep Chauhan, Karan, Dr. Varun Rana,. Rakesh Chauhan, Sushil Kumar, Smt. Giribala Chauhan, Dr. B.L. Thakur, Ranvir Singh and Dr. Ravinder Mokta, as PWs-1 to 3 and 5 to 16, respectively. The claimant has also stepped into the witness box as PW-4. On the other hand, the insurer has not led any evidence. Thus, the evidence led by the claimant has remained un-rebutted.

8. The claimant has also produced on record the documents i.e. copies of the medical treatment, receipt of taxi/ambulance charges, copy of the challan, copy of the FIR and other documents and particularly, the disability certificate Ext.PW-16/A.

9. The Tribunal after scanning the entire evidence awarded compensation to the tune of Rs.23.00 lacs.

10. The insurer has questioned the impugned award on the ground that the same is excessive and the claimant has questioned the same on the ground of adequacy of compensation. The owner/driver has not questioned the impugned award on any ground.

11. The moot question in these appeals is – whether the amount awarded by the Tribunal is just and adequate.

12. The findings recorded by the Tribunal under issue No.1 are not in dispute. Accordingly, issue No.1 is decided in favour of the claimant.

13. Before issue No.2 is taken up, I deem it proper to deal with the other issues.

14. As far as issue No.3 is concerned, the onus to prove the same was on the insurer, which has not been discharged by it. Accordingly, the findings recorded on this issue are upheld.

15. The insurer-appellant has not questioned the findings recorded by the Tribunal under issues No.4, 5 and 6. Accordingly, the same are upheld.

Issue No.2

16. Coming to issue No.2, it is apt to reproduce the statement of PW-16 Dr. Ravinder Mokta, in toto, hereunder:

> "Stated that I am posted as Orthopedics Surgeon in D.D.U. Hospital, Shimla for the last 12 years. On 30.6.2009 a Medical Board was constituted to assess the disability of Lalit Chuahn the petitioner who had suffered injuries in a motor vehicle accident. Dr. P.K. Sharma Medical Superintendent of D.D.U Hospital Shimla was the Chairman of the Board, whereas, myself along with Dr. P.C. Machhan were its members. On examination of the petitioner the Board found that he had suffered fracture D-12 vertibra with paraphlazia with bladder bowel involvement. We had also gone through the contents of discharge certificate of the injured. On his medical examination we found that the petitioner has suffered permanent 100% disability incurable. In view of the nature of disability suffered by the petitioner, the petitioner requires the services of one attendant throughout his life. He is required to undergo regular physiotherapy throughout life and is also to take hyprotaneous diet. He can move only on the wheel chair not otherwise. The copy of disability certificate is Ext.PW-16/A (earlier marked as Z) which is true and correct as per the original seen by me today in the Court. The original bears my signatures as well as signatures of Chairman and other member of the Board.
>
> XXXXXXXXXXXXXXXXXXXX
>
> (By Shri Sanjay Karol, Advocate, for respondent No.2).
>
> It is correct that today I have not brought the record of the case because no record is maintained in our office while assessing disability of the injured and issuing disability certificate. It is incorrect that with the passage of time the disability suffered by the petitioner is likely to be cured."

17. PW-16 Dr.Ravinder Mokta has proved how the injury has shattered the physical frame of the claimant and has become burden for his family forever. Dr. Akshay Kumar, Dr.Brij Bhan Singh, Dr. Varun Rana and Dr. B.L. Thakur have proved that the claimant has undertaken treatment from them, has undergone and has to undergo physiotherapy, and cannot live without an attendant. PW-10 Dr.Varun Rana has specifically stated in his statement that there is no chance of recovery of the claimant. The evidence does disclose that the claimant has lost all charm and amenity in life and even also lost matrimonial life.

18. 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."*

19. 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."*

20. 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."

21. 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."

22. The Tribunal after scanning the entire evidence has rightly determined the compensation under various heads in paragraph 27 of the impugned award, after making discussions in paragraphs 23, 24 and 26. It is apt to reproduce paragraph 27 of the impugned award:

"27. In view of the evidence discussed above and findings recorded, in the opinion of this Tribunal, the petitioner is entitled to get compensation under the following heads and extent:-

i)	Expenses on medical treatment already incurred.	Rs.5,17,000/-
ii)	Boarding and Lodging	Rs.1,07,800/-
iii)	Conveyance charges	Rs. 14,300/-
iv)	Loss of future income	Rs.9,60,000/-
v)	Compensation on account of mental and physical pain and suffering and loss of amenities.	Rs.4,00,000/-
vi)	Compensation on account of future treatment and attendance etc.	Rs.3,00,000/-
	Total	Rs.22,99,100/-."

23. Having said so, I am of the considered view that the amount awarded by the Tribunal is just and proper.

24. During the course of hearing, the argument advanced by Mr.Ashwani K. Sharma, learned counsel for the insurer, that 1/3rd amount was to be deducted from the income of the claimant is devoid of any force for the reason that in the present case, the injured himself is seeking compensation and 1/3rd of the income is to be deducted only in those cases where the claimants have lost their earning hand. In the present case, the claimant has lost his own earning capacity, thus 1/3rd amount cannot be deducted towards his personal expenses.

25. My this view is fortified by the decision of the Apex Court in **Raj Kumar versus Ajay Kumar and another, (2011) 1 Supreme Court Cases 343**. It is apt to reproduce paragraph 27 of the said decision hereunder:

"27. In the case of an injured claimant with a disability, what is calculated is the future loss of earning of the claimant, payable to claimant, (as contrasted from loss of dependency calculated in a fatal accident, where the dependent family members of the deceased are the claimants). Therefore there is no need to deduct one-third or any other percentage from out of the income, towards the personal and living expenses."

26. Keeping in view the law settled by the Apex Court, I am of the opinion that the compensation awarded by the Tribunal is just and proper. However, the Tribunal has awarded compensation under the heads 'loss of future income' and 'compensation on account of future treatment and attendance etc.' with interest at the rate of 9% per annum from the date of filing of the claim petition till realization, which is not as per the law occupying the field. Therefore, I deem it proper to reduce the rate of interest on the whole award amount from 9% per annum to 7.5% per annum from the date of filing of the claim petition till realization. The impugned award stands modified accordingly.

27. Consequently, the appeal filed by the insurer (FAO No.110 of 2010) is partly allowed as indicated above and the appeal filed by the claimant (FAO No.111 of 2010) is dismissed.

28. The Registry is directed to release the award amount strictly in view of the conditions contained in the impugned award. Excess amount, if any, deposited be released in favour of the insurer through payees account cheque.

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

Anuradhika .....Petitioner.

Versus

State of H.P. & ors. .....Respondents.

CWP No. 1152 of 2014.

Reserved on: 12.11.2014.

Decided on: 14.11.2014.

Constitution of India, 1950- Article 226- Petitioner belongs to OBC category- she married in forward/advance caste- her candidature was rejected on the ground that she could not produce latest OBC Certificate- State contended that in view of her marriage in advance caste, she is not entitled to OBC certificate- held, that a person born in OBC caste does not lose her status by marrying in forward caste- issuance of OBC Certificate was wrongly declined by the respondent- petitioner had qualified in the examination- her candidature was rejected merely for non-production of OBC Certificate- hence, respondent directed to appoint the petitioner as clerk from the due date. (Para 4 to 5)

For the petitioner: Mr. Sunny Dhatwalia, Advocate.

For the respondents: Mr. M.A.Khan, Addl. AG, for the respondent-State.
Ms. Archna Dutt, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Advertisement was issued by respondent No. 3 for filling up posts of Clerks on 15.9.2012. The petitioner belongs to *'Jhiwar'* caste of the OBC

category. She has obtained the OBC certificate on 9.8.2010. The petitioner qualified the written test held on 22.7.2013. She was called for interview on 29.1.2014. Her candidature was rejected vide annexure P-9 dated 20.2.2014 only on the ground that she could not produce the latest OBC certificate. The fact of the matter is that the petitioner belongs to OBC category. She married in forward/advanced class. She submitted an application for issuance of OBC certificate to respondent No. 4. Respondent No. 4 returned the application.

2. The reply stands filed. The principal stand of the respondents is that the petitioner has failed to produce the OBC certificate at the time of interview and once she has married to a forward/advanced class, she could not be issued OBC certificate. The fact of the matter is that the petitioner was born in OBC family. She has suffered all the handicaps of person belonging to OBC category. She obtained OBC certificate on 9.8.2010. It expired on 8.8.2012. The brother of the petitioner has also been issued OBC certificate. The legal question involved in this petition is whether a person who is having OBC status by birth, can her right as OBC be taken away because of her marriage in the advanced family?

3. The question raised in this Writ petition is no more *res integra* in view of the definitive law laid down by this Court in CWP No. 5744 of 2010, titled as Meena Devi versus Himachal Pradesh State Subordinate Services Selection Board, decided on 9.8.2011 and CWP No. 3139 of 2009 titled as Smt. Neetu versus The State of H.P. & ors, decided on 19.6.2014.

4. The Division Bench of this Court in the case of ***Meena Devi vrs. Himachal Pradesh State Subordinate Services Selection Board,*** decided on ***9.8.2011,*** has held as under:

> "3. Having thus analyzed the basic principles,we may refer to the facts of this case. Dispute arising for consideration in this case is whether a person born in a backward class and later married to a Scheduled Caste would acquire the status of Scheduled Caste.
>
> 4. The petitioner was born in District Hamirpur in 'Tarkhan'caste which is a community belonging to Other Backward Classes in the State of HimachalPradesh. She was married to one Sh. Rakesh Dhiman, who is a resident of village Mehan in District Bilaspur. Sh. Rakesh Dhiman belongs to 'Luhar'caste, which is a Scheduled Caste in the State of Himachal Pradesh. The petitioner belongs to below the poverty line family. She graduated from Himachal Pradesh University and has also obtained diploma and degree in Bachelor of Library Sciences. She has also obtained M. Phil. Degree in Library Sciences. Applications were invited by the H.P. Subordinate Services Selection Board, Hamirpur for appointment to the post of Assistant Librarian in the State of Himachal Pradesh. She had been issued a certificate by the Executive Magistrate, Sadar, District Bilaspur, showing that she belongs to Scheduled Caste community and therefore, she applied for the post against the quota reserved for scheduled caste. That Certificate is dated 29.10.2002 which is marked as Annexure 'X' in the writ petition. However, at the time of interview, she was directed to produce a contemporaneous certificate and when applied for, the Tehsildar Sadar, District Bilaspur, issued Annexure P-2, Certificate, dated 27.8.2010, which showed that the petitioner, wife of Rakesh Kumar, resident of Village Mehan, District Bilaspur, belongs to OBC in Himachal Pradesh and that she does not belong to creamy layer. Since Annexure P-2, Certificate shows only the marital status, the petitioner was asked to produce Certificate on parental basis. The Certificate on parental basis is Annexure P-1, which certifies that the petitioner daughter of Gian Chand and resident of Hamirpur District belongs to 'Tarkhan' community, which is an OBC. In

view of the apparent confusions, as above, the petitioner was not selected and hence the writ petition.

5. In short, on the basis of one Certificate issued by the competent authority showing that the petitioner belongs to SC community, having been married to Sh. Rakesh Kumar (Rakesh Dhiman) belonging to SC community, she applied for the post of Assistant Librarian against the quota reserved for Scheduled Caste. But the respondent-Board insisted for a Certificate on parental basis. The Certificate on parental basis would show that the petitioner belongs to OBC. The petitioner now rests her claim for a seat reserved for OBC only, she being an OBC by birth. Based on the interim order dated 15.9.2010, passed by this Court, the petitioner was provisionally interviewed. Subsequently, by the interim order dated 15.10.2010, it was directed to take further steps in the matter of appointment, subject to the result of the writ petition.

8. The petitioner is born in 'Tarkhan'caste, which is OBC in Himachal Pradesh. By marriage only she was transplanted into 'Luhar'community which is a Scheduled Caste. By that marriage, the petitioner does not undergo any change in her original caste. Unto death, she is a member of 'Tarkhan'caste which is OBC. In the above circumstances, there will be a direction to the respondent-Board to treat the petitioner as OBC candidate for all purposes and regularize her appointment accordingly."

5. Similarly, in the case of ***Smt. Neetu versus The State of H.P. & ors. CWP No. 3139 of 2009,*** decided on 19.6.2014, the Division Bench of this Court has held as under:

"7. The question is – whether a person, who is having a status by birth can be denied that status because of subsequent developments, i.e. because of adoption in an upper class or because of marriage in upper class?

8. We deem it proper to only discuss and return the findings on the issue – whether in the given circumstances, a person, who is having OBC status by birth and has gone through various social disadvantages and did not have the facilities for development and growth, suffered all odds, can her right as OBC be taken away from her because of her marriage? The answer is in negative.

9. Admittedly, she was belonging to OBC category, was

born in the family, which hails from OBC category, lived with them, undergone all disadvantages, suffered all social stigmas and other painful, ugly situations. She had obtained the OBC certificate, applied for the test, qualified, called for interview but her selection was withheld by respondent No. 3 on the ground that she had to produce latest OBC certificate, which was not required for the reason that marriage in an upper class or adoption in an upper class is not a substitute for the sufferings and other disadvantages, which she has suffered and is no ground to take away the status which a person is having by birth. Had the case being reverse, i.e. had she belonged to upper class and married in a lower class, in that eventuality, that may be a case for not giving benefit because of adoption or because of marriage for the reason that she might have enjoyed all advantageous position right from birth till marriage and had not suffered any disadvantageous position, cannot now be allowed to reap the fruits of a backward class/category due to adoption, after enjoying everything in life.

15. Applying the test to the present case, the facts are admitted that the petitioner before marriage was belonging to a reserve class, i.e. OBC, was having OBC certificate, appeared and selected in the examination, was not given her right and was asked to obtain a latest OBC certificate,

which was not granted to her. The respondents have virtually committed fraud on Constitution and have made the life of the writ petitioner hell and now, she may be thinking, rather cursing, why she was born in a disadvantageous family, i.e. reserved category and why she has married in an upper class, is an eye opener for the respondents, who are implementing the Constitutional laws and the other laws applicable and who are the custodians of the rights and the duties guaranteed by the Constitution to the citizens of India as per the mandate of Fundamental Rights, the Directive Principles of State Policy and the Fundamental Duties contained in Parts III and IV of the Constitution of India.

16. Learned Advocate General argued that the petitioner was not having an OBC certificate at the relevant point of time, and even if she has obtained the same during the pendency of the writ petition, that cannot be a ground to make her eligible, is devoid of any force.

17. As discussed hereinabove, the writ petitioner was having the OBC certificate at the relevant point of time but was asked to furnish latest one, which was not issued by respondent No. 4 at the relevant point of time, thus failed to discharge his duties and rather misused his official position. Thereafter, the latest OBC certificate, dated 16th January, 2014, was issued in favour of the writ petitioner.

20. It is worthwhile to record herein that the respondents have illegally taken away the rights of the writ petitioner and have drawn her to the lis and made her to suffer. The writ petitioner has sought quashment of the instructions, dated 15th March, 2003 (Annexure P-8), are not instructions but just a communication. The said letter/communication, on the face of it, has been issued in violation of the Constitutional provisions, as discussed hereinabove, is bad in the eyes of law, as per the communication, dated 2nd December,2011, (supra).

26. The question arises – from which date the appointment is to be given effect? As discussed hereinabove, the writ petitioner has participated in the examination, was declared successful, was called for interview but was refused the appointment only for the non-availability of the latest OBC certificate."

6. The petitioner has appeared in the written test held on 22.7.2013. She was called for interview on 29.1.2014. Her candidature has been rejected vide communication dated 20.2.2014 only on the ground that she could not produce the latest OBC certificate. The fact of the matter is that the petitioner was in the possession of OBC certificate on 9.8.2010. It expired on 8.8.2012. She applied for the renewal of the certificate which was arbitrarily declined by the respondent No. 4. Respondent No. 4 ought to have renewed the OBC certificate.

7. Accordingly, the Writ Petition is allowed. Annexure P-9, dated 20.2.2014, is quashed and set aside. The petitioner would be deemed to have been appointed as Clerk from the due date pursuant to advertisement dated 15.9.2010. The petitioner would only be entitled to notional seniority. The codal formalities including issuance of appointment letter to the petitioner be completed within two weeks from today.

8. 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.

Ashok Kumar .....Petitioner.
Vs.
State of H.P. & ors. .....Respondents.

CWP No. 9888 of 2013.
Reserved on: 5.11.2014.
Decided on: 14.11.2014.

Constitution of India, 1950- Article 226- Petitioner appeared in the examination for the post of Assistant District Attorney, Class-I (Gazetted)- he contended that the answer of question No. 5(b) was not evaluated- examiner had given three marks to the petitioner for question 5 (a) and 3 marks to the petitioner for question 5(c)- no marks were given for question 5 (b)- examiner explained that answer given by the candidate was too brief and the candidate had failed to mention basic sections in question No. 5(b), therefore, he did not deserve any marks- reply of the respondent was not satisfactory, therefore, respondent directed to get the answer-sheet evaluated from an independent examiner. (Para- 2 to 5)

For the petitioner: Mr. B.C.Negi, Advocate.
For the respondents: Mr. Shrawan Dogra, AG with Mr. M.A.Khan, Addl. AG, for the respondent-State.
Mr. D.K.Khanna, Advocate, for respondent No. 2.
Mr. Dilip Sharma, Sr. Advocate, with Mr. Manish Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Ten posts of Assistant District Attorney, Class-I (Gazetted) were advertised vide advertisement No. III-2012 dated 01.09.2012. Last date of receipt of applications was 1.10.2012. 892 candidates submitted their applications. The petitioner also participated in the selection process. Screening test was held on 8.12.2012. The petitioner was successful in the screening test. He was called for interview on 24.4.2013. The result was declared in the month of May, 2013. The petitioner and respondent No. 3 have scored equal marks in screening test and viva-voce examination. However, as per the H.P. Public Service Commission (Procedure & Transaction of Business and Procedure for conduct of Examinations, Screening Tests & Interviews Etc.) Rules, 2007, respondent No. 3 being older in age, was recommended for the post in question. The relevant portion whereof reads as under:

> "Where selection is to be made on the basis of performance of the candidates having qualified the screening test, before the interview board, a candidate scoring more marks in the interview shall be placed above the candidates scoring lesser marks in the interview. If the candidates will score equal marks in an interview, then a candidate securing more marks in the screening test will be placed above the candidate securing lesser marks in the screening test. In case the marks of screening test are equal then the candidate who is senior in age will be placed above the candidate junior in age. Where selection is to be made purely on the basis of performance of the candidates before the interview

> board, a candidate scoring more marks in the interview shall be placed above the candidates scoring lesser marks in the interview. If the candidates will score equal marks in an interview, then a candidate who is senior in age will be placed above the candidate junior in age."

2. The case of the petitioner, precisely, is that his answer to question No. 5(b) has not been evaluated. In order to ascertain this fact, we have directed respondent No. 2 to produce the answer sheet of the petitioner. The answer sheet of the petitioner has been produced in the sealed cover. We have gone through the answer sheet. The fact of the matter is that the examiner has not evaluated question No. 5(b). He has given 3 marks to the petitioner for attempting question No. 5(a) and 3 marks for attempting question No. 5(c). The comments of the experts were also called for by this Court vide order dated 2.5.2014. The comments of the experts read as under:

> "I have gone through the evaluated copy and found the marks awarded to candidate in question no. 5 are 6 marks out of 20 as a whole because the answer given by the candidate is too brief and language is vague and the candidate has also been failed to mention basic Sections 204 and 107 in question No. 5(b) of Cr.P.C. Therefore, the candidate does not deserve for excessive award."

3. We are not at all satisfied with the comments given by the examiner. He was bound to evaluate/examine question No. 5(b). There is no merit, whatsoever, in the contention that he had given 6 marks to the petitioner as a whole. He has specifically given 3 marks for question No. 5(a) and 3 marks for question No. 5(c). There was every possibility of the petitioner securing march over respondent No. 3 if the question No. 5(b) had been evaluated by the examiner since both of them have scored equal marks in screening test as well as in viva-voce examination. The petitioner has a right to be considered for appointment. In normal circumstances, we would have directed respondent No. 2 to get the question No. 5(b) evaluated/examined from the same examiner. However, since we are not at all satisfied with the comments given by the examiner, which we have already reproduced hereinabove, we are of the considered opinion that question No. 5(b) is required to be examined/evaluated by an independent examiner to do complete justice. We are prima-facie of the view that the petitioner was entitled to get marks for question No. 5(b) but we would not express any final opinion and would leave question No. 5(b) to be evaluated by the independent examiner.

4. Mr. Shrawan Dogra, learned Advocate General has also brought to the notice of this Court that infact new selection process has begun on the basis of Notification dated 11.10.2013. However, the fact of the matter is that the Court is still seized of the matter.

5. Accordingly, the present writ petition is allowed. Respondent No. 2 is directed to get question No. 5(b) of the answer sheet evaluated from an examiner other than the examiner who had earlier examined the answer-sheet. The answer sheet shall be sent to the examiner within one week from today for evaluation of question No. 5(b). In case the petitioner is awarded marks for attempting question No. 5(b), in that eventuality, the name of the petitioner shall be recommended to the State Government by respondent No. 2 for the post in question within two weeks after the receipt of the result. One post from the new advertisement dated 11.10.2013 would be reduced to balance the equities between the petitioner and respondent No. 3.

6. Pending application(s), if any shall also stand disposed of.

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

FAO (MVA) No.385 of 2007 and 388 of 2007.
Date of decision: 14th November, 2014.

1.	***FAO No. 385/2007.***	
	Smt. Bhowmick Arti and anr.	*.....Appellants.*
	Versus	
	Smt. Shiksha Rani and others	*...Respondents*
2.	***FAO No. 388/2007.***	
	Oriental Insurance Co. Ltd..	*.....Appellant.*
	Versus	
	Smt. Bhowmick Arti and others	*...Respondents*

Motor Vehicle Act, 1988- Section 149- Insurer pleaded that driver did not have a valid driving license to drive transport vehicle – he was driving a vehicle whose unladen weight was 1690 kgs. and gross vehicle weight was 2820 kgs- held, that there was no necessity to have the endorsement of transport vehicle on the license in such a situation- further, insurer had not pleaded and proved that owner had committed any willful breach of the terms and conditions of the policy- appeal dismissed.

(Para-6 to 10)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, reported in AIR 2004 Supreme Court 1531

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

For the appellant:	Mr. Naveen K. Bhardwaj, Advocate, for the appellant in FAO No. 385/2007 and Mr. Ashwani K. Sharma, Advocate, for the appellant in FAO No. 388/2007.
For the respondents:	Mr.Naveen K. Bhardwaj, Advocate, for respondents No.1 & 2 in FAO No. 388 of 2008. Mr. Rajiv Rai, Advocate, for respondent No.2 in FAO No. 385/2007 Mr.Ashwani K. Sharma, Advocate, for respondent No. 3 in FAO No. 385/2007. Mr. Onkar Jairath, Advocate, for respondent No. 3 in FAO No. 388/2007. Mr. Rajiv Rai, Advocate, for respondent No. 4 in FAO No. 388 of 2007.

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 29.6.2007, made by the Motor Accident Claims Tribunal, Kullu in Cl. petition No. 61 of 2006, titled *Smt. Bhowmick and another vs. Smt. Shiksha Rani and others,* whereby a sum of Rs.1,05,000/- came to be awarded in favour of the claimant, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The claimants had invoked the jurisdiction of the Tribunal for the grant of compensation to the tune of Rs.10 lacs, as per break-ups given in the claim petition.

3. The respondents contested and resisted the claim petition by filing reply.

4. The Tribunal on the pleadings of the parties framed the following issues:

(i) *Whether deceased Navneet has died in the accident of vehicle Tata 207 bearing regn. No.HP-66-0586, due to rash and negligent driving on the part of respondent No. 2, as alleged? OPP*

(ii) If issue-1 is held in affirmative, to what amount of compensation the petitioners are entitled and from whom? OPP.

(iii) Whether respondent -2 was not holding valid and effective driving license and the vehicle involved in the accident was being plied without valid documents. If so, to what effect? OPR-3.

(iv) Relief.

5. The Tribunal, after examining the evidence on record, awarded a sum of Rs.1,05,000/- in favour of the claimants.

6. The insurer, by the medium of FAO No. 388 of 2007, has questioned impugned award only on the ground that driver of the vehicle was not having a valid and effective driving licence thus, the owner has committed willful breach. This argument has been rightly dealt with by the Tribunal in para 17 of the impugned award. It is apt to reproduce para 17 of the impugned judgment herein:

> *"17.The Ld. counsel for respondent No. 3 contended that since the driver was not having a valid driving licence to drive transport vehicle, the insurance company is not liable to pay the compensation. However, this contention of the Ld. counsel for respondent No. 3 deserves to be rejected as the perusal of the R.C. Ex. RW-1/A of the offending vehicle shows that its unladen weight was 1690 kgs. and gross vehicle weight was 2820 kgs. As per the definition clause in Section 2 (2) of the Motor Vehicles Act, 1988, "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either or which or a motor car of tractor or road roller the unladen weight of any of which does not exceed 7500 kilograms:"*

7. I have also delivered judgment in ***FAO No. 54 of 2012*** titled ***Mahesh Kumar and another vs. Smt. Piaro Devi and others*** decided on 25th July, 2014. It is apt to reproduce paras 10 to 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. 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.

13. 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."

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."

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. 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 judgement 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."

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."

8. Having said so, the driver was having a valid and effective driving licence. The insurer has not pleaded and proved that the owner has committed any willful breach which it was supposed to prove in terms of Section 149 of the Motor Vehicles Act. My this view is fortified by the Apex Court judgment in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

"105. .....

(i) .....

(ii) .....

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

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

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

9. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

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

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

10. The claimants have also questioned the impugned award by the medium of FAO No.385/2007, on the ground of adequacy of compensation. The deceased was 60 years old at the time of the accident. The Tribunal has rightly awarded the compensation in favour of the claimants. The amount of compensation is just and appropriate and cannot be said to be inadequate in any way.

11. Having said so, both the appeals are dismissed and the impugned award is upheld. The amount deposited in the Registry be released in favour of the claimants, after proper verification, through payee's cheque account.

12. Accordingly, both the appeals stand disposed of alongwith pending applications. Send down the record, forthwith.

****

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

FAOs No.222 and 223 of 2007
Decided on: November 14, 2014.

FAO No.222 of 2007.	
Dhiraj Sharma alias Vipin Kumar.	...Appellant.
VERSUS	
Bhagat Ram and others.	...Respondents.
FAO No.223 of 2007.	
Dhiraj Sharma alias Vipin Kumar.	...Appellant.
VERSUS	
Dola Mani and others.	...Respondents.

Motor Vehicle Act, 1988- Section 149- MACT had held after placing reliance on the FIR that driver was charge-sheeted for the commission of offence punishable under Section 185 of M.V. Act and the insured had committed the breach of the terms and conditions of the insurance policy- however, driver was acquitted of the commission punishable under Section 185 after the trial- held, that the insured had not committed any breach of the terms and conditions of the policy and the Insurance Company was wrongly granted the right of recovery.

(Para- 7 and 8)

For the Appellant(s): Mr. Lalit Sehgal, Advocate.

For the Respondents: Mr. Dibender Ghosh, Advocate, for respondents No.1 & 2 in FAO No.222 of 2007 and for respondents No.1 to 3 in FAO No.223 of 2007.
Mr. Deepak Bhasin, Advocate, for respondent No.3 in FAO No.222 of 2007 and for respondent No.4 in FAO No.223 of 2007.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

These appeals are the outcome of one accident, allegedly caused by Dhiraj Kumar on 22.6.2004, at about 11.15 P.M., while driving the offending vehicle i.e. Mahindra Max Jeep No.HP-01A-3068 rashly and negligently, as a result of which Bal Raj Kaushal and Om Parkash died on the spot. FIR No.50 of 2004, dated 23rd June, 2004 was registered at Police Station, Nirmand. The dependants of Bal Raj Kaushal preferred Claim Petition No.46 of 2004 under Section 166 of the Motor Vehicles Act (for short the Act), for grant of compensation to the tune of Rs.20.00 lacs, while the dependants of deceased Om Parkash preferred Claim Petition No.43 of 2004, for grant of compensation to the tune of Rs.7.00 lacs, as per the break-ups given in the Claim Petitions.

2. The Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr, (for short, the Tribunal), in terms of Award, dated 9th May, 2007, awarded a sum of Rs.7,85,000/- as compensation in favour of the claimants in Claim Petition No.46 of 2004 and the Tribunal, vide Award, dated 8th May, 2005, passed in Claim Petition No.43 of 2004, awarded Rs.4,24,000/- as compensation in favour of the claimants, and the insurer was saddled with the liability, with right of recovery from the owner of the offending vehicle. The award amount in both the claim petitions was to carry interest at the rate of 9% per annum from the date of institution of the Claim Petitions till realization.

3. Feeling aggrieved, the insured/owner has questioned the impugned awards, on the grounds taken in the memo of appeals.

4. The claimants and the insurer have not questioned the impugned awards on any ground. Accordingly, the same have attained finality qua them.

5. The only question to be determined in these two appeals is - whether the Tribunal has rightly granted right of recovery to the insurer. The answer is in the negative for the following reasons.

6. It appears that in regard to the accident in question, FIR No.50 of 2004, dated 23rd June, 2004, was registered in Police Station, Nirmand, under Sections 279, 337, 304AA of the Indian Penal Code (for short, IPC), and Section 185 of the Act against appellant Dhiraj Kumar. The Tribunal, after noticing the said FIR and the fact that the driver was charge sheeted under Section 185 of the Act, held that the insured had committed breach of terms of the insurance policy and accordingly, saddled the insurer with the liability at the first instance and granted right of recovery.

7. During the course of hearing, the learned counsel for the appellant has placed on record a copy of the judgment, dated 30th June, 2008, passed by Sessions Judge, Kinnaur at Rampur Bushahr in Sessions Trial No.14 of 2005, titled State of Himachal Pradesh vs. Dheeraj Kumar alias Vipin Kumar, resulting out of FIR No.50 of 2004. A perusal of the said judgment shows that the prosecution case came to be dismissed and the accused, i.e. the appellant in both the appeals, came to be acquitted. Thus, the said judgment is the conclusive proof of the fact that the charge under Section 185 of the Act has not been proved. The said judgment shall form part of this order.

8. In view of the above discussion, I am of the considered view that the Tribunal has wrongly granted right of recovery to the insurer. Accordingly,

the impugned awards are modified to the extent that the insurer is saddled with the liability, without any right of recovery.

9. Both the appeals stand allowed and disposed of accordingly.

****

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

Jai Singh son of Shri Daya Ram ....Petitioner
Versus
State of H.P. and others ....Respondents

Review Petition No. 125 of 2014
Date of Order 14th November, 2014

Code of Civil Procedure, 1908- Order 47 Rule 1- Petitioners claimed that they are entitled for appointment as Beldar on regular basis as per Recruitment and Promotion Rules- held, that Court had specifically held that prayer of the petitioners that they be appointed as DDT Beldars or upon any post of Class IV employee was declined- Review petition is not maintainable in relation to an order wherein, relief sought has already been negated - Review petition dismissed. (Para-5)

Cases referred:
Smt. Krajoy Mog Choudhury and others vs. The State of Tripura and another AIR 2014 33 (Tripura)
Kamlesh Verma vs. Mayawati and others, AIR 2013 SC 3301
Sow Chandra Kanta and another vs. Sheik Habib,AIR 1975 SC 1500

For the Petitioner: Mr. G.R. Palsara, Advocate.
For the Respondents: Mr. M.L. Chauhan, Additional Advocate General, and Mr. J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

This order will dispose of civil review petition filed under order 47 Rule 1 read with Section 114 of Code of Civil Procedure for reviewing the order dated 10.9.2014 passed by this Court in CWP No. 8728 of 2012 titled Jai Singh vs. State of H.P. and others.

2. Petitioner Jai Singh has filed review petition pleaded therein that relief be granted to the petitioner to the effect that petitioner is also entitled for the appointment of Beldar on regular basis and Class IV employee as per Recruitment and Promotion Rules in addition to the relief already granted by the Hon'ble High Court.

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 order dated 10.9.2014 passed in CWP No. 8728 of 2012 carefully.

4. Following points arise for determination in this civil review petition:-

1. Whether civil review petition is liable to be accepted as mentioned in memorandum of grounds of review petition?

2. Final Order.

Findings on point No.1

5. Submission of learned Advocate appearing on behalf of the petitioner that order dated 10.9.2014 passed in CWP No. 8728 of 2012 be reviewed to the effect that petitioner shall be entitled for the appointment of Beldar on regular basis or Class IV employee as per Recruitment and Promotion Rules in addition to relief granted by the High Court is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the entire order passed in CWP No. 8728 of 2012. Court has also carefully perused grounds of civil review petition. Court has specifically mentioned in para 7 in sub clause (4) that prayer of the petitioner that petitioner be appointed as DDT Beldar or upon any post of Class IV employee on regular basis is declined in view of the fact that all appointments on public post are governed by Recruitment and Promotions Rules. It is well settled law that every employee is legally entitled for appointment on regular basis as per Recruitment and Promotion Rules by competent authority after recommendation by Selection Committee in accordance with law. It is well settled law that party cannot direct the Court to pass the order in the manner party likes. It was held in case reported in ***AIR 2014 33 (Tripura) titled Smt. Krajoy Mog Choudhury and others vs. The State of Tripura and another*** that review petition is not maintainable in relation to an order wherein relief sought has already been negated. ***(See AIR 2013 SC 3301 titled Kamlesh Verma vs. Mayawati and others, AIR 1975 SC 1500 titled Sow Chandra Kanta and another vs. Sheik Habib)*** There is no negative direction in the order dated 10.9.2014 passed in CWP No. 8728 of 2012 that petitioner will not be appointed as Beldar on regular basis or Class IV employee as per Recruitment and Promotion Rules. It is held that review petition is devoid of any force in view of no negative direction mentioned above. Point No. 1 is answered in negative.

Final Order

6. In view of my above findings on point No.1 civil review petition filed by petitioner is dismissed *in limine*. Parties are left to bear their own costs. Civil review petition is disposed of.

****

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

Jeet Ram son of Shri Mani Ram & another ....Petitioners

Versus

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

Review Petition No. 126 of 2014

Date of Order 14th November,2014

Code of Civil Procedure, 1908- Order 47 Rule 1- Petitioners claimed that they are entitled for appointment as Beldar on regular basis as per Recruitment and Promotion Rules- held, that Court had specifically held that prayer of the petitioners that they be appointed as DDT Beldars or upon any post of Class IV employee was declined- Review petition is not maintainable in relation to an order wherein, relief sought has already been negated - Review petition dismissed. (Para-5)

Cases referred:

Smt. Krajoy Mog Choudhury and others vs. The State of Tripura and another AIR 2014 33 (Tripura)

Kamlesh Verma vs. Mayawati and others, AIR 2013 SC 3301
Sow Chandra Kanta and another vs. Sheik Habib AIR 1975 SC 1500

For the Petitioner: Mr. G.R. Palsara, Advocate.
For the Respondents: Mr. M.L. Chauhan, Additional Advocate General, and Mr. J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

This order will dispose of civil review petition filed under order 47 Rule 1 read with Section 114 of Code of Civil Procedure for reviewing the order dated 10.9.2014 passed by this Court in CWP No. 3006 of 2012 titled Jeet Ram and another vs. State of H.P. and others.

2. Petitioners have filed review petition pleaded therein that relief be granted to the petitioners to the effect that petitioners are also entitled for the appointment of Beldars on regular basis and Class IV employee as per Recruitment and Promotion Rules in addition to the relief already granted by the Hon'ble High Court.

3. Court heard learned Advocate appearing on behalf of the petitioners and learned Additional Advocate General appearing on behalf of the respondents and Court also perused order dated 10.9.2014 passed in CWP No. 3006 of 2012 carefully.

4. Following points arise for determination in this civil review petition:-

1. Whether civil review petition is liable to be accepted as mentioned in memorandum of grounds of review petition?
2. Final Order.

Findings on point No.1

5. Submission of learned Advocate appearing on behalf of the petitioners that order dated 10.9.2014 passed in CWP No. 3006 of 2012 be reviewed to the effect that petitioners shall be entitled for the appointment of Beldars on regular basis or Class IV employee as per Recruitment and Promotion Rules in addition to relief granted by the High Court is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the entire order passed in CWP No. 3006 of 2012. Court has also carefully perused grounds of civil review petition. Court has specifically mentioned in para 7 in sub clause (4) that prayer of the petitioners that petitioners be appointed as DDT Beldars or upon any post of Class IV employee on regular basis is declined in view of the fact that all appointments on public post are governed by Recruitment and Promotions Rules. It is well settled law that every employee is legally entitled for appointment on regular basis as per Recruitment and Promotion Rules by competent authority after recommendation by Selection Committee in accordance with law. It is well settled law that party cannot direct the Court to pass the order in the manner party likes. It was held in case reported in ***AIR 2014 33 (Tripura) titled Smt. Krajoy Mog Choudhury and others vs. The State of Tripura and another*** that review petition is not maintainable in relation to an order wherein relief sought has already been negated. ***(See AIR 2013 SC 3301 titled Kamlesh Verma vs. Mayawati and others, AIR 1975 SC 1500 titled Sow Chandra Kanta and another vs. Sheik Habib)*** There is no negative direction in the order dated 10.9.2014 passed in CWP No. 3006 of 2012 that petitioners will not be appointed as Beldars on regular basis or Class IV employees as per Recruitment and Promotion Rules. It

is held that review petition is devoid of any force in view of no negative direction mentioned above. Point No. 1 is answered in negative.

Final Order

6. In view of my above findings on point No.1 civil review petition filed by petitioners is dismissed *in limine*. Parties are left to bear their own costs. Civil review petition is disposed of.

****

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

National Insurance Company Ltd. .....Appellant
Versus
Maya Devi & others ..... Respondents

FAO No.343 of 2007
Date of decision: 14.11.2014

Motor Vehicle Act, 1988- Section 166- Deceased was driving a scooter and was hit by a Tractor which was suddenly stopped by the driver at the place of the accident- held, that evidence of the claimant duly proved that driver of the tractor was driving the tractor rashly and negligently- there was no evidence regarding the negligence of the driver of the scooter- hence, driver and owner of the tractor were rightly held liable to pay the compensation. (Para- 9 and 10)

For the appellant: Mr. Sandeep Sharma, Senior Advocate with Mr. Parshant Sharma, Advocate.
For the respondents: Mr. Ramakant Sharma, Advocate, for respondents No.1 to 4.
Mr. Vijay Bhatia, Advocate, for respondents No. 5 to 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Short controversy involved in this appeal is whether the Tribunal has rightly saddled the insurer with liability while making the award dated 8th May, 2007 passed by the Motor Accident Claims Tribunal, Hamirpur (for short "the Tribunal") in Claim Petition No.63 of 2005, titled Maya Devi & others vs. Anant Ram and others, whereby a sum of Rs.4,88,425/-alongwith interest at the rate of 9% per annum came to be awarded as compensation in favour of the claimants and against the insurer (for short the "impugned award").

2. Deceased Bahadur Singh became the victim of vehicular accident, which was alleged to have been caused by the driver of the tractor bearing registration No.HP-33-1670 being driven rashly and negligently on 14.4.2005 at Jahu Kalan (Talai), District Hamirpur at about 8.30 p.m. The deceased sustained injuries and later on succumbed to the same.

3. Precisely, the case of the claimants is that the deceased was driving Scooter bearing registration No.HP-22-1201, was hit by the tractor, which was suddenly stopped by the driver at the place of accident, the tractor hit the scooter, the deceased sustained injuries and lateron succumbed to the same on 16.4.2005. The pillion rider escaped unhurt. FIR was lodged. Claim petition was filed for grant of compensation to the tune of Rs.5 lacs as per the break-ups given in the claim petition.

4. The insurer, owner and the driver contested the claim petition.

5. The Tribunal framed the following issues:-

1. Whether Shri Bahadur Singh had died on account of rash and negligent driving of respondent No.2 of Tractor No. HP-33-1670?

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

3. Whether respondent No.2 had not been in possession of a valid and effective driving licence at the time of the accident, if not with what effect? OPR-3

4. Whether Shri Bahadur Singh had contributed to the accident as alleged, if so, with what effect? OPR-3.

5. Relief."

6. The parties led evidence. The Tribunal after scanning the evidence held that the claimants are entitled to compensation to the tune of Rs.4,88,425/-.

7. PW-2 Basudev was a pillion rider. He has given details how the accident had occurred. Virtually, he has stated that he was a pillion rider on the scooter and the tractor was being driven by the driver, which was suddenly stopped by the driver in order to alight a person and hit the scooter, deceased Bahadur Singh sustained injuries and succumbed to the same lateron. He is the only eye witness to the accident and has supported the claim of the claimants.

8. The respondents have also led evidence. RW-2 has stated that the tractor was stationary, enabling Amar Singh to alight. Thus, his statement also supported the case of the claimants.

9. The insurer and owner of the tractor have not examined any other person in order to prove that the deceased was driving the scooter rashly and negligently.

10. Having said so, prima facie, it appears that the driver of the tractor was driving the tractor rashly and negligently at the relevant point of time. The Tribunal has rightly decided issue No.1 against the respondents and in favour of the claimants.

11. The other issues are not in dispute. Thus, the findings returned by the Tribunal on those issues are also upheld.

12. Viewed thus, no case is made out for interference and the appeal merits to be dismissed. Dismissed as such.

13. The Registry is directed to release the awarded amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award through payee's account cheque, after proper identification.

14. Send down the record.

****

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

Oriental Insurance Company Ltd. .....Appellant

Versus

Sardaru & others ..... Respondents

FAO No.260 of 2007

Date of decision: 14.11.2014

Motor Vehicle Act, 1988- Section 149- Tribunal had directed the insurer to satisfy the award and to recover the amount from the owner- held that the claimants fall within the purview of third party and the insurer is liable to satisfy the award with the right of the recovery.

(Para-3)

For the appellant: Mr. G.D. Sharma, Advocate.

For the respondents: Mr. Surender Verma, Advocate, for respondents No.1 and 2.
Mr. Surinder Saklani, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award dated 13th April, 2007, passed by the Motor Accident Claims Tribunal, Mandi (for short "the Tribunal") in Claim Petition No.72 of 2003, titled Sardaru & another vs. Oriental Insurance Company Ltd. & others, whereby a sum of Rs.1,64,000/- alongwith interest at the rate of 7.5% per annum came to be awarded as compensation in favour of the claimants and against the insurer with right of recovery from the insured-owner (for short the "impugned award").

2. The claimants, insured and the driver have not questioned the impugned award on any ground and thus, it has attained finality so far it relates to them.

3. The appellant/insurer has questioned the impugned award on the ground that the Tribunal has fallen in error in directing the insurer to satisfy the impugned award and recover the same from the owner. The averment is misconceived for the simple reason that the claimants are third party and it is beaten law of land that the insurer has to satisfy the award at the first instance with right of recovery.

4. Accordingly, there is no merit in the appeal. Hence dismissed.

4. The Registry is directed to release the awarded amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award through payee's account cheque, after proper identification. Learned counsel for the appellant/insurer is at liberty to lay a motion before the Tribunal to recover the awarded amount from the owner.

5. Send down the record.

****

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

Surinder Kumar ...Petitioner
Versus
Parkash Chand ...Respondent

Cr.MMO No. 184 of 2014
Date of decision: 14.11.2014

Code of Criminal Procedure, 1973- Section 482- There was a family dispute between two brothers- complaint was made before the Gram Panchayat which was settled in view of compromise- decision passed by Gram Panchayat as affirmed by Judicial Magistrate is set aside.

(Para-3)

Indian Evidence Act, 1872- Section 114- Magistrate relied upon Section 114 to draw an inference that the petitioner had caused disturbance in the proceedings of the Panchayat- he relied upon the facts that proceeding was conducted before Gram Panchayat, there was no allegation of ill-will against the respondent and the appellant had not led any evidence to prove that he had not caused any interruption- held, that the Court hearing an appeal has to record the findings duly supported by reason on all points and there has to be a conscious application of mind - support could not have been drawn from Section 114 of Indian Evidence Act. (Para-5)

Case referred:
Sunka Ram Vs. Gram Panchyat Patta and another, 1984 Shimla Law Cases, 230

For the Petitioner: Mr.Sanjeev Bhushan, Advocate.

For the Respondent: Mr.Virender Thakur, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (Oral).

This petition under Section 482 of Cr.P.C. is directed against the order dated 28.7.2014 passed by learned Judicial Magistrate, IInd Class, Court No. IV, Hamirpur, H.P., whereby appeal filed by the petitioner was dismissed and the order passed by Gram Panchayat Badehar, Tehsil Bhoranj is affirmed.

2. It appears that there was a family dispute between the two brothers and on the instigation of one of the brothers, their father made a complaint before the Gram Panchayat against the present petitioner. However, during the pendency of these proceedings, the petitioner and his father have amicably settled the dispute, as stated by the learned counsel representing the father, who is respondent herein.

3. In this view of the matter, the orders passed by the Gram Panchayat, Badehar dated 24.7.2012 and affirmed by the learned Judicial Magistrate on 28.7.2014 are quashed and set aside.

4. Normally this Court would have left the case at this stage, but it cannot ignore the manner in which the learned Magistrate below has decided the present case and it leaves much to be desired. He has simply relied upon Section 114 of the Evidence Act and then affirmed the order passed by the Gram Panchayat, as would be clear from the following observations:-

> "6. During oral arguments learned counsel for appellant has reiterated his version made in the appeal by submitting that the Panchayat has not followed the procedure prescribed.
>
> 7. The appellant has filed the appeal to set aside the impugned order on the ground that the same is against law, fact and procedure, but he has not lead any evidence in proof of the said fact. The other contention of the appellant is that the impugned order has been passed against the principle of natural justice on the ground that the impugned order was passed behind the back of the appellant, but perusal of the Panchayat record reveals that a notice was duly served upon the appellant and thereafter the appellant has put his appearance before the concerned Gram Panchayat and during the proceedings before the Gram Panchayat, he caused interruption in the proceedings. Even

appellant not disputed his appearance before Gram Panchayat Bedehar on dated 24.07.2012.

8. As per Section 114 of the Indian Evidence Act, court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

9. In the present case, I have no hesitation to raise presumption under Section 114 of the Indian Evidence Act that appellant caused interruption in the proceedings in light of following effects:-

i) that proceeding was conducted before the Gram Panchayat.

ii) there is no allegation regarding any ill-will of the respondent against the appellant.

iii) appellant has not lead evidence to prove that he had not caused any interruption.

10. Thus, in the present case, the contention of the appellant that the order was against principle of natural justice, has no substance as the Gram Panchayat concerned gave opportunity to appellant being heard, but he caused interruption in the proceedings of the Gram Panchayat.

11. The other contention of the appellant that the Gram Panchayat has decided the case without going into the matter, also got no substance as no evidence was lead by the appellant. It is settled law that pleadings of a party do not prove the case and the case is required to be proved by leading cogent evidence. In the present case, appellant failed to lead any evidence in support of his pleadings.

12. In view of the above discussion, point No. 1 is answered in the negative and decided against the appellant."

5. Even while affirming the order passed by the Gram Panchayat, there had to be a conscious application of mind and the findings had to be supported by reasons on all points which had to be put forth and pressed by the parties and in no event support could have been drawn from Section 114 of the Indian Evidence Act.

6. More than three decades back this Court in **Sunka Ram Vs. Gram Panchyat Patta and another, 1984 Shimla Law Cases, 230** had held the imposition of recurring penalty of Rs.1/- per day till the breach continues to be bad in law, but despite this authoritative pronouncement, the Panchayats continue to impose such penalties and such orders invariably are upheld in appeal by the Courts. The point is not that a Court or Panchayat cannot impose a recurring fine for a continuance breach of an order of this kind, but that it cannot do so on the first conviction of the offender for breach, since by doing so, it would tantamount to imposing fine for an offence not yet committed, which cannot be done. In other words, after a conviction for disobedience of an order of this kind, whether passed by Panchayat or any other authority, the recurring fine can only be imposed after the continuance of breach has taken place and as long as the breach continues, the Panchayat or Court must call the offender and impose the recurring fine on him from time to time as it becomes due.

This 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 MANSOOR AHMAD MIR, C.J.

United India Insurance Co. Ltd. .....Appellant.
Versus
Akash Babu and others ...Respondents

FAO (MVA) No.383 of 2007.
Date of decision: 14th November, 2014.

Motor Vehicle Act, 1988- Section 149- Driving License of the driver was fake but it was renewed from time to time- held, that the insured is not supposed to take any steps to verify the license from the licensing authority to determine the validity- hence, insurer cannot be absolved the liability on the ground that driving license was fake.

(Para-4 and 5)

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

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Mr.Onkar Jairath, Advocate, for respondent No. 1 & 2.
Ms. Kiran Lata Sharma, Advocate, for respondents No. 3 and 4.

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 30.6.2007, made by the Motor Accident Claims Tribunal, Una in MAC petition No. 3 of 2005, titled *Akash Babu vs. Raj Kumar and others,* whereby a sum of Rs.1,50,000/- came to be awarded in favour of the claimant, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

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

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

4. The learned counsel or the insurer/appellant argued that the driver was having a fake driving licence but stands renewed. There is evidence on the file that driving licence was renewed by Licencing Authority from time to time, as such it cannot be said that the owner has committed any willful breach. It was for the insurer to plead and prove that the insured has committed willful breach which the insurer has failed to prove. My this view is fortified by the Apex Court judgment in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

"105. .....

(i) .....

(ii) .....

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

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

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

5. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If

despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

6. The impugned award is very meager, I wonder why the insurer has filed the appeal.

7. Having said so, the appeal is dismissed and the impugned award is upheld. The amount deposited in the Registry be released in favour of the claimant, after proper verification, through payee's cheque account.

8. Accordingly, the appeal stands disposed of alongwith pending applications. Send down the record, forthwith.

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

Dalbir Singh. ...Appellant.

Versus

State of Himachal Pradesh. ...Respondent.

Cr.A.No. 237 of 2011
Reserved on: 12.11.2104
Decided on: 17.11.2014

N.D.P.S. Act, 1950- Section 20- Accused was found in possession of 3 kg 800 grams charas concealed in a bag under his left arm pit- no independent witness was associated during the search, seizure and sampling process- prosecution witnesses admitted that police party had checked 20-25 vehicles and the place where the accused was apprehended was a national highway- they further admitted that there were 4-5 hotel and restaurants between the police Station and the place of incident, therefore, place of the incident was not isolated place where no independent witness was available- police had not made any efforts to associate independent witness- there were contradictions in the testimonies of eye-witness regarding the time of sending ruqqa and the time spent in taking photographs- held that in these circumstances, prosecution case was doubtful- accused acquitted. (Para- 23)

For the Appellant: Mr. Ravinder Thakur, Advocate.
For the Respondent: Mr. Ramesh Thakur, Asstt. A.G.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 28.4.2011 rendered by the Special Judge-II, Solan in Sessions Trial No. 4-S/7 of 2010, 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 undergo imprisonment for a period of six months. Hence, the present appeal.

2. Case of the prosecution, in a nutshell, is that on 24.11.2009 police party was on Nakka duty at place near Deli. Accused was noticed coming on foot from the side of Timber Trail Resort at 3.15 A.M. on 25.11.2009. Accused tried to escape. He was apprehended. He was taken to a place where Nakka was laid. Accused had concealed bag under his left arm pit. Police had suspicion of some incriminating substance, hence, accused was apprised about his right to be searched before Magistrate or Gazetted Officer vide memo Ex.PW-1/A. Accused consented to be searched by the police party vide memo Ex.PW-1/E. The members of police party afforded their personal search to the accused vide memo Ex.PW-1/C. The bag of accused was searched. It was found to be containing charas in the shape of balls and sticks. Weights and scale were brought by PW-3 HC Baggi Ram. The charas so recovered was weighed. It was found to be 3 kgs 800 grams. The charas was sealed in a parcel with seal 'H'. The woolen shawl of accused was also sealed in another parcel with seal 'H'. Seizure memo Ex.PW-1/G was prepared. NCB forms in triplicate were filled in. Columns No.1 to 8 were filled in by the Investigating Officer. The Investigating Officer prepared rukka Ex.PW-4/A and the same was sent to Police Station through PW-4 Constable Rajesh Kumar. FIR Ex.PW-6/A was registered. Photographs Ex.PW-3/A to Ex.PW-3/J were taken on the spot. The Investigating Officer prepared the spot map. He handed over the parcel containing charas and other documents to S.H.O. PW-6 Govind Ram. He resealed the property with seal 'N'. PW-6 Govind Ram filled in columns No. 9 to 11 of NCB form. Special report Ex.PW-5/A was prepared by PW-6 Govind Ram. It was sent to the Superintendent of Police, Solan through PW-5 Constable Kuldeep Singh. The contraband was sent to F.S.L., Junga. The report of F.S.L. Ex.PW-6/G was received. 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 11 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. He has produced 4 DWs in support of his defence. Learned trial Court convicted and sentenced the accused, as noticed hereinabove.

4. Mr. Ravinder Thakur, learned counsel for the appellant has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. Ramesh Thakur, leaned 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 Ashok Kumar has deposed that he alongwith ASI Ram Lal, Constable Desh Raj, Constable Rajesh Kumar, Constable Gurcharan Singh were on patrolling duty on the intervening night of 24/25.11.2009 at about 3.15 A.M. They were present near village Deli on National Highway-22. In the meantime, a person emerged from the side of Timber Trail Resort. He turned back after noticing the police party. He tried to escape. He was nabbed. He was apprised about his right to be searched either before a Gazetted Officer or a Magistrate or a police party vide Ex.PW-1/A. Accused gave his consent vide Ex.PW-1/B. All the members of the police party afforded their personal search to the accused. Nothing incriminating was recovered from them. Personal search of the accused was conducted. He was carrying a saffron coloured bag under his left arm. It was checked. This bag further contained another bag having zip. The zip was opened. It contained blue coloured bag. This bag further contained a grey coloured plastic bag which was contained a black coloured substance in the shape of balls and sticks. It was found to be charas. Memo Ex.PW-1/D was prepared. ASI Ram Pal gave information through his mobile phone to the Police Station and summoned the weights and scale from the Police Station. H.C. Bagi

Rath brought weights and scale on a motorcycle. It weighed 3 kgs 800 grams. The charas was kept in the bag. Thereafter, all the bags were kept in the same manner as found during search. It was sealed with seal 'H' at five places. The sample of seal was also drawn on three pieces of cloth, one of which was Ex.PW-1/E. The woolen shawl was also sealed in a separate cloth parcel with seal 'H'. NCB form in triplicate was filled in. Photographs of the proceedings were also taken on the spot by H.C. Bhagi Rath vide marks A to H and J. In his cross-examination, he has deposed that he alongwith four other police officials started from Police Station, Parwanoo at about 11.00 P.M. for laying Nakka. The Timber Trail Resort was not visible from Deli. They checked 20-25 vehicles on that day up till 3.00 A.M. No other passenger was apprehended on the relevant day. He has admitted that it was a busy road being National Highway. According to him, there was no shop on the spot where they had laid Nakka. However, there were some shops towards Parwanoo side after about two curves. The shops of market committee were at a distance of about 40-50 meters. The accused was seen from a distance of 15-20 meters. Neither any vehicle was stopped nor any efforts were made to stop the vehicle passing on the road. The accused was apprehended at a distance of about 50 meters away from the spot of Nakka on National Highway. The rukka was prepared after the recovery of contraband. The rukka was taken by Rajesh Kumar to the Police Station, Parwanoo. He did not remember the exact date. Photographs of the proceedings were taken on the spot. Photographs were taken before preparation of seizure memo and photographs of proceedings of seizure were also taken. Photographs were taken as per proceedings on the spot and not simultaneously.

8. PW-2 Desh Raj has also deposed the manner in which accused was apprehended, his personal search was carried out, the contraband was recovered and the sampling process was completed on the spot. In his cross-examination, he has admitted that there were 5-6 shops at Deli. They had checked 3-4 buses on that day on the spot. He has also admitted that there were 4-5 hotels or restaurants in between Police Station, Parwanoo and Timber Trail Resort. The accused was apprehended at a distance of 30-40 steps from police Nakka. The proceedings were conducted with the help of search light and head light of the Government vehicle. The rukka was sent through Constable Rajesh Kumar at about 4.45 A.M. He came back from Police Station within 30-45 minutes.

9. PW-3 H.C. Baggi Ram has deposed that MHC Prem Singh informed him that he has to deliver weights and scale to ASI Ram Lal at place near Deli on National Highway-22. He carried weights and scale to the spot. He delivered the same to ASI Ram Lal. He also clicked the photographs marks A to J (Ex.PW-3/A to Ex.PW-3/J). He has admitted in his cross-examination that there were residential houses near Deli shops. The distance between place of Nakka and Timber Trail Resort was 100 meters. The Timber Trail Resort was not visible from the place of Nakka since there was a curve. He has admitted that so many buses passed on National Highway when they were conducting proceedings on the spot. No efforts were made to stop these vehicles. The gap between first photograph and the last photograph taken by him was about 10 minutes. First photograph was taken at 3.55 A.M. He had not brought the camera since it was already with ASI Ram Lal.

10. PW-4 Rajesh Kumar has also deposed the manner in which the accused was apprehended, search and sampling process was completed. In his cross-examination, he has deposed that he proceeded to Police Station from the spot alongwith rukka at 4.45 A.M. and returned back after 45 minutes. They checked 8-9 vehicles on that day, including 3-4 buses. They left the spot of Nakka at about 9.15 A.M. after the proceedings were over. They checked one bus of Chandigarh Transport. He did not remember the registration number of the vehicle. The bus was full. It was checked at about 12 -1.00 A.M.

11. Statement of PW-5 Kuldeep Singh is formal in nature.

12. PW-6 Inspector Govind Ram has deposed that on 25.11.2009 Rukka Ex.PW-4/A was prepared and the same was received in the Police Station through Constable Rajesh Kumar. He recorded FIR Ex.PW-6/A. The case file was sent to ASI Ram Lal for further investigation. ASI Ram Lal handed over to him a parcel duly sealed with five seal impression 'H' at 9.35 A.M. stated to be containing 3 kgs 800 grams charas alongwith NCB form in triplicate, sample of seal and other documents. He re-sealed the parcels in a separate cloth parcel with seal 'N' at five places. He filled in columns No. 9 to 11 of NCB form. The parcel alongwith NCB form was handed over to MHC for safe custody. On 25.11.2009, he also prepared the special report in duplicate and sent the same to the Superintendent of Police, Solan through constable Kuldeep. In his cross-examination, he has admitted that rukka was received by him at about 3.15 A.M. on 25.11.2009. ASI Ram Lal deposited case property with him at 9.35 A.M. He has also admitted that Kalka-Shimla road is a busy road and vehicles frequently pass on it during day and night. He has also admitted that there were shops in Deli Bazaar. Parwanoo Bazaar was at a distance of 2 KMs from Deli Bazaar.

13. PW-7 H.C. Prem Singh has deposed that on 25.11.2009 S.H.O. Govind Ram deposited with him a parcel duly sealed with seal 'N' at five places stated to be containing charas. He made entry at Sr. No.425 of the Malkhana register. ASI Ram Lal deposited with him another parcel duly sealed with seal 'H' at three places stated to be containing a woolen shawl. The contraband was sent to F.S.L. Junga through Constable Santosh Kumar.

14. Statement of PW-8 H.C. Yadav Chand is formal in nature.

15. PW-9 Santosh has deposed that MHC Prem Singh handed over to him a parcel duly sealed with five seal impressions of seal 'N' alongwith sample of seal 'H' and NCB form, copy of FIR and recovery memo vide RC No.87/09. He deposited the same at F.S.L. Junga. As long as the parcel remained with him, it remained safe and intact.

16. PW-10 Sri Chand in his cross-examination has admitted that there were some shops in Deli and residential houses. He has admitted that on both the sides of road from Deli to Parwanoo, there were shops and habitation.

17. PW-11 Ram Lal has deposed the manner in which the accused was apprehended, search, seizure and sampling process was completed on the spot. He filled in columns No. 1 to 8 of NCB form. He prepared rukka Ex.PW-4/A and the same was sent to Police Station through Constable Rajesh Kumar, which led to registration of FIR Ex.PW-6/A. Photographs of the proceedings were also taken. He prepared spot map Ex.PW-11/A. He handed over the contraband to S.H.O. Govind Ram, who re-sealed the same with seal 'N' and also filled in NCB form and issued Ex.PW-6/E. In his cross-examination, he has deposed that they checked 100-150 vehicles approximately on that night upto 3.00 A.M. The Nakka was laid near Dharam Kanta on National Highway. They had noticed the accused coming from T.T.R. side from a distance of approximately 14-15 meters. The time gap between first photograph and the last photograph was about one hour. There were shops in Deli. There were shops on both the sides of road from Deli to Patwanoo. He has admitted that there was vehicular traffic on National Highway. Volunteered that the traffic was less as compared to day time. He has denied the suggestion that accused was travelling in a C.T.U. bus.

18. The accused has also examined four DWs. DW-1 Rishi Pal was driver of C.T.U. bus No. CH-01G-8871. The bus left from Shimla. They stopped for dinner near Dharampur at Sanwara. They reached at Parwanoo around 1-1.30 A.M. Conductor No. 826 of Depot No.1 was accompanying him as a conductor. The bus was full. The accused was travelling in the bus. The accused was apprehended by the police from the bus. Their signatures were

obtained on some papers by the police at Parwanoo. In his cross-examination, he has admitted that he was posted at Bus Stand Sector-17 for the last one year. Before this posting, he remained posted in workshop as supervisor.

19. DW-2 Surjeet Singh was working as conductor in Chandigarh Transport Undertaking. He has deposed that at about 10.30 P.M. on 24.11.2009, they started journey from Shimla to Chandigarh. DW-1 Rishi Pal was driving the bus. The police officials checked the bus at Parwanoo and accused was taken away by them.

20. DW-3 Sandeep Kumar was also traveling in the C.T.U bus. He has deposed that the bus left Shimla at about 10.45 P.M. Accused was also travelling in the bus from Shimla. DW-1 Rishi Pal was driver and DW-2 Surjeet Singh was conductor of the bus. He has denied the suggestion that accused was not travelling in the bus and he was not apprehended by the police at Parwanoo.

21. DW-4 Harminder Singh has deposed that as per yard control register, bus No. CH-01G-8871 left Chandigarh for Shimla on 24.11.2009 at 5 p.m. The bus left Shimla for Chandigarah at about 11 : 30 p.m. on the same day. It reached at Chandigarh on 25.11.2009 at 3 p.m. The entries qua departure and arrival were recorded in the register. In his cross-examination, he has admitted that as per record, the complete registration of the vehicle is not mentioned. The names of drivers and conductors were not entered and only their numbers were mentioned.

22. According to PW-1 Ashok Kumar, Rukka was prepared after the recovery of contraband and it was taken by Constable Rajesh Kumar to Police Station, Parwanoo. PW-2 Constable Desh Raj had deposed that Ruqua was sent with Rajesh Kumar at about 4:45 a.m. He came back from Police Station within 30-45 minutes. They remained on the spot upto 9 a.m. approximately. PW-4 Rajesh Kumar has deposed that he proceeded to Police Station from the spot at 4:45 a.m. and came back after 45 minutes. PW-11 Ram Lal has also deposed that rukka was prepared by him vide Ext. PW4/A and the same was sent to the Police Station through Rajesh Kumar. According to statements of PW-2 Desh Raj and PW-4 Rajesh Kumar, Rukka was carried to the Police Station at 4:45 a.m. PW-6 Govind Ram, in his cross-examination, has specifically admitted that rukka was received by him at 3:15 a.m. on 25.11.2009. If the rukka itself has been sent at 4:45 a.m. through PW-4 Rajesh Kumar how it could be received by PW-6 Govind Ram at 3:15 a.m. It demolishes the entire case of the prosecution.

23. Admittedly, no independent witness has been associated by the Police during nabbing, seizure and sampling process on the spot. PW-1 Ashok Kumar, in his cross-examination, has admitted that there were one or two factories and some godowns near market committee's shops. He has also deposed that they had checked 20-25 vehicles on that day till 3 a.m. He has also admitted that it is a busy road being a national highway. PW-2 Desh Raj has also admitted that there were 4-5 hotels or restaurants in between Police Station, Parwanoo and Timber Trail Resort. They had checked 3-4 buses on that day on the spot. PW-3 Baggi Ram has also deposed that so many buses passed on the national highway when they were conducting the proceedings on the spot. No efforts were made to stop those vehicles by the Investigating Officer. He has also admitted that there were residential houses near Deli shops. The distance between Timber Trail Resort and the place where the nakka was laid was 100 mtrs. PW-11 Ram Lal has deposed that there was regular traffic on the national highway. However, despite the residential houses and shops being available near the place where the accused was apprehended, no efforts were made to associate the independent witnesses. The nakka was laid on the national highway. According to PW-11 Ram Lal himself, approximately 100-150 vehicles were checked by him upto 3 a.m. PW-7 Prem Singh has deposed that 20-25 vehicles were checked on the nakka. Drivers/conductors or passengers of

the buses could be associated as independent witnesses. It cannot, thus, be termed as an isolated place where the availability of independent witness was remote. The police has not made any effort whatsoever to associate independent witnesses. It is not the case of the prosecution that the efforts were made and independent witnesses were not available on the spot. PW-3 Baggi Ram has photographed the spot. According to him, the photographs were taken as per the proceedings conducted on the spot. The gap between first photograph and the last photograph was about 10 minutes. The first photograph was taken at 3:55 p.m. PW-11 Ram Lal has deposed that the time gap between first photograph and the last photograph was about 1 hour. It also casts doubt on the prosecution version the manner in which photographs were taken on the spot. Thus, the prosecution has failed to prove that contraband was recovered from exclusive and conscious possession of the accused by not associating independent witnesses. We have already noticed that Rukka as per statement of PW-2 Desh Raj and PW-4 Rajesh Kumar was taken to Police Station at 4:45 a.m. PW-6 S.H.O. Govind Ram has testified that Rukka was received at 3:15 a.m. FIR was registered on the basis of Rukka.

24. 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.

25. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 28.4.2011 rendered in Sessions Trial No. 4-S/7 of 2010 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.

26. 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 TARLOK SINGH CHAUHAN, J.

Harcharan Singh alias Charan Singh ...Petitioner

Versus

Krishan Chand and another ...Respondents

Cr.MMO No. 163 of 2014
Reserved on 13.11.2014
Date of decision: 17.11.2014

Code of Criminal Procedure, 1973- Section 245- Complaint was filed by the complainant for the commission of offence punishable under Sections 379, 467, 471 read with Section 34 IPC and cognizance was taken- pre-charge evidence was led- complainant did not step into witness-box- the Court drew an adverse inference and discharged the accused- held, that petitioner was the best witness to depose about the entire case but he had not stepped into witness box- evidence led by the complainant at the time of taking cognizance cannot be used for framing of charge- therefore, discharge of the accused was justified.

(Para- 5 and 6)

Case referred:

Sunil Mehta and another Vs. State of Gujarat and another (2013) 9 SCC 209
For the Petitioner: Mr.S.K. Sood, Advocate.
For the Respondents: Mr.Dheeraj K. Vashisht, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The petitioner has moved this Court under Section 482 of Cr.P.C. for quashing order dated 3.6.2014 passed by the learned Additional Chief Judicial Magistrate (I), Amb, whereby the respondents/accused were ordered to be discharged.

2. The petitioner had preferred a complaint on the allegations that he was a co-sharer in joint possession of land comprised in Khewat No. 251 min, Khatauni No. 361, Khasra Nos. 1, 2, 3 and 14, measuring 2-25-43 hectares situated in Village Hamboli, Tehsil Amb, District Una. Upon this land there were many valuable trees like Khair, Kikkar, Sheesham etc. and the respondents had cut number of trees from the aforesaid land without prior consent of the complainant or the other co-sharers and without any proper sanction of the competent authority. The petitioner lead his preliminary evidence in support of his case, upon which cognizance against the accused persons for commission of offence punishable under Sections 379, 467, 471 read with Section 34 IPC was taken. Thereafter the complainant led pre-charge evidence, in which he examined four witnesses. The petitioner did not step into the witness box in the pre-charge evidence, resulting in an adverse inference being drawn by the learned trial Magistrate, consequently leading to discharge of the respondents. It is this order of the Magistrate below, which has been impugned in this proceeding, on the ground that there was sufficient material available with the Court below to frame the charge.

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

4. While leading pre-charge evidence, petitioner-claimant examined CW-1, Sh. Janam Singh, Range Officer, Amb and proved copy of affidavit of the complainant Ex.CW-5/A. But a close scrutiny of this affidavit shows that the same does not pertains to the land in dispute, but pertains to land comprised in Khata No. 180, Khatoni No. 300, Khasra Nos. 448, 449, 467, 484, 485, 486 and 487. Though the petitioner had claimed this affidavit to be a forged document, but then he himself did not appear in the witness box to depose about the same. CW-2, Harbans Lal and CW-3 Amar Nath had claimed that one of the respondents Krishan Chand had felled trees standing over the land in dispute. However, there is nothing on record to suggest that they had obtained any demarcation to show felling of trees from the land in question. The tone and tenor of the cross-examination of these witnesses clearly suggest that there in fact is a dispute regarding share in consideration for felling of these trees with some society, but then there is nothing to show that there is some nexus or connection of any of the accused with such society. CW-3 Amar Nath had infact categorically deposed that he has no dispute with the accused person, as the land had not yet been demarcated and therefore, it was not ascertainable as to whether trees which were felled were in fact standing upon the land in question or some other land. In so far as testimony of CW-4, Chaman Lal is concerned, the same leads nowhere. Therefore, in this background, it was the petitioner alone, who was the best witness and could have depose about the entire case, but unfortunately he did not choose to step into the witness box.

5. The petitioner at this stage has though made a reference to the judgment of the Hon'ble Supreme Court in **Sunil Mehta and another Vs. State of Gujarat and another (2013) 9 SCC 209** to contend that the order of the Magistrate should be set aside and the matter be remanded back with a

direction to proceed in accordance with the provisions of Sections 244 to 247 of the Code. But I fail to understand as to how the ratio of the aforesaid judgment can help the petitioner. Rather, it has been clearly held in this judgment that the deposition of the complainant and his witnesses recorded by the Magistrate under Chapter XV at the stage of taking cognizance of an offence when the accused does not appear, cannot be considered as evidence for framing charge under Chapter XIX of the Code, as would be clear from the following observations:-

> "7. Chapter XV of the Code of Criminal Procedure, 1973 deals with complaints made to Magistrates. Section 200 which appears in the said Chapter inter alia provides that the Magistrate taking cognizance of an offence on a complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and signed by the complainant and the witnesses, as also the Magistrate. An exception to that general rule is, however, made in terms of the proviso to Section 200 in cases where the complaint is made by a public servant acting or purporting to act in the discharge of his official duties, or where a Court has made the complaint, or the Magistrate makes over the case for enquiry or trial by another Magistrate under Section 192 of the Cr.P.C.
>
> 8. Section 201 deals with the procedure which a Magistrate not competent to take cognizance of the case is required to follow. Section 202 empowers the Magistrate to postpone the issue of process against the accused either to inquire into the case himself or direct an investigation to be made by a police officer for the purpose of deciding whether or not there is sufficient ground for proceeding. Sub-section (2) of Section 202 empowers the Magistrate to take evidence of witnesses on oath in an inquiry under sub-section (1) thereof. Section 203, which is the only other provision appearing in Chapter XV, empowers the Magistrate to dismiss the complaint if he is of the opinion that no sufficient ground for proceeding with the same is made out.
>
> 9. There is no gainsaying that a Magistrate while taking cognizance of an offence under Section 200, whether such cognizance is on the basis of the statement of the complainant and the witnesses present or on the basis of an inquiry or investigation in terms of Section 202, is not required to notify the accused to show cause why cognizance should not be taken and process issued against him or to provide an opportunity to him to cross- examine the complainant or his witnesses at that stage.
>
> 10. In contra distinction, Chapter XIX of the Code regulates trial of warrant cases by Magistrates. While Part A of that Chapter deals with cases instituted on a police report, Part B deals with cases instituted otherwise than on a police report. Section 244 that appears in Part B of Chapter XIX requires the Magistrate to "proceed to hear the prosecution" and "take all such evidence as may be produced in support of the prosecution" once the accused appears or is brought before him. Section 245 empowers the Magistrate to discharge the accused upon taking all the evidence referred to in Section 244, if he considers that no case against the accused has been made out which if unrebutted would warrant his conviction. Sub-section (2) of Section 245 empowers the Magistrate to discharge an accused even "at any previous stage" if for reasons to be recorded by such Magistrate the charges are considered to be "groundless". In cases where the accused is not discharged, the Magistrate is required to follow the procedure under Section 246 of the Code.
>
> 11. That provision may at this stage be extracted:

> **"246. Procedure where accused is not discharged** - (1) If, when such evidence has been taken, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.
>
> (2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty or has any defence to make.
>
> (3) If the accused pleads guilty, the Magistrate shall record the plea, and may, in his discretion, convict him thereon.
>
> (4) If the accused refuses to plead, or does not plead or claims to be tried or if the accused is not convicted under sub-section (3), he shall be required to state, at the commencement of the next hearing of the case, or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken.
>
> (5) If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged.
>
> (6) The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross-examination and re- examination (if any), they shall also be discharged."

A simple reading of the above would show that the Magistrate is required to frame in writing a charge against the accused "when such evidence has been taken" and there is ground for presuming that the accused has committed an offence triable under this Chapter which such Magistrate is competent to try and adequately punish.

12. Sections 244 to 246 leave no manner of doubt that once the accused appears or is brought before the Magistrate the prosecution has to be heard and all such evidence as is brought in support of its case recorded. The power to discharge is also under Section 245 exercisable only upon taking all of the evidence that is referred to in Section 244, so also the power to frame charges in terms of Section 246 has to be exercised on the basis of the evidence recorded under Section 244. The expression "when such evidence has been taken" appearing in Section 246 is significant and refers to the evidence that the prosecution is required to produce in terms of Section 244(1) of the Code. There is nothing either in the provisions of Sections 244, 245 and 246 or any other provision of the Code for that matter to even remotely suggest that evidence which the Magistrate may have recorded at the stage of taking of cognizance and issuing of process against the accused under Chapter XV tantamounts to evidence that can be used by the Magistrate for purposes of framing of charges against the accused persons under Section 246 thereof without the same being produced under Section 244 of the Code. The scheme of the two Chapters is totally different. While Chapter XV deals with the filing of complaints, examination of the complainant and the witnesses and taking of cognizance on the basis thereof with or without investigation and inquiry, Chapter XIX Part B deals with trial of warrant cases instituted otherwise than on a police report. The trial of an accused under Chapter XIX and the evidence relevant to the same has no nexus proximate or otherwise with the evidence adduced at the initial stage where the Magistrate records depositions and examines the evidence for purposes of deciding whether a case for proceeding further has been made out. All that may be said is that evidence that was adduced before

a Magistrate at the stage of taking cognizance and summoning of the accused may often be the same as is adduced before the Court once the accused appears pursuant to the summons. There is, however, a qualitative difference between the approach that the Court adopts and the evidence adduced at the stage of taking cognizance and summoning the accused and that recorded at the trial. The difference lies in the fact that while the former is a process that is conducted in the absence of the accused, the latter is undertaken in his presence with an opportunity to him to cross-examine the witnesses produced by the prosecution.

14. There is, in our opinion, no merit in that contention which needs to be noticed only to be rejected. We say so for reasons more than one. In the first place, the expression "Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution" appearing in Section 244 refers to evidence within the meaning of Section 3 of the Indian Evidence Act, 1872. Section 3 reads as under:

> **"3. Interpretation clause** - In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-
>
> * * *
>
> **'Evidence'**.-'Evidence' means and includes-
>
> (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;
>
> (2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence."

16. It is trite that evidence within the meaning of the Evidence Act and so also within the meaning of Section 244 of the Cr.P.C. is what is recorded in the manner stipulated under Section 138 in the case of oral evidence. Documentary evidence would similarly be evidence only if the documents are proved in the manner recognised and provided for under the Evidence Act unless of course a statutory provision makes the document admissible as evidence without any formal proof thereof.

17. Suffice it to say that evidence referred to in Sections 244, 245 and 246 must, on a plain reading of the said provisions and the provisions of the Evidence Act, be admissible only if the same is produced and, in the case of documents, proved in accordance with the procedure established under the Evidence Act which includes the rights of the parties against whom this evidence is produced to cross-examine the witnesses concerned.

18. Secondly, because evidence under Chapter XIX (B) has to be recorded in the presence of the accused and if a right of cross-examination was not available to him, he would be no more than an idle spectator in the entire process. The whole object underlying recording of evidence under Section 244 after the accused has appeared is to ensure that not only does the accused have the opportunity to hear the evidence adduced against him, but also to defend himself by cross-examining the witnesses with a view to showing that the witness is either unreliable or that a statement made by him does not have any evidentiary value or that it does not incriminate him. Section 245 of the Code, as noticed earlier, empowers the Magistrate to discharge the accused if, upon taking of all the evidence referred to in Section 244, he considers that no case against the accused has been made out which may warrant his conviction.

Whether or not a case is made out against him, can be decided only when the accused is allowed to cross- examine the witnesses for otherwise he may not be in a position to demonstrate that no case is made out against him and thereby claim a discharge under Section 245 of the Code. It is elementary that the ultimate quest in any judicial determination is to arrive at the truth, which is not possible unless the deposition of witnesses goes through the fire of cross-examination. In a criminal case, using a statement of a witness at the trial, without affording to the accused an opportunity to cross-examine, is tantamount to condemning him unheard. Life and liberty of an individual recognised as the most valuable rights cannot be jeopardised leave alone taken away without conceding to the accused the right to question those deposing against him from the witness box.

19. Thirdly, because the right of cross-examination granted to an accused under Sections 244 to 246 even before framing of the charges does not, in the least, cause any prejudice to the complainant or result in any failure of justice, while denial of such a right is likely and indeed bound to prejudice the accused in his defence. The fact that after the Court has found a case justifying framing of charges against the accused, the accused has a right to cross-examine the prosecution witnesses under Section 246(4) does not necessarily mean that such a right cannot be conceded to the accused before the charges are framed or that the Parliament intended to take away any such right at the pre-charge stage.

21. This Court further clarified that the expression “or at any previous stage of the case” appearing in Section 246(1) did not imply that a Magistrate can frame charges against an accused even before any evidence was led under Section 24. This Court approved the decision of the High Court of Bombay in Sambhaji Nagu Koli v. State of Maharashtra 1979 Cri LJ 390 (Bom), where the High Court has explained the purport of the expression “at any previous stage of the case”. The said expression, declared this Court, only meant that the Magistrate could frame a charge against the accused even before all the evidence which the prosecution proposed to adduce under Section 244(1) was recorded and nothing more. This Court observed:

> “44. In Section 246 Cr.P.C. also, the phraseology is "if, when such evidence has been taken", meaning thereby, a clear reference is made to Section 244 Cr.P.C. The Bombay High Court came to the conclusion that the phraseology would, at the most, mean that the Magistrate may prefer to frame a charge, even before all the evidence is completed. The Bombay High Court, after considering the phraseology, came to the conclusion that the typical clause did not permit the Magistrate to frame a charge, unless there was some evidence on record. For this, the Learned Single Judge in that matter relied on the ruling in Abdul Nabi v. Gulam Murthuza Khan 1968 Cri LJ 303 (AP).”

22. More importantly, this Court recognised the right of cross- examination as a salutary right to be exercised by the accused when witnesses are offered by the prosecution at the stage of Section 244(1) of the Code and observed:

> “51. The right of cross-examination is a very salutary right and the accused would have to be given an opportunity to cross- examine the witnesses, who have been offered at the stage of Section 244(1) Cr.P.C. The accused can show, by way of the cross- examination, that there is no justifiable ground against him for facing the trial and for that purpose, the prosecution would have to offer some evidence. While interpreting

this Section, the prejudice likely to be caused to the accused in his losing an opportunity to show to the Court that he is not liable to face the trial on account of there being no evidence against him, cannot be ignored."

6. The findings reproduced above rather support the case of the respondents. Therefore, taking into consideration all the aforesaid facts, as also the exposition of law in Sunil Mehta's case supra, this Court find no infirmity or illegality in the order passed by the learned Magistrate below. Consequently, the petition being devoid of any merits is 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.

State of H.P. .....Appellant.
Versus
Rajesh Kumar & others .....Respondents.

Cr. Appeal No. 214 of 2013.
Reserved on: 03.11.2014.
Date of Decision :17.11.2014.

N.D.P.S. Act, 1985- Section 20- Accused was driving the Tata Sumo- accused S was occupying front seat while other accused were occupying the rear seats- search of the vehicle and the persons of the accused were conducted leading to the recovery of the charas- held, that the testimonies of the prosecution contradicted each other regarding the time of their arrival at the place of incident- regarding the manner of taking the accused to the police station- no independent witness was associated- link evidence was not established, therefore, in these circumstances, acquittal of the accuses was justified.

For the Appellant: Mr. Ramesh Thakur, Assistant Advocate General.
For the Respondents: Mr. H.S. Rangra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed by the State of H.P. against the impugned judgment rendered on 1.12.2012 by the learned Special Judge (Fast Track Court), Mandi in Sessions trial No. 42 of 2009, whereby, the learned trial Court acquitted the accused/respondents of theirs having allegedly committed the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act).

2. Brief facts of the case are that on 10.01.2009, Inspector/Incharge SIU Mandi along with HHC Padam Singh, H.C. Prem Lal, left the office in Government vehicle No.HP-33-6202 being driven by Lalman and on a motor cycle No.HP-33B-0199 in connection with Nakabandi and were present at Dyodh Mod near Pandoh dam. The police party intercepted a Tata Sumo bearing registration No. HP-33E-0508 being driven by accused Rajesh Kumar and accused Sanjay Kumar was occupying the front seat by the side of the driver and accused Satish Kumar was occupying the seat on the back of the driver. Accused Rajesh Kumar, Sanjay Kumar and Satish Kumar were apprised of their legal rights to be searched either before Magistrate or Gazetted Officer vide memo Ex.PW4/A, Ex.PW4/B and Ex.PW4/C in the presence of the witnesses

and the accused persons gave in writing that they are willing to be searched by the police. The photographs of the vehicle and of the accused were also taken by the Investigating Officer through official camera. The police party checked the vehicle and one packet was recovered from the right side of the dash board and two packets were recovered from the left side of the dash board of the vehicle which were wrapped with khaki tape and the three packets which were found in the possession of Rajesh Kumar accused . 1 kg 400 grams charas was recovered and two samples of 25-25 grams were drawn from these packets which were separately packed and sealed with 7 seals of 'D' and the bulk charas of one Kg 350 grams was also sealed with 7 seals of 'D', whereas on the personal search of accused Sanjay Kumar, two packets were found to be tied on his left leg and two packets were found to be tied on his right leg. These packets were opened and they were found to be containing black colour material in the shape of sticks and balls and on weighment, it was found to be 2 kgs out of which two samples of 25 grams each were drawn which were separately packed and sealed and the bulk charas 1 kg 950 grams were also sealed with seal 'D' at 7 places. On search of the black and green colour bag which was kept by accused Satish Kumar on left side of the seat, three packets wrapped with khakhi colour tape were recovered, which were opened and found containing black colour charas in the shape of sticks and balls. On weighment, it was found to be containing 2 kgs charas. Two samples of 25 grams each were drawn from the recovered charas and the samples of charas separately packed and sealed with seal 'D' at 7 places. NCB forms in triplicate were filled in by Sh. Jaishi Ram, Investigating Officer upon which seal impression "D' was embossed and sample seal was taken on cloth. The vehicle was also taken into possession. Ruqua was scribed and sent to police station through HHC Padam Singh for registration of FIR and the Investigating Officer prepared site plan, recorded statements of the witnesses and has given notice of arrest of the accused and information of the arrest was given to the persons as desired by the accused. On coming to the police station the case property was handed over along with NCB forms to the then SHO Haripal Saini for resealing, who resealed the case property with seal 'N' by affixing three seals on each parcel and prepared the reseal memo Ex.PW1/C and the specimen of seal also affixed on NCB forms and deposited the case property with MHC Nand Lal and he made the entry in the Malkhana register. On 12.1.2009, the case property was sent through PW-6 Nikka Ram for depositing in the office of FSL, Junga, who deposited the case property and handed over the receipt to the MHC. As per the report of the FSL Junga, Ex. P-6, the entire mass of the exhibit marked as A-1, B-1 and C-1 is a mixture of cannabis and the sample of charas.

3. On conclusion of the investigation, into the offence, allegedly committed by the accused, report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court.

4. Accused were charged for theirs having committed an offence punishable under Section 20 of the NDPS Act by the learned trial Court to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined twelve witnesses. On closure of prosecution evidence, the statement of accused, under Section 313 of the Code of Criminal Procedure was recorded in which they pleaded innocence and chose to lead no evidence in defence.

6. On appraisal of the evidence on record, the learned trial Court, returned findings of acquittal against the accused/respondents.

7. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Assistant Advocate General has concertedly and vigorously contended that the findings of acquittal recorded by the learned trial Court are not based on a proper appreciation of 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.

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

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

10. The first witness, who, stepped into the witness box in proof of the prosecution case is PW-1 Inspector Hari Paul Saini, who in his deposition deposes that on 10.1.2009 on receiving ruka Ex.PW1/A through HHC Padam Singh in Police Station, Sadar Mandi, recorded FIR Ex.PW1/B which bears his signatures. He further deposes that on the evening of 10.1.2009, Inspector Jaishi Ram handed over the case property to him which was resealed by him with seal bearing impression 'N' . He proceed to depose that he prepared memo Ex.PW1/C qua the factum of resealing of the case property. He deposes that facsimile of seal was also affixed on NCB forms and also filled in the relevant columns of these forms. He further deposes that he deposited the case property along with NCB form and other relevant documents with MHC. NCB forms have been deposed by this witness to be Ex.PW1/D to Ex.PW1/F. He further deposes that on receipt of report of FSL, Ex.PX, he prepared the challan in this case and presented the same in the Court. In his cross-examination, he deposes that only samples were sent to the laboratory and bulk parcels have not been sent to the laboratory.

11. PW-2 H.C. Ramesh Chand deposes that on 12.1.2009 at about 10.45 a.m., he handed over the special report of this case to the then Addl. S.P., Mandi Sh. Mandan Lal.

12. PW-3 HHC Padam Singh in his deposition has deposed a version which is in square tandem with the genesis of the prosecution version as referred to hereinabove. In his cross-examination he deposes that after leaving the police station they first set up naka at Bindrabani and stayed there till 3.30 p.m. He further deposes that they left police station at about 9.00 a.m and remained at Bindrabani from 9.00 a.m. till 3.30 p.m. He proceeds to depose that after leaving Bindrabandi, they straightway had gone to the place of Naka at Dyodh-Mod. He deposes that distance of place of naka from Pandoh dam is about 3-4 kilometers.

13. PW-4 HC Prem Pal in his deposition has deposed a version which in square tandem with the genesis of the prosecution version as also in corroboration to the deposition of PW-3. In his cross-examination he deposes that they left police station at 9.00 a.m. They reached at Dyodh mod at 4.15 p.m. Distance of Dyodh from police station is about 20 kilometers. He further deposes that pandoh dam is at a distance of 2 kilometers from the place of Naka. He further deposes that he does not know whether the parcels were already stitched or they were prepared by the IO, on the spot. He further deposes that during the carrying out of the proceedings, the accused remained outside the vehicle and they were sitting on the parapet under the supervision of the police. He proceeds to depose that the entire proceedings were carried out by sitting on parapet. He further deposes that the driver was called on the spot to bring the vehicle of the accused to the police station but he does not remember the name of that driver. He further deposes that the accused were brought to the police station in the police van and the policy party came in the

vehicle of the accused but he does not remember the name of the police officials who came to the police station in the vehicle of the accused.

14. PW-5 H.C. Hoshiar Singh deposes that the vehicle No. HR-33E-0508 was handed over to Pawan Kumar along with R.C. and key on supurdari vide memo Ex.PW5/A in his presence.

15. PW-6 H.C. Nikka Ram deposes that on 12.1.2009, MHC Nand Lal handed over to him three parcels sealed with 7 seals of "D" and three seals of "N" each stated to be containing 25 grams cannabis each vide R.C. No.386/08-09 along with documents i.e NCB form in triplicate and samples of seals D & N, copy of FIR and seizure memo for being taken to FSL, Junga. He further deposes that on that date, he deposited the above case property in the laboratory and obtained receipt on the R.C. which he handed over to MHC on his return.

16. PW-7 H.C. Lachhman Dass deposes that on 12.1.2009, the then Addl. S.P. Madan Lal handed over to him special report of case FIR No.11/09, P.S. Sadar Mandi for being kept in the record and he made entry in the special report register at serial No.2. Abstract of special report register has been deposed by this witness to be Ex.PW7/A. Copy of special report has been deposed by this witness to be Ex.PW7/B.

17. PW-8 HHC Manoj Kumar and PW-9 HHC Yakub Khan have proved the copies of rapat No.3, dated 10.1.2009, Ex.PW8/A and rapat No.45, 10.01.2009, Ex.PW9/A respectively.

18. PW-10 HHC Nand Lal deposes that on 10.01.2009, Inspector/SHO Hari Pal Saini deposited with him sample parcels and parcels of bulk charas sealed with seals N and D along with NCB forms, samples of seals and other documents. He deposes that on 12.01.2009, sample parcels marked as Mark A-1, B-1 and C-1 were forwarded to the laboratory through HHC Nikka Ram along with NCB form, samples seals D and N and seizure memo vide R.C. No.386/08/09, who after depositing the parcels returned the R.C., alongwith receipt to him. Copy of R.C. has been deposed by this witness to be Ex.PW10/B. He proceeds to depose that on 26.06.2009, the remaining case property was forwarded to the laboratory through HHC Thakur Singh vide R.C. No.97/09, who after depositing the case property in the laboratory returned the R.C. to him. Copy of the R.C. and abstract of Malkhana register have been deposed by this witness to be Ex.PW10/C and Ex.PW10/D respectively.

19. PW-11 SI Rishi Raj deposes that in pursuant to the identification of the spot by accused Sanjay Kumar on 12.01.2009, he prepared site plan Ex.PW11/A. He further deposes that he recorded the statement, Ex.PW11/B of Nikka Ram.

20. PW-12 Jaisi Ram in his deposition has deposed a version which is in square tandem with the genesis of the prosecution version as referred to hereinabove as also in corroboration with the depositions of PW-3 and PW-4. In his cross-examination he deposes that they started from SIU Office at 9.00 a.m., and reached at Dyodh mod directly. He further deposes that forest check post Bindrawani falls in between their office and Dyodh Mod. He further deposes that Dyodh mod is at a distance of two kilometers from Pandoh Dam. They reached at Dyodh mod at 10.00 a.m. He further deposes that there is an office of the security at Pandoh dam where persons remain 24 hours. He admitted the suggestion that ahead of Pandoh dam there are 3-4 shops. He further deposes that rukka was given to H.C. Padam Singh at 6.30 p.m. and Padam Singh went in private vehicle to police station and he did not use the official motor cycle and car. He proceeds to depose that while carrying out the proceedings, some of the accused were in their own vehicle and some were in police vehicle. He further deposes that accused Rajesh and Sanjay were sitting in their own vehicle whereas accused Satish was in the police vehicle. He proceeds to depose that

accused Sanjay and Rajesh were brought in their vehicle which was being driven by their driver Lalman, whereas their vehicle was being driven by HHC Ramesh Kumar, accused Satish was brought in that vehicle.

21. The alleged occurrence took place on 10.01.2009 at Dyodh Mod. At the place aforesaid, the police intercepted a tata sumo bearing No. HP-33E-0508. The vehicle aforesaid, at the relevant time was driven by accused Rajesh Kumar, whereas, accused Sanjay Kumar was occupying the front seat adjoining the driver seat and accused Satish Kumar was occupying the seat on the rear of the driver. The prosecution on the strength of the credible testimonies of the police witnesses which while, hence, inspiring confidence, as also, being trustworthy concerts to attain success. However, reinforced credibility would be imputed to the testimonies of the prosecution witnesses in case they are bereft of any stark or dire inter se or intra se contradictions. However, in case their testimonies suffer from the blemish or vice of inter se or intra se contradictions, the testimonies of the official witnesses would acquire the taint of prevarication, as such, sequeling a jolt to the prosecution case.

22. For determining, whether the prosecution witnesses have deposed in harmony with each other and, as such, their testimonies are to be construed to be both trustworthy as well as inspiring, it is necessary to advert to certain pre-eminent facts as unfolded in the depositions of PW-12, PW-3 and PW-4. An advertence to the un-foldment by the prosecution witnesses aforesaid rather conveys the existence of dire and blatant intra se contradictions in their testimonies which contradictions, hence, erode the efficacy of the prosecution case. The unfoldment by PW-12 Jaishi Ram in his deposition of the police party having started from SIU office at 9 a.m., and having reached the site of occurrence at 10 a.m., stands contradicted by the testimony of PW-3 HHC Padam Singh, who deposed that the police party had departed from the police station at 9 a.m., however, they prior to their arriving at the site of occurrence, had till 3.30 p.m. laid a naka at Bindribani. The deposition of PW-3 stands corroborated by PW-4 H.C. Prem Pal. However, both PW-3 Padam Singh and PW-4 Prem Pal, hence, blatantly contradict the deposition of PW-12 Jaishi Ram qua the time of arrival of the police at the site of occurrence, inasmuch as though PW-12 Jaishi Ram deposes that the police party had reached at the site of occurrence at 10 a.m., whereas PW-3 and PW4 have deposed that they had arrived at the site of occurrence in the later hours of the afternoon. This contradiction qua the time of arrival of the police party at the site of occurrence existing in the testimonies of PW-12, PW-3 and PW-4 underscores the factum of the proceedings relating to search, seizure and recovery of contraband from the alleged exclusive and conscious possession of the accused having been effected at a time when, hence, all PWs were not simultaneously present at the site of occurrence. In other words, it dispels the factum of the simultaneous presence of PWs at the site of occurrence. As a concomitant, it also erodes and undermines the efficacy of the prosecution version of the entire proceedings having commenced at the site of occurrence at 9.00 a.m., as a corollary then the inevitable conclusion which is filliped is that the proceedings relating to search, seizure and recovery of contraband from the purported exclusive and conscious possession of the accused were effected at a place other than as propounded by the prosecution. The learned trial Court in having imputed significance to the factum of the existence of the aforesaid contradictions and it having concluded that they constituted major contradictions rendering, hence, the prosecution version to be unbelievable cannot be obviously concluded to have mis-appreciated their significance thereto or having committed a legal mis-demeanor. Moreover, the further unfoldment of stark intra se contradictions in the testimonies of PW-12 and PW-4, inasmuch as PW-4 having deposed that the accused was brought to the police station in the police van, whereas the police party traveled in the vehicle of the accused, whereas PW-12 in his cross-examination having deposed that both accused Sanjay Kumar and Rajesh Kumar were brought in their vehicle i.e. tata sumo which was driven by the

police driver Lalman and accused Satish Kumar was brought in the police vehicle driven by HHC Ramesh Kumar, devolves upon the factum of the manner of accused having been brought to the police station. The contradictory manner in which both PW-12 and PW-4 have deposed qua the manner in which the accused were brought to the police station obviously begets an inference that both PW-4 and PW-12 were not simultaneously present at the site of occurrence, besides it also boost an inference that the accused were not simultaneously nabbed by the police as propounded by the prosecution.

23. It is in the face of the existence of stark contradictions in the testimonies of PWs as highlighted hereinabove that the necessity or significance qua association of independent witnesses by the police, arises. However, fatality to the prosecution for non association of independent witnesses would occur only in the event of palpable evidence existing on record displaying or marking the factum of availability of independent witnesses in the vicinity of the site of occurrence. Only in the face of imminent evidence existing on record marking the factum of availability of independent witnesses that lack of concert by the Investigating Officer or lack of efforts on his part to associate them in the proceedings relating to search, seizure and recovery would fasten prevarication to the prosecution case. For determining whether evidence exists on record displaying the availability of independent witnesses in the vicinity of the site of occurrence, an advertence to the testimony of PW-12 Jaishi Ram is apt. The witness aforesaid in his testimony has voiced the factum of existence of office of security at Pandoh Dam situated within two kilometers from the site of occurrence. Now given the uncontroverted fact of the existence of the office of security at Pandoh Dam at a distance of two kilometers from the site of occurrence as also when the said fact entwined with the fact of availability of vehicle with the police to travel to solicit the joining of the personnel manning the security office, the palpable absence of concerted efforts on the part of the Investigating Officer to solicit the joining of the personnel manning the security office at Pandoh Dam, located at a distance of two kilometers from the site of occurrence, personifies that their association was not solicited by the Investigating Officer, despite theirs being available as he intended to smother the truth qua the genesis of the prosecution case. Therefore, in the face of the conclusion drawn hereinabove by this Court that the testimonies of the official witnesses do not for existence of intra se contradictions in their respective testimonies inspire the confidence of this Court, the palpable inertia as well as indolence on the part of the Investigating Officer despite availability to associate independent witnesses at the site of occurrence, assumes importance, inasmuch as their non association aggravates the magnitude of the prevarication resorted to by the Investigating Officer or portrays that the Investigating Officer omitted to associate them as he was carrying out a slanted or tainted investigation. Therefore, the slanted and tainted investigating as carried out by the Investigating Officer fastens fatality to the prosecution case, rendering it unbelievable.

24. Furthermore, PW-10 HHC Nand Lal, the then MHC with whom the case property was deposited by the Investigating Officer has deposed that on 12.1.2009 sample parcels marked as Mark A1, B1 and C1 were forwarded to the Laboratory through PW-6 Nikka Ram along with NCB form, sample seals 'D' and 'N' and seizure memo vide R.C. No.386/08/09, besides PW-10 has also proceeded to depose that on 26.6.2009, the remaining case property was forwarded to the laboratory through HHC Thakur Singh vide R.C. No.97/09 who after depositing the case property in the laboratory concerned returned the R.C. However, HHC Thakur Singh, who carried the remaining case property to the laboratory for analysis subsequent to the prior dispatch of the sample parcels, has remained not associated by the Investigating Officer in the investigation carried out by him. Obviously, HHC Tahkur Singh also did not step into the witness box to support the prosecution case qua the factum as deposed by PW-10 of his having handed over to the former on 26.6.2009 the remaining bulk

parcel for rendition of an opinion by the Chemical Analyst. His non association by the Investigating Officer in the investigation carried out by him, as also, his not stepping into the witnesses box would have obviated an inference of tampering with the case property, as a corollary, his then having remained omitted to be associated in the investigation by the Investigating Officer and consequently when he omitted to step into the witness box, aggravates an inference that the case property as carried out by him to the laboratory concerned may have been tampered with or was some case property other than one attributed to the accused. With the formation of the inference aforesaid, the sequeling effect is that, hence, even the samples sent for rendition of an opinion to the Chemical Analyst may have not been extracted from the bulk sent through HHC Thakur Singh for analysis to the Chemical Analyst, rather may have been extracted from some other case property. In aftermath, the deduction which ensues is that the opinion rendered by the Chemical Analyst on samples sent to it for analysis may not be, hence, relatable to the bulk as recovered at the site of occurrence from the purported conscious and exclusive possession of the accused.

25. On an incisive and thorough scanning of the evidence on record comprised in the testimonies of the official witnesses which suffer from the taint of stark and blatant intra se contradictions, the prosecution case, hence, suffers a jolt. Moreover, the factum of non association of the independent witnesses by the Investigating Officer in the investigation despite their availability especially when the depositions of the prosecution witnesses suffer erosion for the reasons aforesaid, dispels the truth of the genesis of the prosecution case, apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of the evidence on record, rather it has aptly appreciated the material available on record.

26. For the foregoing reasons, the appeal is dismissed and the judgment of the learned trial Court is affirmed and maintained. Records be sent back forthwith.

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

ITA No. 28 of 2009 a/w ITA Nos 30, 48 of 2009, 35 of 2010 and 16 and 21 of 2012.
Judgment reserved on: 10.11.2014.
Date of decision: November 18, 2014.

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1. **ITA No. 28 of 2009**
   Commissioner of Income tax, Shimla .....Appellant.
   Vs.
   M/s. Indus Cosmeceuticals ..... Respondent

2. **ITA No. 30 of 2009**
   Commissioner of Income tax, Shimla .....Appellant.
   Vs.
   M/s. Indus Cosmeceuticals .....Respondent.

3. **ITA No. 48 of 2009**
   Commissioner of Income tax, Shimla .....Appellant.
   Vs.
   M/s Indus Cosmeceuticals .....Respondent.

4. ITA No. 35 of 2010

Commissioner of Income tax, Shimla ..... Appellant.

Vs.

M/s Indus Cosmeceuticals .....Respondent.

5. ITA No. 16 of 2012

Commissioner of Income tax, Shimla ..... Appellant.

Vs.

Sh. Mela Ram, Prop. Deewal Gramudyog Sansthan .....Respondent.

6. ITA No. 21 of 2012

Commissioner of Income tax, Shimla ..... Appellant.

Vs.

Sh. Mela Ram, Prop. Deewal Gramudyog Sansthan .....Respondent.

Income Tax Act, 1961- Section 80 (IB)2- Assessing Officer conducted a status inquiry and found that the assessee had employed 13 person who had worked for 3-4 months except for the two employees - he further found that most of the employees had left the job and only three workers were working with the assessee- he held that the requirement of 10 workers was not fulfilled and, therefore, deduction was not permissible to the assessee- held, that when the employees were not employed during the substantial part of the year, assessee is not entitled to the deduction. (Para- 7 and 8)

Income Tax Ac, 1961t- Section 80 (IB)iv- Assessee was converting henna leaves into herbal powder by the process of mixing and grinding - raw material was first collected, dried with the use of mixture of various acids and thereafter ground by putting the definite quantity (in percentage) and the end product was the result of many transformations carried out with the help of various materials, manpower and machines and was commercially a different items- henna leaves only constitute about 40% of the raw material, -held that the activity of the assessee would fall within the definition of manufacture and the assessee is entitled to the benefit of Section 80(IB) iv. (Para-12 to 17)

Cases referred:

Commissioner of Income Tax vs. Pawan Aggarwal 2014 (3) Him.L.R. 1981

Commissioner of Income-Tax vs. Sacs Eagles Chicory [2000] 241 I.T.R. 319

Sacs Eagles Chicory vs. Commissioner of Income Tax [2002] 255 I.T.R. 178

For the Appellant(s) : Mr. Vinay Kuthiala, Senior Advocate, with Ms. Vandana Kuthiala, Advocate.

For the respondent(s) : Mr. Sunil Kumar Mukhi, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan,Judge

All these appeals have been admitted on the following common substantial question of law:-

> Whether the conversion of heena leaves into herbal heena powder by a process of mixing and grinding amounted to manufacture and consequently whether the profits derived from such activity

were eligible for deduction under section 80IB(4) of the Income Tax Act?

2. While an additional substantial question of law was framed in ITA No. 28 of 2009, which is as follows:-

Whether the condition specified in section 80IB(2)(iv) requiring employment of ten or more workers in the process carried out could be said to have been complied with, when most of the workers had not actually worked for more than four months during the year?

3. Before proceeding to the common question of law, we propose to deal with question No. 2 separately framed in ITA No. 28 of 2009.

4. Section 80IB(2) of Income Tax Act, 1961 (for short, the Act) reads as follows:-

"80IB(2): This section applies to any industrial undertaking which fulfils all the following conditions, namely :—

(i) it is not formed by splitting up, or the reconstruction, of a business already in existence :

Provided that this condition shall not apply in respect of an industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose;

(iii) it manufactures or produces any article or thing, not being any article or thing specified in the list in the Eleventh Schedule, or operates one or more cold storage plant or plants, in any part of India:

Provided that the condition in this clause shall, in relation to a small scale industrial undertaking or an industrial undertaking referred to in sub-section (4) shall apply as if the words "not being any article or thing specified in the list in the Eleventh Schedule" had been omitted.

Explanation 1.—For the purposes of clause (ii), any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely:-

(a) such machinery or plant was not, at any time previous to the date of the installation by the assessee, used in India;

(b) such machinery or plant is imported into India from any country outside India; and

(c) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of the installation of the machinery or plant by the assessee.

Explanation 2.—Where in the case of an industrial undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value

of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with;

(iv) in a case where the industrial undertaking manufactures or produces articles or things, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power."

5. A bare perusal of the aforesaid section shows that for claiming deduction under this section the sine qua non is that an industrial undertaking is required to employ ten or more workers in a manufacturing process carried on with the aid of power. The Income Tax Officer (for short: A.O.) held a detailed discreet inquiry and on examination of attendance register, it was noticed that the assessee had employed 13 employees/ workers i.e. 1) Sonia Chemist who worked for 27 days, 2) Hani, who worked for 86 days, 3) Ayodhya Bhatia, who worked for 207 days, 4) Anita Rohal, who worked for 75 days, 5) Roshani, who worked for 99 ½ days, 6) Anil, who worked for 83 ½ days, 7) Nirmala, who worked for 81 ¼ days, 8) Lata, who worked for 100 ¼ days, 9) Om Parkash, who worked for 96 days, 10) Chaman, who worked for 95 days, 11) Manju, who worked for 79 days, 12) Urmila, who worked for 101 days and 13) Ram Uger, who worked for 216 ½ days only. On the basis of such inquiry, he concluded that most of the workers had only worked for three to four months during the entire financial year 2002-03 except the two employees/ workers i.e. Ayodhya Bhatia and Ram Uger. During the course of assessment proceeding, the A.O. had asked the assessee to produce these employees for verification and in response, it was informed that most of the employees/ workers had left the job and only three workers were still working with the assessee firm. The assessee had produced for verification all the three employees, namely; Urmila Shandil, Ayodhya and Manjna Parihar, whose statements were recorded. As per the statement of these employees, the maximum number of employees/ workers employed by the assessee during the financial year 2002-03 was eight. Based upon such inquiry, the A.O. held that the essential condition for claiming deduction under section 80IB by the assessee was not fulfilled and therefore, the deductions under this section were not admissible to the assessee.

6. This finding was affirmed in appeal by the CIT (Appeals). The assessee thereafter filed an appeal before the ITAT, who returned the findings in favour of assessee by according the following reasons:-

"As far as the employment of number of workers is concerned, the assessee has claimed 13 workers whereas the requirement of law is that there must be minimum 10 Nos. of workers. The stand of the department is that insufficient salary has been paid to the workers and skilled persons cannot be employed in such a meager salary. The claim of the assessee is that both husband and wife are trained/qualified persons who themselves are looking after the technical aspect. Even otherwise there is a finding in the order that in the attendance register there are 13 employees, therefore, in view of the settled position of law that there must be substantial compliance and workers deployed on all process must be counted, therefore, the following cases can be relied upon:

CIT vs. Sawyers Asia Ltd. (122 ITR 259) (Bom)

CIT vs. Harjit Synthetic Fabric Pvt. Ltd. (162 ITR 640) (Bom)

CIT vs. Taluja Enterprises Pvt. Ltd. (250 ITR 675) (Del)

CIT vs. Sultan and Sons Rice Mills (272 ITR 181) (All)

CIT vs. Hanuman Rice Mills (275 ITR 79) (All)."

7. We are surprised and wonder how the ITAT could have given such findings without there being any material placed before it. It was never the case of the assessee either before the A.O. or before the CIT that the workers include the assessee, who are husband and wife and trained and qualified persons and therefore should be counted as workers. Further even the finding that there was substantial compliance when there were 13 employees entered in the attendance register is absolutely erroneous in teeth of the findings recorded by A.O. against which findings there was no contradiction or rebuttal on behalf of the assessee.

8. In **M/s Amrit Rubber Industries** vs. **Commissioner of Income Tax, ITA Nos. 32 of 2004 and 33 of 2004 decided on 30.9.2010,** this court was dealing with the interpretation of section **80IA(2) (v),** which reads as follows:-

"(v) in a case where the industrial undertaking manufactures or produces articles or things, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power."

Therein, in one of the appeals, the assessee had employed ten or more workers only for two months, while in the other case only for six months and this court held that this could not be deemed to fulfill the requirements of section as the employment had to be for a substantial part of a year. It was held as follows:-

"3. It is not disputed before us that in one of the appeal, ten or more workers were employed only for two months and in the other, only for six months. This cannot be deemed to fulfill the requirements of the aforesaid clause of Section 80-IA. The employment has to be for a substantial part of a year and employment for two months and six months cannot be termed to be employment for a substantial part of the year.

4. In this regard, we may make reference to the judgment of Delhi High Court in Commissioner of Income Tax versus Taluja Enterprises (P.) Ltd., (2001) 250 ITR 675 , wherein the Division Bench held as follows:

"In order to qualify for relief under section 80J (4) (iv) of the Income Tax Act, 1961, substantial compliance with the requirement that the new industrial undertaking must have employed in the manufacturing process carried on with the aid of power ten or more workers, is all that is required. The undertaking must have employed ten or more workers substantially during the period for which relief is claimed. There can be no hard and fast rule by which one can determine whether there has been substantial compliance. It is for the authority or the court to so decide based upon the facts before it."

5. It may be true that substantial part does not mean the entire year, but employment for 1/6th of the year or half of the year can under no circumstance be termed to be employment for a substantial part of the year. "

Since the assessee has not employed ten or more workers during the substantial part of the year, therefore, this question is answered in favour of the revenue and against the assessee.

Substanaial question of law No.1:

9. At the outset, it may be observed that both the A.O. and CIT (Appeals) have denied deductions to the assessee under section 80IB of the Act on the ground that the activity of the assessee did not amount to 'manufacture'. Now what is "manufacture" has been dealt in detail by this Bench in appeal in **ITA No. 17 of 2010 and other connected cases** titled **Commissioner of Income Tax** vs. **Pawan Aggarwal 2014 (3) Him.L.R. 1981,** wherein this court held as follows:-

> "12. Now, what would appear from the aforesaid facts is that this Court is required to consider as to what would constitute 'manufacture' and 'production' under the Act. Indisputably, the word 'manufacture' was not defined under the Act, uptil the insertion of Section 2 (29BA) of the Finance (No.2) Act, 2009 introduced w.e.f. 1.4.2009, which reads as follows:
>
> ***"29BA – "manufacture", with its grammatical variations, means a change in a non-living physical object or article or thing, -***
>
> ***(a) resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or***
>
> ***(b) bringing into existence of a new and distinct object or article or thing with a different chemical composition or integral structure."***
>
> Though, it may be noted here that this insertion has been made with effect from 1.4.2009, while we are dealing with the assessments prior to 1.4.2009.
>
> 13. The expression 'manufacture' as well as 'production' has come up repeatedly for interpretation and consideration not only before the various High Courts but even before the Hon'ble Supreme Court. The Hon'ble Supreme Court in ***India Cine Agencies vs. Commissioner of Income Tax (2009) 308 ITR 98*** considered the word 'manufacture' as also 'production' in the following manner:
>
> > ***"3. In Black's Law Dictionary, (5th Edition), the word `manufacture' has been defined as, "the process or operation of making goods or any material produced by hand, by machinery or by other agency; by the hand, by machinery, or by art. The production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations, whether by hand labour or machine". Thus by process of manufacture something is produced and brought into existence which is different from that, out of which it is made in the sense that the thing produced is by itself a commercial commodity capable of being sold or supplied. The material from which the thing or product is manufactured may necessarily lose its identity or may become transformed into the basic or essential properties. (See Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. M/s. Coco Fibres (1992 Supp. (1) SCC 290).***
> >
> > ***4. Manufacture implies a change but every change is not manufacture, yet every change of an article is the***

result of treatment, labour and manipulation. Naturally, manufacture is the end result of one or more processes through which the original commodities are made to pass. The nature and extent of processing may vary from one class to another. There may be several stages of processing, a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. Whenever a commodity undergoes a change as a result of some operation performed on it or in regard to it, such operation would amount to processing of the commodity. But it is only when the change or a series of changes takes the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place. Process in manufacture or in relation to manufacture implies not only the production but also various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to that the manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process processing of goods would be impossible or commercially inexpedient, that process is one in relation to the manufacture. (See Collector of Central Excise, Jaipur v. Rajasthan State Chemical Works, Deedwana, Rajasthan (1991 (4) SCC 473).

5. `Manufacture' is a transformation of an article, which is commercially different from the one, which is converted. The essence of manufacture is the change of one object to another for the purpose of making it marketable. The essential point thus is that, in manufacture something is brought into existence, which is different from that, which originally existed in the sense that the thing produced is by itself a commercially different commodity whereas in the case of processing it is not necessary to produce a commercially different article. (See M/s. Saraswati Sugar Mills and others v. Haryana State Board and others (1992 (1) SCC 418).

6. The prevalent and generally accepted test to ascertain that there is `manufacture' is whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognized as a distinct and new article that has emerged as a result of the process. There might be borderline cases where either conclusion with equal justification can be reached. Insistence on any sharp or intrinsic distinction between `processing and manufacture', results in an oversimplification of both

and tends to blur their interdependence. (See Ujagar Prints v. Union of India (1989 (3) SCC 488).

7. To put it differently, the test to determine whether a particular activity amounts to `manufacture' or not is: Does a new and different good emerge having distinctive name, use and character. The moment there is transformation into a new commodity commercially known as a distinct and separate commodity having its own character, use and name, whether be it the result of one process or several processes `manufacture' takes place and liability to duty is attracted. Etymologically the word `manufacture' properly construed would doubtless cover the transformation. It is the transformation of a matter into something else and that something else is a question of degree, whether that something else is a different commercial commodity having its distinct character, use and name and commercially known as such from that point of view, is a question depending upon the facts and circumstances of the case. (See Empire Industries Ltd. v. Union of India (1985 (3) SCC 314).

8. The aforesaid aspects were highlighted in Kores India Ltd., Chennai v. Commissioner of Central Excise, Chennai (2005 (1) SCC 385) in the background of Central Excise Act, 1944 (in short the `Excise Act') and Central Excise Rules, 1944 (in short the `Excise Rules') and Central Excise Tariff Act, 1985 (in short the `Tariff Act'). The stand of the revenue was that it amounted to "manufacture", contrary to what has been pleaded in these cases. This Court held that it amounted to manufacture.

9. The matter can be looked at from another angle. In Commissioner of Income Tax v. Sesa Goa Ltd. (2004 (271) ITR 331) this Court considered the meaning of word `production'. The issue in that case was whether the extraction and processing of iron ore amounted to manufacture or not in view of the various processes involved and the various processes would involve production within the meaning of Section 32A of the Act. It was inter alia observed as under:

> ***"There is no dispute that the plant in respect of which the assessee claimed deduction was owned by it and was installed after March 31, 1976, in the assessee's industrial undertaking for excavating, mining and processing mineral ore. Mineral ore is not excluded by the Eleventh Schedule. The only question is whether such business is one of manufacture or production of ore. -The issue had arisen before different High Courts over a period of time. The High Courts have held that the activity amounted to "production" and answered the issue in question in favour of the assessee. The High Court of Andhra Pradesh did so in CIT v. Singareni Collieries Co. Ltd.***

[1996) 221 ITR 48, the Calcutta High Court in Khalsa Brothers v. CIT [1996] 217 TTR 185 and CIT v. Mercantile Construction Co. [1994] 74 Taxman 41 (Cal) and the Delhi High Court in CIT v. Univmine (P.) Ltd, [1993] 202 ITR 825. The Revenue has not questioned any of these decisions, at least not successfully, and the position of law, therefore, was taken as settled.

The reasoning given by the High Court, in the decisions noted by us earlier, is, in our opinion, unimpeachable. This court had, as early as in 1961, in Chrestian Mica Industries Ltd. v. State of Bihar [1961] 12 STC 150, defined the word "Production", albeit, in connection with the Bihar Sales Tax Act, 1947. The definition was adopted from the meaning ascribed to the word in the Oxford English Dictionary as meaning "amongst other things that which is produced; a thing that results from any action, process or effort, a product; a product of human activity or effort". From the wide definition of the word "production", it has to follow that mining activity for the purpose of production of mineral ores would come within the ambit of the word "production" since ore is "a thing", which is the result of human activity or effort. It has also been held by this court in CIT v. N.C. Budharaja and Co. [1993] 204 ITR 412 that the word "production" is much wider than the word "manufacture". It was said (page 423) :

The word `production' has a wider connotation than the word `manufacture'. While every manufacture can be characterised as production, every production need not amount to manufacture .....

The word 'production' or 'produce' when used in juxtaposition with the word 'manufacture' takes in bringing into existence new goods by a process which may or may not amount to manufacture. It also takes in all the by-products, intermediate products and reside rodeos which emerge in the course of manufacture of goods."

10. In "Words and Phrases" 2nd Edn. by Justice R. P. Sethi the expressions `produce' and `production' are described as under:

"In Webster's New International Dictionary, the word "produce" means something that is brought forth either naturally or as a result of effort and work; a result produced. In Black's Law Dictionary, the meaning of the word `produce' is to `bring into view or notice; to bring to surface'. A reading of the aforesaid dictionary meanings of the word `produce' does indicate that if a living creature is brought forth, it can be said that it is produced. (See Commissioner of Income Tax v. Venkateswara Hatcheries (P) Ltd. (1999 (3) SCC 632), Commissioner

of Income Tax, Orissa and Ors. v. M/s N.C. Budharaja and Company and Ors. (1994 Supp 1 SCC 280).

Production or produce- The word `production' or `produce' when used in juxtaposition with the word `manufacture' takes in bringing into existence new goods by a process, which may or may not amount to manufacture. It also takes in all the byproducts, intermediate products and residual products, which emerge in the course of manufacture of goods. The expressions manufacture' and `produce' are normally associated with movables articles and goods, big and small but they are never employed to denote the construction activity of the nature involved in the construction of a dam or for that matter a bridge, a road and a building. (See Moti Laminates Pvt. Ltd. and Anr. v. Collector of Central Excise, Ahmedabad (1995 (3) SCC 23).

11. In Advanced Law Lexicon, 3rd Edn. by P. Ramanatha Aiyar, the expressions `production' and `manufacture' are described as under:

"'Production' with its grammatical variations and cognate expressions; includes-

(i) packing, labeling, relabelling of containers.

(ii) re-packing from bulk packages to retail packages, and

(iii) the adoption of any other method to render the product marketable.

`Production' in relation to a feature film, includes any of the activities in respect of the making thereof. (Cine Workers and Cinema Theatre Workers (Regulations of Employment) Act (50 of 1981) S.2(i).)

The word `production' may designate as well a thing produced as the operation of producing; (as) production of commodities or the production of a witness.

`Manufacture' includes any art, process or manner of producing, preparing or making an article and also any article prepared or produced by manufacture. (Patent and Designs Act (2 of 1911), S.2(10).

`Manufacture' includes any process-

(i) incidental or ancillary to the completion of a manufactured product; and

(ii) which is specified in relation to any goods in the section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture, or, and the word `manufacturer' shall be constructed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods but also any person who engages in their production or manufacturer on his own account.

(iii) which is specified in relation to any goods by the Central Government by notification in the Official Gazette as amounting to manufacture. (Central Excise Act (1 of 1944) S.2(f)).”

14. At this stage, it may be worthwhile to note that the ITAT in the order impugned before us has taken note of number of judicial pronouncements of not only the various High Courts but also of the Hon’ble Supreme Court and proceeded to determine the issue in the following manner:

> “***9.1. Now, we may refer to some of the judicial precedents on the issue. The Hon'ble J & K High Court in the matter of CIT v. Abdul Ahad Najar, 248 ITR 744 (J&K) considered the question, whether the undertaking of a n assessee engaged in extraction of timber from forest and conversion of same into logs, planks, etc. constituted an industrial undertaking within the meaning of section 80J(4) of the Act or not ? In this case, the assessee claimed that it was engaged in the manufacture and production of articles. The case of the assessee was that the planks sawn out of logs and, articles produced therefrom were different in shape from the logs and the trees. However, the Assessing Officer did not accept the contention of the assessee as according to him the assessee did not manufacture or produce any article. According to the Assessing Officer, the process of converting trees into logs did not involve much sawing operations as after felling the trees, it had been cut into logs and sold as such. The Revenue also contended that the process of sawing of logs into planks also did not involve any manufacture of articles and that manufacturing process could not be carried out by bare hands without the aid of machinery. The claim of the assessee was, however accepted by the Appellate Commissioner, who held that the use of machinery was not indispensible to a manufacturing process and even for the conversion of the standing trees into logs, labour was required as something is converted into something else viz. logs. He was of the view that the logs could be said to be a new product emerging out of manufacturing process. He accordingly held that the assessee was entitled to deduction under section 80J of the Income-tax Act, which was confirmed by the Tribunal. The matter was considered by the Hon'ble High Court on the above facts. The Hon'ble High Court was of the view that in order to claim relief under section 80J, an industrial undertaking must manufacture or produce articles and it was a condition precedent. The Hon'ble High Court observed that the assessee cut trees in the forest, converted them not only into logs but also into planks and other articles for the purpose of sale. As a forest lessee, the assessee's business was to cut standing trees and to extract timber and convert the same into form of logs, planks, etc. f or the purpose of sale. It was observed that the logs and planks could never be known as trees ; that the two are undoubtedly different from the standing trees. The***

Hon'ble High Court accordingly upheld the stand of the assessee. It is clear from the above that the activity of the forest lessees of extraction of timber from the forest and conversion of the same into logs, planks, etc. is understood to be a manufacturing process. The Hon'ble High Court on the question of manufacturing further held as under:-

"Otherwise also, it is clear that the activity undertaken by the assessee clearly amounts to manufacture and production of articles. The expressions 'manufacture' and 'produce' have not been defined in the Income-tax Act. The dictionary meaning of 'manufacture' is 'transform or fashion new materials into a changed form for use'. In common parlance, manufacture means production of articles from raw or prepared materials by giving these materials new forms, qualities, properties or combinations, whether by hand labour-or by mechanical process. In other words, it means making of articles or materials commercially different from the basic components by physical labour or mechanical process, In its ordinary connotation, manufacture signifies emergence of new and different goods as understood in relevant commercial circles. So far as the meaning of the word 'produce' is concerned, though the word 'produce' has a wider connotation than the word 'manufacture', when used in juxtaposition with the word 'manufacture', it takes in bringing into existence new goods by a process which may not amount to manufacture. The activity of extraction of wood by the assessee from the forest by felling the trees and converting the same into logs, planks, sleepers and other articles, undoubtedly, falls within the definition of 'manufacture'."

9.2. The Hon'ble Supreme Court in the matter of CIT v. N.C. Budharaja & Co. [1993] 204 ITR 412 (S.C) considering a similar point of law held, "The test for determining whether manufacture can be said to have taken place is whether the commodity which is subjected to the process of manufacture can no longer be regarded as the original commodity but is recognised in the trade as a new and distinct commodity."

9.3. The Hon'ble Supreme Court in the case of CIT v. Sesa Goa Ltd. reported i n 27 1 IT R 331 while considering the question under section 32A(2)(b)(iii) for grant of investment allowance dealt with the question of 'production' in a case where the assessee's industrial undertaking was engaged in the business of excavating, mining and processing mineral ore. Mineral ore was not excluded by the Eleventh Schedule. The only question was whether such business was one of manufacture or production of ore. The Hon'ble Supreme Court noted that the issue was dealt with by different High Courts over a period of time, and it was held that the activity amounted to "production" and answered the issue in question in

favour of the assessee. The Hon'ble Supreme Court held as under :-

"The reasoning given by the High Court, in the decisions noted by us earlier, is, in our opinion, unimpeachable. This court had, as early as in 1961, in Chrestian Mica Industries Ltd. v. State of Bihar [1961] 12 STC 150, defined the word 'production', albeit, in connection with the Bihar Sales Tax Act, 1947. The definition was adopted from the meaning ascribed to the word in the Oxford English Dictionary as meaning 'amongst other things that which is produced; a thing that results from any action, process or effort; a product; a product of human activity or effort'. From the wide definition of the word 'production', it has to follow that mining activity for the purpose of production of mineral ores would come within the ambit of the word 'production' since ore is 'a thing', which is the result of human activity or effort ...

It is, therefore, not necessary, as has been sought to be contended by learned counsel for the Revenue, that the mined ore must be a commercially new product ...

Learned counsel appearing on behalf of the assessee, correctly submitted that the other provisions of the Act, particularly section 33(1)(b)(B) read with Item No. 3 of the Fifth Schedule to the Act, would show that mining of ore is treated as 'production'. Section 35E also speaks of production in the context of mining activity. The language of these sections is similar to the language of section 32A(2). There is no reason for us to assume that the word 'production' was used in a different sense in section 32A." [underlined for emphasis by us]

9.4. Thus, having regard to the proposition as discussed above, particularly in view of the decision in Sesa Goa Ltd (supra) it is evident that, that the word "production" has been used in a very wide sense to mean-to bring out a new product, albeit not a commercially new product. Infact, it may be relevant to state here that, in the aforesaid judgment, The Hon'ble Supreme Court affirmed the judgment of the Hon'ble Karnataka High Court in the case of CIT v. Mysore Minerals Ltd. 250 ITR 725 (Kar.) wherein activity of cutting granite blocks into slabs and sizes and polishing them was held to be manufacturing or production of goods. It was held therein as under:

" Section 80-I also refers to profits and gains in respect of an industrial undertaking. In view of the decision given in the case of the assessee, we are of the view that the Appellate Tribunal is right in law in coming to the conclusion that the original assessment which granted the relief under sections 32A and 80-I to the assessee was not erroneous and the inference of the Commissioner of Income-tax under section 263 was not proper. The Tribunal is also right in law in holding that extracting granite from quarry and cutting it to various sizes and polishing should be

considered as manufacture or production of any article or thing and the assessee's business activity must be considered as an industrial undertaking for the purpose of granting reliefs under sections 32A and 80-I of the Income-tax Act, 1961."

9.5. Further, following the judgements in the case of Sesa Goa Ltd. (supra), Mysore Minerals Ltd (supra) and, another judgement of the Hon'ble Supreme Court in the case of Kores India Ltd v CCE reported in 174 ELT 7 (2004), the Hon'ble Rajasthan High Court in the case of Arihant Tiles and Marbles Ltd v ITO 295 ITR 148 (Raj) held as under:

> ***"Apparently, the principle applied by the Supreme Court was that if without applying the process a thing in its raw form cannot be usable and it is made usable for particular purpose, it amounts to manufacture.***

The court approved the principle enunciated in Saraswati Sugar Mills v . Haryana State Board [1992] 1 SCC 418 that essence of manufacture is a change of one object to another for the purpose of making it marketable.

On this principle, the court accepted the contention that by cutting jumbo rolls into smaller sizes, a different commodity has come into existence and the commodity which was already in existence serves no purpose and no commercial use, after the process. A new name and character has come into existence. The original commodity after processing does not possess original identity. Obviously, so far as physical characteristic of jumbo rolls and its shorter version in the form of typewriter and telex roll may have the same physical properties, none the less on the basis of their different use as a marketable commodity and after being cut, the same cannot be used for the purpose for which it could be used in original shape, the activity was held to be manufacture.

The principle aptly applies to the present case. Here also, the original commodity, namely, marble block could not be used for building purposes as such until it is cut into different sizes to be used as building material. It is only by the process of cutting the marble block into slabs and tiles that it is made marketable. The marble block cannot be used for the same purpose as the marble slab or tile can be used and after the marble block has been cut into different sizes, the end product by putting it simultaneously cannot be used as a block. The principle in Kores India Ltd.'s case [2004] 3 RC 613 (SC) supports the contention of appellant." [underlined for Emphasis by us]

9.6. Also, the aforesaid view has been followed by the Hon'ble Bombay High Court in the case of CIT v Fateh Granite (P) Ltd 314 ITR 32 (Bom.) and, the Hon'ble Delhi High Court in the case of CIT v

Sophisticated Granite Marble Industries reported 225 CTR 410 (Del) and, it was held that, process of purchasing marble slabs and then converting these into tiles by applying various processes like cutting, sizing, polishing so as to produce marketable tiles constitutes "manufacturing" an article.

10. Now, we may revert back to the facts of the captioned appeals. On consideration of the principles stated above and, the different steps of manufacturing through which the raw materials i.e. wire rods are processed, we are of the considered opinion that, wire so manufactured can no longer be regarded as the original commodity. Infact, the final product is recognized in the trade as a new and distinct commodity. Ostensibly, the wire rod having undergone various mechanized and chemical based processes like annealing, galvanizing etc. results into manufacture of wire with distinct name, character and use. The name of the raw material, originally is wire rod before processing and after processing, it becomes wire of different types, say paper/enamel insulated wires or strips or barbed wire, GSS/Stay Earth wire, chainlink, etc. Therefore, it is commercially distinct commodity with a distinct name. The wires so produced are used for power cables, industrial control cables, electric motors, transformers, etc. but wire rod as a raw material cannot be used as such. Therefore, a new and distinct commodity is manufactured and produced by the assessee namely wire. Infact, in Union of India and Others v. J.G. Glass Industries Ltd. and Others (1998) 2 SCC 32, the Hon'ble Supreme Court had laid down a two-fold test for determining whether a particular process amounts to 'manufacture' or not ? First, whether by the said process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist. Secondly, whether the commodity which was already in existence would not serve the desired purpose but for the said process. Applying this two-fold test to the fact situation of the appellants, it is irresistible to hold that the process undertaken by the appellants amount to manufacture.

11. Infact, Hon'ble Madras High Court's decision in the case of Tamil Nadu Heat Treatment & Fetting Services (P) Ltd. (supra) supports the case of the appellant. In this case, the assessee was receiving un-treated crankshafts, forgings and castings from its clients and was subjecting them to heat treatment to toughen them up for being used as automobile spare parts. The said activity was held to be a manufacturing activity by the Hon'ble High Court. The Hon'ble Madras High Court held as under:

> ***"12. In the backdrop and setting of the principles, as enunciated by the Supreme Court and various High Courts as relatable to the activity of "manufacture" of "processing of goods" and in the light of the various literature***

and books of foreign authors, relatable to the qualitative change having been brought about by well termed process, as referred to above, we may now proceed to consider and decide the moot question as to whether the activities carried on by the assessee namely, receiving untreated crankshafts and forgings and castings from its clients and subjecting them to heat treatment to toughen them up for being used as automobile spare parts can ever the construed as activities relatable to manufacture and, consequently enable it to claim investment allowance under s. 32A of the IT Act."

"13. We have to take note of the fact that the process of heat treatment to crankshaft, etc. were absolutely essential for rendering in marketable. Automobile parts as crankshafts, need to be subjected to heat treatment to increase the wear and tear resistance to remove the inordinate stress and increase tensile strength. The raw untreated crankshafts and the like can never by used in an automobile industry. Thus, in the crankshafts subjected to the process of heat treatment etc., a qualitative change is effected, to be fit for use in automobiles, although there is no physical change in them. In such state of affairs, it cannot at all the stated that the crankshafts, subjected to heat treatment, etc. cannot at all change the status of new products of different quality for a different quality for a different purpose altogether. In this view of the matter, we are of the view that the activities of the assessee in relation to raw or untreated crankshafts being subjected to heat treatment, etc., is definitely a "manufacturing activity" entitling it to claim "investment allowance" under s. 32A of the I. T. Act. We answer questions No. 2 and 3 according." [underlined for emphasis by us]

12. From perusal of the said judgement, it is evident that even qualitative changes effected in the raw material through heating, also amounts to a 'manufacturing activity'. The aforesaid view has also been followed by the Ahmedabad Bench of the Tribunal in the case of Anil Steel Traders (supra) to hold that the activity of annealing of steel rods and coils as per the customer specifications, amounts to 'manufacture'. Thus, in light of the aforesaid judgements alone, we do not find any justification in the stand of the Revenue that the assessee did not carry out any activity of manufacturing. Undoubtedly, the process undertaken by the assessee results in qualitative change in the inputs initially use d in the process of manufacturing. The argument of the Revenue, as manifested in the assessment orders, is that, the activity does not bestow any

physical change in the article to which the heat treatment was given by the assessee. In our vie w, considered in the light of the judgement of the Hon'ble Madras High C ourt, which again has referred to various case laws on the issue, the aforesaid argument of the Revenue is not sustained.

13. Further, even if the test of marketability is applied to the facts of the case of the appellants, the process carried out by them constitutes manufacture, as enunciated by the Hon'ble Rajasthan High Court in the case of Arihant Tiles and Marbles (P) Lt d v I TO (supra) following the judgement of the Hon'ble Supreme Court i n t he case of Sesa Goa Ltd. (supra) and, Kores India (supra), since the original commodity, namely, wire rod could not be used for transformers, power cables, etc. as such, until it is drawn into enameled/insulated wires. It is only by this process that, input is made marketable as a distinct commodity and, therefore we hold, in the facts and, circumstances of the case, the process undertaken by the appellants amounts to manufacture of thing or article within the meaning of section 80IC of the Act.

14. In any case, the process amounts to production, as interpreted by the Hon'ble Supreme Court in the case of Sesa Goa Ltd. (supra) wherein it has been held that, the word "production" has been used in a very wide sense to mean to bring out a new product, may be not a commercially new product. In this case, undisputedly and, irrefutably new product has been produced as a result of the various processes undertaken by the appellant and, as such, even on this ground, the appellants are eligible for claim of deduction u/s 80IC of the Act."

15. In ***CIT vs. M/s Doon Valley Rubber Industries ITA No. 2 of 2009*** decided on 6.11.2013 this Court has taken into consideration all the relevant judgments to hold that the rubber crumb produced by the assessee therein was commercially different from its raw material and further held that it was commercially known to be different in the market. This Court proceeded to hold as under:

"5. The question as to what amounts to manufacture is no more resintegra. The three Judges Bench of the Apex Court in the case of Aspinwall and Co. Ltd. v. Commissioner of Income Tax, 2001 (251) ITR 323, has expounded thus:

....."The word "manufacture" has not been defined in the Act. In the absence of a definition of the word "manufacture" it has to be given a meaning as is understood in common parlance. It is to be understood as meaning the production of articles for use from raw or prepared materials by giving such materials new forms, qualities or combinations whether by hand labour or machines. If the change made in the article results in a new and different article then it would amount to a manufacturing activity."

6. In the latest decision of the Apex court in the case of Income Tax Officer vrs. Arihant Tiles and Marbles P. Ltd., (2010) 320 ITR 79 (SC) after analyzing its earlier decisions and including in the case of Aman Marble Industries P. Ltd. vrs. Collector of Central Excise, (2003) 157 ELT 393 (SC) it has been noted that the expression used in Section 80IA - which is analogous to the expression used in Section 801B, which uses words manufactures or produces, as applicable to the present case – mandates the Court to consider not only word "manufacture" but also the connotation of word "production". Having noted this position, the Court went on to observe that the said expressions have wider meaning as compared to the word "manufacture". Further, the word "production", means manufacture plus something in addition thereto. The Court also noticed the exposition in CIT vrs. Sesa Goa Ltd.(2004) 271 ITR 331 (SC) wherein it has been held that while every manufacture can constitute production, every production did not amount to manufacture. Further, the test for determining whether manufacture can be said to have taken place is whether the commodity, which is subjected to a process, can no longer be regarded as original commodity, but is recognized in trade as a new and distinct commodity. Further, the word "production", when used in juxtaposition with the word "manufacture" takes in bringing into existence new goods by a process which may or may not amount to manufacture. The word "production" takes in all the by-products, intermediate products and residual products, which emerge in the course of manufacture of goods."

16. The word 'manufacture' and 'processing' came up for consideration before the Hon'ble Supreme Court in its recent judgment in ***Mamta Surgical Cotton Industries, Rajasthan vs. Assistant Commissioner (Anti-Evasion), Bhilwara, Rajasthan (2014) 4 SCC 87***. Though in that case the Hon'ble Supreme Court was dealing with an entirely different Act and the word 'manufacture' therein was in no manner pari materia with the term 'manufacture', now introduced in the Income Tax Act, how even the judgment assumes importance as it has dealt with the word 'manufacture' and 'processing' in detail alongwith relevant case law and held as under:

"13. It is, therefore, relevant to notice the definition of 'manufacture' as defined in the dictionary clause of the Act. Section 2(27) of the Act defines the expression 'manufacture' as under:

> ***"2.(27) "manufacture" includes every processing of goods which bring into existence a commercially different and distinct commodity but shall not include such processing as may be notified by the State Government."***

The definition aforesaid is an inclusive definition and therefore would encompass all processing of goods which would produce new commodity which is commercially different and distinctly identifiable

from the original goods. The definition however excludes all such mechanisms of processing of goods which have been notified by the State Government to the said effect. Admittedly, no such exclusion in respect of the process in analysis for surgical cotton has been notified by the State Government. Therefore, the process of transformation has to be tested on the anvil of proposition whether surgical cotton is processed such that it is commercially different and distinctly identifiable than cotton.

14. The essential test for determining whether a process is manufacture or not has been the analysis of the end product of such process in contradistinction with the original raw material. In 1906, Darling, J. had subtly explained the quintessence of the expression "manufacture" in McNichol and Anor v. Pinch, [1906] 2 KB 352 as under:

"...I think the essence of making or of manufacturing is that what is made shall be a different thing from that out of which it is made."

15. In order to understand the finer connotation of the expression 'manufacture', it may be useful to refer to the decision of this Court in the case of Empire Industries Limited and Ors. v. Union of India and Ors.,(1985) 2 SCC 314, wherein this Court after exhaustively noticing the views of the Indian Courts, Privy Council and this Court had stated as under: (SCC p.329, para 24)

> ***"24. .....'14. .....'Manufacture" implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use. '*"***

(CCE v. Osnar Chemical (P) Ltd., (2012) 2 SCC 282; Jai Bhagwan Oil & Flour Mills v. Union of India, (2009) 14 SCC 63; Crane Betel Nut Powder Works v. Commr. of Customs & Central Excise, (2007) 4 SCC 155; CIT v. Tara Agencies, (2007) 6 SCC 429; Ujagar Prints (II) v. Union of India, 1986 Supp SCC 652; Saraswati Sugar Mills v. Haryana State Board, (1992) 1 SCC 418; Gramophone Co. of India Ltd. v. Collector of Customs, (2000) 1 SCC 549; CCE v. Rajasthan State Chemical Works, (1991) 4 SCC 473; CCE v. Technoweld Industries, (2003) 11 SCC 798; Metlex (I) (P) Ltd. v. CCE, (2005) 1 SCC 271; Aman Marble Industries (P) Ltd. v. CCE, (2005) 1 SCC 279; Shyam Oil Cake Ltd. v. CCE, (2005) 1 SCC 264; South Bihar Sugar Mills Ltd. v. Union of India, (1968) 3 SCR 21; Laminated Packings (P) Ltd. v. CCE, (1990) 4 SCC 51; Dy. CST v. Coco Fibres, 1992 Supp (1) SCC 290; CST v. Jagannath Cotton Co., (1995) 5 SCC 527; Ashirwad Ispat Udyog v. State Level Committee, (1998) 8 SCC 85; State of Maharashtra v. Mahalaxmi Stores, (2003)

1 SCC 70; Aspinwall & Co. Ltd. v. CIT, (2001) 7 SCC 525; J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. STO, (1965) 1 SCR 900; CCE v. Kiran Spg. Mills, (1988) 2 SCC 348 and Park Leather Industry (P) Ltd. v. State of U.P., (2001) 3 SCC 135).

16. The following observations by the Constitution Bench of this Court in Union of India v. Delhi Cloth & General Mills Co. Ltd., 1963 Supp (1) SCR 586 where the change in the character of raw oil after being refined fell for consideration are also quite apposite: (AIR p.794, para 14)

> *"14. ... The word 'manufacture' used as a verb is generally understood to mean as 'bringing into existence a new substance' and does not mean merely 'to produce some change in a substance.'....."*

17. For determining whether a process is "manufacture" or not, this Court in Union of India v. J.G. Glass Industries Ltd., (1998) 2 SCC 32 has laid down a two-pronged test. Firstly, whether by such process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist and secondly, whether the commodity which was already in existence would serve no purpose but for the said process. In light of the said test it was held that printing on bottles does not amount to manufacture.

18. A Constitution Bench of this Court in Devi Das Gopal Krishnan v. State of Punjab, (1967) 3 SCR 557 observed that if by a process a different identity comes into existence then it can be said to be "manufacture" and therefore, when oil is produced out of the seeds the process certainly transforms raw material into different article for use.

19. In CCE v. S.R. Tissues (P) Ltd., (2005) 6 SCC 310, the issue for consideration was whether the process of unwinding, cutting and slitting to sizes of jumbo rolls into toilet rolls, napkins and facial tissue papers amounted to manufacture. While holding that the said process did not amount to manufacture this Court inter alia, held as under: (SCC p.317, para 12)

> *"12. ... However, the end use of the tissue paper in the jumbo rolls and the end use of the toilet rolls, the table napkins and the facial tissues remains the same, namely, for household or sanitary use. The predominant test in such a case is whether the characteristics of the tissue paper in the jumbo roll enumerated above is different from the characteristics of the tissue paper in the form of table napkin, toilet roll and facial tissue. In the present case, the Tribunal was right in holding that the characteristics of the tissue paper in the jumbo roll are not different from the characteristics of the tissue paper,*

after slitting and cutting, in the table napkins, in the toilet rolls and in the facial tissues."

20. At this stage the discussion of difference between "processing" and "manufacture" holds much relevance to well appreciate the contention canvassed by Shri Giri that the transformation of cotton into surgical cotton would be mere processing and not manufacture.

21. According to Oxford English Dictionary one of the meanings of the word "process" is "a continuous and regular action or succession of actions taking place or carried on in a definite manner and leading to the accomplishment of some result". In Chambers 21st Century Dictionary, the term "process" has been defined as "Process.- (1) a series of operations performed during manufacture, etc. (2) a series of stages which a product, etc. passes through, resulting in the development or transformation of it."

22. In East Texas Motor Freight Lines v. Frozen Food Express, 351 US 49 the Supreme Court of United States of America has held that the processing of chicken in order to make them marketable but without changing their substantial identity did not turn chicken from agriculture commodities into manufactured commodities.

23. A three-Judge Bench of this Court in Pio Food Packers case (supra) has dealt with the distinction between "manufacture" and "processing". Therein the appeals were filed against the order of the Kerala High Court holding that the turnover of pineapple fruits purchased for preparing pineapple slices for sale in sealed cans is not covered by Section 5- A(1)(a) of the Kerala General Sales Tax Act, 1963. This Court while deciding whether such conversion of pineapple fruit into pineapple slices for sale in sealed cans amounted to manufacture or not has observed as follows: (SCC p. 176, para 5)

> ***"5. ..... Commonly, manufacture is the end result of one [or] more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognised as a new and distinct article that a manufacture can be said to take place. Where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has***

undergone a degree of processing, it must be regarded as still retaining its original identity." (emphasis supplied)

This Court held that when the pineapple fruit is processed into pineapple slices for the purpose of being sold in sealed cans, there is no consumption of the original pineapple fruit for the purpose of manufacture. Pineapple retains its character as fruit and whether canned or fresh, it could be put to the same use and utilized in similar fashion.

24. In Sterling Foods case (supra) this Court has observed that processed and frozen shrimps, prawns and lobsters cannot be regarded as commercially distinct commodity from raw shrimps, prawns and lobsters. The aforesaid view has further been adopted and applied by this Court in Shyam Oil Cake Ltd. case (supra) wherein the classification of refined edible oil after refining was under consideration and on similar lines it was held that the process of refining of raw edible vegetable oil did not amount to manufacture.

25. In Aman Marble Industries case (supra), this Court has held that the cutting of marble blocks into smaller pieces would not be a process of manufacture for the reason that no new and distinct commercial product came into existence as the end product still remained the same and thus its original identity continued.

26. This Court in Crane Betel Nut Powder Works case (supra) citing the earlier decision in Brakes India Ltd. v. Supdt. of Central Excise, (1997) 10 SCC 717 wherein the process of drilling, trimming and chamfering was said to amount to "manufacture", has reiterated that if by a process, a change is effected in a product and new characteristic is introduced which facilitates the utility of the new product for which it is meant, then the process is not a simple process, but a process incidental or ancillary to the completion of a manufactured product.

27. In Kores India Ltd. v. CCE, (2005) 1 SCC 385 the cutting of duty-paid typewriter/telex ribbons in jumbo rolls into standard predetermined lengths was considered by this Court and it was held that such cutting brought into existence a commercial product having distinct name, character and use and amounted to "manufacture" and attracted the liability to duty. In Standard Fireworks Industries v. Collector of Central Excise, (1987) 1 SCC 600 this Court held that cutting of steel wires and the treatment of paper is a process for the manufacture of goods in question.

28. In Lal Kunwa Stone Crusher case (supra), the decision relied upon by Shri Giri, this Court has considered that whether on crushing stone boulders into gitti, stone chips and dust different commercial

goods emerge so as to amount to manufacture as per the definition of "manufacture" under Section 2(e-1) of the U.P. Sales Tax Act, 1948 and observed that even if gitti, kankar, stone ballast, etc. may all be looked upon as separate in commercial character from stone boulders offered for sale in the market, "stone" as under the relevant Entry is wide enough to include the various forms such as gitti, kankar, stone ballast. It is in this light, that the Court had opined that stone gitti, chips, etc. continue to be identifiable with the stone boulders.

After taking into consideration the entire law on the subject, the Hon'ble Supreme Court has finally concluded as under:

35. It is trite to state that "manufacture" can be said to have taken place only when there is transformation of raw materials into a new and different article having a different identity, characteristic and use. While mere improvement in quality does not amount to manufacture, when the change or a series of changes transform the commodity such that commercially it can no longer be regarded as the original commodity but recognised as a new and distinct article. "

10. Reverting to the facts of the present case, it would be seen that the assessee had been manufacturing herbal henna powder and for this purpose he had purchased the following plant and machinery:-

S.No.	***Name of the Machinery***	***Date of Purchase/ installation***
1.	Wet Grinder	17.4.2002
2.	Milan Magnetic Floor Mill	11.6.2002
3.	Electronic weighing scale	1.8.2002
4.	Pouch sealing machine	1.8.2002
5.	Ribbon	1.8.2002
6.	Mixer	1.8.2002
7.	Grinder	1.8.2002
8.	Dehumidifier with humidistate	5.8.2002
9.	Automatic form fill & seal machine	12.8.2002
10.	Rabid-o-seal plastic stamping machine	31.8.2002

11.	Plastic tube sealing machine	29.10.2002

11. The herbal heena powder was being manufactured by using the following ingredients:-

Name of the raw material	***Percentage***
Heena	40
Barium	25
PPD	10
Citric Acid	10
Amla, Shikakai, plantago, barhmi, rose petals, PAP, Manganese Carbonate & Sodium Suylphite.	15

12. There is nothing on record to suggest that the assessee was merely grinding and mixing the raw material rather it has come on record that the raw material was first collected, dried with the use of mixture of various acids and thereafter grinding by putting the definite quantity (in percentage) with the help of various specialized persons. In case any item was mixed in disproportionate manner, then the end product could be harmful and it was possible that the same could not be used for the purpose for which it was produced. The end product was the result of many transformations carried out with the help of various materials, manpower and machines and was commercially a different item.

13. The learned counsel for the revenue would still argue that even after undergoing various process like drying, mixing, grinding etc., the same does not bring about a new or distinct produce. Therefore, these activities do not amount to manufacture and the assessee is therefore not entitle to the benefit of provisions of section 80IB of the Act. In support of its contention he has relied upon judgement of Madras High Court in **Commissioner of Income-Tax** vs. **Sacs Eagles Chicory [2000] 241 I.T.R. 319** as affirmed by the Hon'ble Supreme Court vide judgement reported in **[2002] 255 I.T.R. 178** titled **Sacs Eagles Chicory** vs. **Commissioner of Income Tax** and a judgement of this Court in **ITA No. 27 of 2005** titled **Mrs. Poonam Arora** vs. **Income Tax Officer and others decided on 14.10.2009.**

14. In **Sacs Eagles Chicory** case (supra), the Madras High Court was dealing with the case, wherein chicory roots were being converted into chicory powder by simply grinding them and on such basis it was held that there was no manufacturing activity. Notably the judgement of the Madras High Court was challenged by the assessee before the Hon'ble Supreme Court in case reported as **Sacs Eagles Chicory** (supra), wherein the Hon'ble Supreme Court observed as under:-

> *" The question to be considered reads thus (see [2000] 241 ITR 319, 320):*
>
> > *Whether, on the facts and in the circumstances of the case, the assessee- firm is an industrial undertaking eligible for deduction under Sections 80HH, 80-I and 80-J of the Income Tax Act, 1961? "*
>
> *All that is on record in regard to the "process " that the assessee carries on is stated in the order of the Appellate Assistant Commissioner of Income Tax thus:*
>
> > *"But if an analysis of the activity of making powder from the chicory roots is made, it will be found out that*

there are only two processes in making the powder from chicory roots: (i) roots are roasted, and (ii) after that they are powdered. "

We have asked learned counsel for the assessee whether there is anything else that describes the process. There is apparently nothing else. If that is the only process, it does not satisfy the test laid down by this Court in Aspinwall and Co. Ltd. v. CIT [2001] 251 ITR 323."

15. The aforesaid observations leave no manner of doubt that no manufacturing was involved in this case, as there were only two processes involved in making of powder from chicory roots, namely the roots were firstly roasted and thereafter powdered.

16. In so far as **Poonam Arora** case (supra) is concerned, this court had categorically come to the conclusion that mere process of roasting of raw groundnut seeds into groundnut did not amount to manufacture as no new and distinct product came into existence.

17. Therefore, none of the aforesaid judgements are applicable to the facts of the present case because as noticed above in order to manufacture heena powder, heena leaves only constitute about 40% of the raw material which is dried with other raw-materials by using various acids and thereafter these raw materials are grinded by putting a definite quantity of mixture to get the resultant product, which is commercially known differently. The end product so manufactured has a different name and is identified by the buyer and seller as a different produce and is distinct in its form from the original raw-material.

In view of aforesaid discussion, we have no hesitation in concluding that the conversion of heena leaves into herbal heena powder by process of missing and grinding amounts to manufacture and therefore the profits derived from such activity are liable for deduction under section 80IB(iv) of the Act, accordingly this question is answered against the revenue and in favour of the assessee.

18. Resultantly, all the aforesaid appeals save and except ITA No. 28 of 2009 are dismissed, while in ITA No. 28 of 2009 though the assessee is eligible for benefit under section 80IB(iv), however, the said benefit cannot be extended to it as it has not complied with the conditions specified in section 80IB(2)(iv).

19. Accordingly, all the appeals are disposed of in the aforesaid terms.

****

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

Hari Chand and others .....Appellants.

Versus

Land Acquisition Collector, Hamirpur .....Respondent.

RFA No. 429 of 2004.
Reserved on: 12th November, 2014.
Date of Decision :18th November, 2014.

Land Acquisition Act, 1894- Section 18- Land of the claimant was acquired for the construction of road- he relied upon the sale deed for determination of the market value of the land- held, that sale deed relied upon by the claimants was for the construction of the colonies for housing people which had a profit motive - the land of the claimants was

acquired for constructing the road which had no profit motive - asking the State to pay compensation would defeat the purpose of acquisition - given the distinction in the purpose of acquisition of the land, sale deed could not be relied upon to determine the compensation. (Para-5)

Land Acquisition Act, 1894- Section 18- Possession of the land was taken in the year 1964 whereas the land was acquired in the year 1998- held, that when the possession has been taken prior to the acquisition of the land- land owners are not entitled to compensation from the date of possession but from the date of acquisition- claimants are entitled to file a civil suit for damages. (Para-6)

Cases referred:

A. Natesam Pillai versus Special Tehsildar, Land Acquisition, Tiruchy, (2010)9 SCC 118

Haridwar Development Authority versus Raghubir Singh and others (2010)11 SCC 581

R.L. Jain vs. D.D.A., Civil Appeal No. 5515 of 1997, decided on 12.3.2004

For the Appellants: Mr. Suneet Goel, Advocate.
For the respondent: Mr. R.S. Thakur, Addl. A.G. and Mr. Tarun Pathak, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The lands of the appellants/claimants were brought under acquisition vide notification issued under Section 4 of the Act published on 9.6.98. The Land Acquisition Officer, HPPWD, Harmpur vide award No.60 dated 12.12.2000 ordered the payment of total compensation of Rs.68,982/- to the claimants/appellants.

2. The claimants/appellants, who were not satisfied with the award of the Land Acquisition Collector, filed Land Reference Petition before the learned District Judge, Hamirpur, under Section 18 of the Land Acquisition Act. The learned District Judge when seized of the reference petition dismissed the reference petition preferred by the appellants/claimants and held that proper compensation as per market price stood assessed by the Collector and the petitioners/appellants are not entitled for enhanced compensation.

3. The claimants/appellants are aggrieved by the dismissal of their reference petition by the learned District Judge, hence, have preferred the instant appeal before this Court.

4. The learned counsel appearing for the appellants is aggrieved by the learned District Judge in his impugned award having not reckoned and taken into consideration the sale transaction comprised in Ex.PA whereby land measuring one marla was sold for a sale consideration of Rs.50,000/-. The learned counsel appearing for the appellants vehemently canvassed before this Court that in the face of the aforesaid exhibit pronouncing upon the factum of a bonafide sale transactions having been entered into inter se a willing buyer and a willing seller, besides when evidence exists on record manifesting the fact of the lands comprised in the sale deed aforesaid being located in close proximity to the land subjected to acquisition, the sale consideration as explicitly pronounced therein constituted a valid parameter to on its strength goad the learned District Judge to compute/reckon the market value of the land subjected to acquisition. He further contends that the reason as advanced by the learned District Judge in overlooking and benumbing the probative worth of

the exhibit aforesaid, inasmuch, as its comprising a sale exemplar of a sale transaction of a small tract of land, whereas the land subjected to acquisition was of a large expanse, hence, the sale instance pertaining to a small tract of land being un-reckonable for on its strength assessing and reckoning the market value of the land subjected to acquisition, is too tenuous a reason and falters in the face of a pronouncement rendered in **A. Natesam Pillai versus Special Tehsildar, Land Acquisition, Tiruchy, (2010)9 SCC 118** wherein in paragraph No.18, which is extracted hereinafter, the Hon'ble Apex Court has held that a sale transaction of small tracts of land can be a valuable guide or of immense assistance to, on its strength assessing compensation for large expanses of land.

> *"18. the small area of land measuring 1710 sq. ft was sold for Rs.20,000/- as per Ext. A-3 dated 15.7.1992 which works out to a value of Rs.11 per square foot. A comparison of the two plots, namely, land in Ext. A-3 and the acquired land shows that they are not identical. While the land in Ext.A-3 may not be an excellent guide it is still a better guide than any other document exhibited on record. The same could be used as a relevant yard stick to assess the just and reasonable compensation in the present case."*

He also relied upon a judgment of the ***Hon'ble Apex Court reported in Haridwar Development Authority versus Raghubir Singh and others (2010)11 SCC 581,*** the relevant paragraphs No. 9 & 10 are extracted hereinafter, which emphatically communicate the view that the sale instances of small tracts of land constitute evidence of probative worth, on strength whereto compensation can be determined for large tracts of land. However, while computing or assessing compensation for large expanses of land on the strength of sale consideration contracted for small tracts of land, deductions upto the permissible per centum are to be made. Relevant paragraphs No.9 and 10 read as under:-

> "9. The Collector has referred to several sale transactions but relied upon only one document, that is, sale deed dated 19.12.1990 relating to an extent of 11,550 sq. ft of land sold for Rs.4,04,250, which works out to a price of Rs.35 per square foot. The Collector deducted 25% from the said price, as the relied upon sale transaction related to a small extent of 11,550 sq. ft and the acquired area was a larger extent of 8,45,174 sq. ft. By making such deduction, he arrived at the rate as Rs.26.25 per square foot. The Reference Court and the High Court have also adopted the said sale transaction and valuation.
>
> 10. The claimants do not dispute the appropriateness of the said sale transaction taken as the basis for determination of compensation. Their grievance is that no deduction or cut should have been effected in the price disclosed by the sale deed for arriving at the market value in view of the following factors:-
>
> > (i) that the acquired lands were near to the main by-pass and had road access on two sides;
> >
> > (ii) that may residential houses had already come up in the surrounding areas, and the entire area was already fast developing; and
> >
> > (iii) that the acquired land had the potential to be used as an urban residential area.
>
> When the value of a large extent of agricultural land has to be determined with reference to the price fetched by sale of a small residential plot, it is with reference to the price fetched by sale of a

> small residential plot, it is necessary to make an appropriate deduction towards the development cost, to arrive at the value of the large tract of land. The deduction towards development cost may vary from 20% to 75% depending upon various factors {see Lal Chand v. Union of India, (2009)SCC 769, SCC p.790, para 22}. Even if the acquired lands have situational advantages, the minimum deduction from the market value of a small residential plot, to arrive at the market value of a larger agricultural land, in the usual course, will be in the rage of 20% to 25 %. In this case, the Collector ahs himself adopted a 25% deduction which has been affirmed by the Reference Court and the High Court. We therefore do not propose to alter it." (pp.584-585)

On the strength of the aforesaid pronouncement of the Hon'ble Apex Court, the learned counsel for the appellants urges that the sale instance comprised in Ex.PA constituted a valuable guide for the learned District Judge, as also, it constituted an admissible and relevant parameter while it enjoying probative vigour, for facilitating on its strength an assessment of compensation qua the land subjected to acquisition. His having omitted to rely upon it, as such, has been contended to have committed a legal misdemeanor.

5. The contentions aforesaid advanced by the learned counsel appearing for the appellants in dispelling the purported tenuous reason afforded by the learned District Judge for overwhelming the effect of Ex.PA are extremely shaky and are, for the reasons hereinafter, construed to be not having either sinew or strength. The reasons for so concluding is that in both the judgments relied upon by the counsel for the appellants the lands as subjected to acquisition were for the construction of colonies for housing people. Obviously, the authority/entity for whom the lands were acquired, had an inherent profiteering motive, inasmuch as the entity would after developing the lands acquired proceed to sell them at a profit to the public, therefore, the loss, if any, as it may be beset with in paying a hefty amount of compensation to the land owners would hence be off set by its selling lands on a phenomenal or escalated price to the public. Consequently, when the objective of acquisition in the cases relied upon by the learned counsel for the appellants was commercial, as a corollary, then the lands of the land owners as subjected to acquisition in the cases aforesaid perceivably commanded an inherent immense escalated potentiality which escalated potentiality as compatibly pronounced in the sale considerations qua small tracts of land, was construed to be a vindicable, tenable as well as a reckonable parameter for determining the market value of large tracts of lands as were subjected to acquisition. However, while determining compensation payable for large expanses of lands, on the strength of sale considerations of small tracts of land, deductions towards developmental costs were ordained to be made. However, in the instant case the marked distinction is that lands of the landowners were subjected to acquisition for a public purpose by a welfare estate, inasmuch as, the lands of the landowners have been acquired for the purpose of construction of a public road. The respondent-State subjected to acquisition the lands of the landowners for construction of a public road as a measure of providing public amenity to the public. Obviously, the respondent/State given the salutary purpose of the acquisition of the lands of the landowners has no inherent profiteering motive in subjecting the lands of the land owners to acquisition nor it would rear any commercial advantage from the acquisition of land of the landowners/appellants. As a corollary, encumbering it with the financial liability to defray to the landowners an exorbitant amount of compensation would defeat the very purpose for which the acquisition was made rather would put the public exchequer replenished by taxing the honest taxpayers to an unnecessary and avoidable heavy burden. Further salient palpable distinction vis-à-vis the case relied upon by the learned counsel for the appellant and the instant case is that the sale consideration pronounced in Ex.PA which is qua a small tract of

land is imminently defrayed to the vendor towards acquisition of land comprised in it not for raising a dwelling house or a homestead rather for carrying out of commercial activities. Naturally, when the vendor of Ex.PA seeks to develop the land purchased by him in it for commercial activities, the land comprised in obviously had to fetch a higher sale consideration than it would have fetched had it been acquired or purchased for raising a homestead or a dwelling house. Given the salient distinction in the purpose of acquisition of the land of the landowners/appellants vis-à-vis the land purchased under Ex.PA, inasmuch as the former has been acquired by the respondent/State for the salutary objective of constructing a road as a measure of providing an amenity to the public at large, whereas the land acquired by vendor under Ex.PA has been purchased or acquired for rearing commercial activities on it. Naturally then, on that score the sale consideration comprised in Ex.PA cannot provide a reasonable, fair and just parameter for determining on its strength compensation for the entire stretch of the vast expanse of land acquired by the respondent/State for providing a public amenity. Consequently, this Court is of the considered view that the judgments as relied upon by the learned counsel for the appellants are discardable. Naturally then the view as adopted by the learned District Judge in dispelling the effect of Ex.PA which pertains to small tracts of land, inasmuch as its not providing a valuable and reckonable parameter for determining on its strength compensation for an immense tract or a vast expanse of land, is a tenable view and ought not to be interfered with.

6. Furthermore, the learned counsel appearing for the appellant has vigorously strived to prevail upon this Court qua the illegality committed by the learned District Judge in omitting to award compensation to the appellants since 1964 when the respondent had taken possession of lands which were ultimately subjected to acquisition in the year 1998. The said argument wanes in the face of the authoritative pronouncement of the Hon'ble Apex Court in ***R.L. Jain vs. D.D.A., Civil Appeal No. 5515 of 1997***, ***decided on 12.3.2004*** wherein it has been mandated that even where the lands of the landowners have been subjected to utilization even prior to theirs having come to be ultimately subjected to acquisition in accordance with law, the landowners are not entitled to receive compensation from the date when their lands came to be subjected to utilization rather they are only entitled to compensation form the date their land is subjected to acquisition in accordance with law. Nonetheless, the judgment aforesaid expounds the view that the remedy, if any, of the land owners for their lands being utilized prior to theirs having come to be subjected to acquisition in accordance with law, is to institute a suit for damages. The view as explicitly pronounced in the judgment as relied upon by the learned District Judge having not been demonstrated by the learned counsel appearing for the appellants to have come to be overruled by a larger Bench of the Hon'ble Apex Court, consequently, when the view expressed in the judgment relied upon by the learned District Judge in declining to the appellants herein the relief of compensation from the date when their lands were subjected to utilization, is a tenable and reverrable view and it ought not to be interfered with. However, it is open to the appellants to institute a civil suit for damages against the respondent for their lands having come to be utilized by the respondent, even before they were subjected to acquisition in accordance with law.

7. For the fore going reasons, there is no merit in this appeal which is dismissed accordingly and the judgment of the learned District Judge is affirmed and maintained. All the pending applications also stand disposed of. No costs.

****

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

Ms. Inder Jyoti Chauhan ...Petitioner

Versus

Union of India and others. . ...Respondents.

CWP No. 7744 of 2010
Judgment reserved on: 3.11.2014
Date of Decision : November 18, 2014.

Constitution of India, 1950- Article 226- Petitioner had applied for the post of Lower Division Clerk as general category candidate - she applied for change of category from general to schedule caste on the ground that she could not submit her certificate earlier- application was allowed and it was held that petitioner is entitled for the benefits of reservation from the date of joining but she shall not consume the reserved point for initial appointment in the recruitment roster - held, that petitioner had not taken any benefit at the time of recruitment by not declaring herself to be a member of Scheduled Caste- she had joined as general category without availing the benefit of the relaxed standard - since, she is scheduled caste by birth, therefore, she is entitled to all the benefits of scheduled caste. (Para-24)

Cases referred:

Kumari Nikita vs. Centralised Admission Coordination Committee and Others 2000 (3) Rajasthan L R 664

Sandeep Singh vs. Punjab University, Chandigarh, AIR 1997 (Punjab) 237

J & K Public Service Commission vs. Israr Ahmad and others (2005) 12 SCC 498

Ajit Singh and others vs. State of Punjab and others (2000) 1 SCC 430

Bimlesh Tanwar vs. State of Haryana and others (2003) 5 SCC 604

Union of India and another vs. S.K. Goel and others (2007) 14 SCC 641

H.S. Vankani and others vs. State of Gujarat and others (2010) 4 SCC 301

Ramesh Chand Sharma vs. Udhan Singh Kamal and others, (1999) 8 SCC 304

For the Petitioner: Ms. Shikha Chauhan and Mr. Jasbir Singh, Advocates.

For the respondents : Mr. Ashok Sharma, Assistant Solicitor General of India, for respondent No.1.
Mr. Rahul Mahajan, Advocate, for respondents No. 2 to 4.
Mr. Rajnish Maniktala, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner by medium of this writ petition has questioned the order passed by the learned Central Administrative Tribunal, Chandigarh Bench, Chandigarh on 12.11.2010 whereby it quashed the order dated 4.9.2006 whereunder the petitioner had been held entitled to the benefit of reservation from the date of joining with a condition that in the recruitment roster she would not be entitled to consume the reservation point for initial appointment.

2. It appears that the petitioner had applied for post of Lower Division Clerk as general category candidate and this fact was recorded in her service book. Some time later, the petitioner applied for change of category from general category to Scheduled Caste on the ground that she could not submit her certificate earlier as she had lost the same. The competent authority allowed the change of category (from General to Reserved) vide order dated 20.6.2004 and it was subsequently, vide letter dated 4.9.2006 that the competent authority held the petitioner "*is entitled to the benefits of reservation from the date of joining but in the recruitment roster she shall not consume the reserved point for initial appointment.*"

3. This order came to be challenged by 5th respondent, who preferred Original Application No. 1029-HP/09 before the learned Central Administrative Tribunal, Chandigarh. It was contended therein that he was appointed as Lower Division Clerk against the quota reserved for Scheduled Caste vide order dated 14.11.1990. He joined his duty on 22.11.1990, whereas the petitioner had been appointed as Lower Division Clerk on 6.1.1988 against the vacancy falling in the share of general category. Vide order dated 24.6.1993, 5th respondent was promoted as Upper Division Clerk. A provisional seniority list of Upper Division Clerks as on 31.8.1998 was drawn up and circulated which was followed by final seniority list in which the name of 5th respondent figured at serial No. 16 as an Scheduled Caste candidate whereas the name of the petitioner appeared at serial No. 15 as a general category candidate. The respondents further circulated the final seniority list of Upper Division Clerks as on 1.4.2002 wherein the name of 5th respondent appeared as reserved category candidate at serial No. 14, whereas the name of the petitioner appeared at serial No. 13 as a general category candidate. 5th respondent was promoted as Assistant in terms of the order dated 23.10.2002 and assumed the duty of that post on that very day. Later, he was promoted as Section Supervisor vide order dated 6.3.2003. The final seniority list of Section Supervisors as on 31.12.2006 was circulated vide order dated 2.3.2007 wherein the name of 5th respondent figured at serial No. 8 as an Scheduled Caste candidate, whereas the name of the petitioner did not figure in the list as by that time she had not been promoted to the post of Section Supervisor. Yet, another final seniority list of Section Supervisors was circulated vide letter dated 4.2.2008 wherein the name of 5th respondent appeared at serial No. 8 as an Scheduled Caste candidate, whereas the name of the petitioner again did not figure in this list as she had not been promoted as Section Supervisor by that time.

4. Notably the 5th respondent did not challenge the change of category before the Tribunal but was only aggrieved by the grant of benefit in favour of petitioner from "*the date of her entry into service".* He maintained that since the petitioner had been appointed as Lower Division Clerk in general/open category, she could not now take U-turn and claimed the benefit of reservation from the date of her appointment as she was estopped by own act and conduct. It was further claimed that in case such benefit is granted, the same would be unconstitutional being contrary to Articles 14 and 16 of the Constitution of India. It was also contended that granting of benefit to the petitioner after 20 years especially when 5th respondent had already been promoted several times would amount to take away the vested right already accrued in his favour. Lastly, it was contended that the petitioner had made a false declaration at the time of entry into service and, therefore, was not entitled to the benefit of reservation.

5. The official respondents filed reply and opposed the petition on the ground that under the provisions of Article 16 (4) (A) of the Constitution, there is a reservation in promotion for Scheduled Caste and Scheduled Tribe employees against the posts reserved for them in the roster as per rules and, therefore, 5th respondent could not seek any rights against the petitioner and such challenge was not only bad in law but was also not maintainable. It was

further averred that the official respondents had accepted the plea of the petitioner and thereafter treated her as a reserved candidate from the date of initial appointment. It was also contended that unintentional negligence which may occurred at the instance of an employee, if traced at a later stage, could be set right as the same was duly supported by rules and once this was done, then the consequential benefits flowing from the order could not be denied. 5th respondent had enjoyed the benefit of negligence of the petitioner so far by getting the promotion to the post of Section Supervisor and now no right of 5th respondent was taken away by the petitioner. Rather reserved community category employee's right was being protected as per the rules.

6. The petitioner also opposed the petition by filing a reply wherein it was claimed that 5th respondent was much junior to the petitioner and had been promoted as Upper Division Clerk later than the petitioner and, therefore, could not claim promotion prior to her to the post of Section Supervisor. The petitioner also took a specific ground regarding the non-maintainability of the Original Application on the ground of delay and laches. It was then contended that the petitioner at the time of initial appointment mistakenly could not give correct information regarding her caste but that did not mean that she did not belong to the Scheduled Caste category and, therefore, could be denied the benefit of reservation.

7. It is this order of the learned Tribunal, which has been challenged by the petitioner on various grounds as taken in the petition.

8. We have heard learned counsel for the parties and have also gone through the records carefully.

9. The petitioner has vehemently argued that she has acquired her caste by birth which could be only lost by death and, therefore, having suffered disadvantages of belonging to that caste, she is entitled to all the benefits of reservation and cannot be denied the benefit thereof. In support of such contention, the petitioner has relied upon the judgment of this Court in ***Meena Devi*** vs. ***Himachal Pradesh State Subordinate Services Selection Board, CWP No. 5744 of 2010 decided on 9.8.2011*** and a judgment of this Bench in ***Smt. Neetu*** vs. ***The State of H.P. and others, CWP No. 3139 of 2009, decided on 19.6.2014.***

10. We need not to go into this question because as already observed earlier, even 5th respondent had not challenged the change of category of the petitioner from general to schedule caste before the Tribunal but was only aggrieved by grant of benefit in her favour from the "*date of her entry into service*".

11. The petitioner would then contend that once it is undisputed that she belongs to Scheduled Caste, then she is not only legitimately but legally entitled to all the benefits as available to this category. She had already suffered much because even as per the office order dated 4.9.2006, she would be entitled to the benefit of reservation from the date of joining but then in the recruitment roster, she has been held not entitled to consume the reservation point from initial appointment.

12. On the other hand, 5th respondent would contend that the petitioner having opted under the general category could not be permitted to turn around and claim benefit of reservation that too to the disadvantage of 5th respondent. In support of his contention, he has relied upon the single Bench judgment of Rajasthan High Court in ***Kumari Nikita vs. Centralised Admission Coordination Committee and Others 2000 (3) Rajasthan L R 664,*** a Division Bench judgment of Punjab and Haryana High Court in ***Sandeep Singh vs. Punjab University, Chandigarh, AIR 1997 (Punjab) 237*** and lastly upon the judgment of Hon'ble Supreme Court in ***J & K Public Service Commission vs. Israr Ahmad and others (2005) 12 SCC 498.***

13. We have gone through the aforesaid judgments and find that all these judgments deal with the cases wherein the candidate had applied as a general category candidate, but after having failed to qualify or get selected in the general category had sought the change of category. The Courts in this background held that once a candidate had chosen to opt under general category, he could not be allowed the change of status and make fresh claim. However, this is not the fact situation obtaining in the present case. The petitioner had applied as a general category candidate and was selected as a general category candidate and joined the services. She did not even consume the roster point of the reserved category, it is only thereafter that the petitioner chose to opt the category to which she was entitled.

14. Learned counsel for 5th respondent would then contend that Article 16 (4) was only an enabling provision and it neither imposed any constitutional duty nor conferred any fundamental right for reservation and, therefore, the petitioner was not entitled to the benefits of reservation. In support of his submission, he has relied upon the judgment of the Hon'ble Supreme Court in ***Ajit Singh and others vs. State of Punjab and others (2000) 1 SCC 430.***

15. We have gone through the judgment and are of the firm opinion that the same does not in any manner support the claim of 5th respondent. 5th respondent has clearly unequivocally stated before the learned Tribunal that he did not dispute that the petitioner belongs to a Scheduled Caste category and had in fact not even challenged the validity of the change of category. He had only questioned the benefit given to her with effect from the date of her entry into service as would appear from paragraph 18 of the impugned judgment, which reads as under:

> *"18. In view of the fact that the applicant herein has not challenged the validity of the change of category as such, we would not go into the legal appropriateness thereof and would confine ourselves to the impugned order, Annexure A-1, vide which the grant of that benefit to her was ordered with effect from the date of her entry into service."*

16. 5th respondent has thereafter relied upon the judgment of the Hon'ble Supreme Court in ***Bimlesh Tanwar vs. State of Haryana and others (2003) 5 SCC 604, Union of India and another vs. S.K. Goel and others (2007) 14 SCC 641*** and ***H.S. Vankani and others vs. State of Gujarat and others (2010) 4 SCC 301*** to contend that the settled things cannot be unsettled after such a long lapse of time.

17. We have gone through the aforesaid judgments and are of the opinion that the same do not apply to the given facts and circumstances of the case. 5th respondent has sought to defeat the claim of the petitioner on the ground of delay and laches by claiming that in case her claim is allowed the settled things would be unsettled. At this stage, we may notice that 5th respondent had himself preferred the Original Application only on 15.12.2009 questioning an order which had been passed more than three years back on 4.9.2006. The petitioner in her reply had raised a specific objection regarding the Original Application being barred by limitation. However, the learned Tribunal brushed aside this objection by according the following reasons:

> *"13. The official respondents reiterated the correctness of the impugned order. It was averred that it is too late in the day for the applicant to raise a challenge thereto inasmuch as the impugned order had been granted in the year 2004, while the O.A. was filed only in the year 2009. This plea was also raised by the official respondents and also respondent No.5 in the course of the resistance offered to the plea raised by the applicant for condonation of delay in filing of the O.A. Respondent No.5 also averred*

that the plea for conversion of category had been rightly made by her and justly allowed by the competent authority."

18. This finding of the learned Tribunal cannot be countenanced and is not sustainable in teeth of the decision of the Hon'ble Supreme Court in ***Ramesh Chand Sharma*** *vs.* ***Udhan Singh Kamal and others, (1999) 8 SCC 304*** wherein the Hon'ble Supreme Court held as under:

"4. The respondent No. 1 Udham Singh Kamal on 2nd June, 1994 filed Original Application (O.A.) before the Himachal Pradesh Administrative Tribunal. This O.A. was admittedly beyond the prescribed period of limitation of three years as provided under Section 21 of the Administrative Tribunals Act, 1985. As regards the limitation in paragraph 5, the first respondent has stated as under :

> *"The applicant further declares that the application is within the limitation prescribed in Section 21 of the Administrative Tribunals Act, 1985."*

This averment clearly indicates that the first respondent was all along asserting that he had filed O.A. within limitation but it was not so. The appellants in both these appeals have raised a contention that the O.A. was beyond three years and, therefore, the same was barred by limitation under Section 21 of the Administrative Tribunals Act, 1985. Despite this objection raised by the appellants, the first respondent did not file any application for condonation of delay. Section 21 (3) of the Act gives power to the Tribunal to condone the delay if sufficient cause is shown.

5. Section 21 reads as under :

> *"21. Limitation - (1) A tribunal shall not admit an application,*
>
> *(a) in a case where a final order such as is mentioned in clause (a) of sub-section (2) of Section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;*
>
> *(b) in a case where an appeal or representation such as is mentioned in clause (b) of sub-section (2) of Section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period of six months.*
>
> *(2) xxxx xxxx xxxx xxxx*
>
> *(3) Notwithstanding anything contained in sub-section (1) or subsection (2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of sub-section (1) or, as the case may be, the period of six months specified in sub-section (2), if the applicant satisfies the Tribunal, that he had sufficient cause for not making the application within such period."*

Relying upon the aforesaid provisions, it was contended on behalf of the appellants that the O.A. filed by the first respondent Udham Singh Kamal was barred by limitation. No application for condonation of delay was filed. In the absence of any application under sub-Section (3) of Section 21 praying for condonation of delay, the Tribunal had no jurisdiction to admit and dispose of O.A. on merits. It was, therefore, contended that the Tribunal has totally overlooked the statutory provision contained in Section 21 of the Act and, therefore, impugned order be set aside.

7. On perusal of the materials on record and after hearing counsel for the parties, we are of the opinion that the explanation sought to be given before us cannot be entertained as no foundation thereof was laid before the Tribunal. It was open to the first respondent to make proper application under Section 21(3) of the Act for condonation of delay and having not

done so, he cannot be permitted to take up such contention at this late stage. In our opinion, the O.A. filed before the Tribunal after the expiry of three years could not have been admitted and disposed of on merits in view of the statutory provision contained in Section 21(1) of the Administrative Tribunals Act, 1985. The law in this behalf is now settled, see Secretary to Government of India and Others v. Shivam Mahadu Gaikwad, [1995] Supp. 3 SCC 231."

19. Even in this case as regards the limitation, 5th respondent in paragraph 3 has stated as under:

"That the applicant declare that the Original Application is within limitation, however in the facts and circumstances as mentioned in the application under Section 21 of the Administrative Tribunal Act, the delay, if any, may be condoned in terms of the application."

The averments clearly indicates that 5th respondent was all along asserting that he had filed the Original Application within limitation, but it was not so. The petitioner on the other hand had raised a specific plea that the Original Application was barred by limitation as would be clear from the reply to this para, which reads thus:

"That the contents of this para of original application are vehemently denied being wrong and misconceived. The decision to grant the benefit of reservation to the answering respondent was taken as back as on 20.7.2004 and applicant has approached this Hon'ble Tribunal in December, 2009 and therefore, present original application badly suffers from delay and laches on the part of applicant. Therefore, present original application is liable to be dismissed on this score alone."

20. Despite this objection raised by the petitioner, 5th respondent did not file an application for condonation of delay under Section 21 (3) of the Act, which gives power to the Tribunal to condone the delay, if sufficient cause is shown.

21. Once the question of limitation had been raised, it was incumbent upon the learned Tribunal to have answered the same. Now, in case the Original Application preferred by 5th respondent is seen, the same is ex-facie barred under the provisions of Section 21 of the Administrative Tribunals Act as the Original Application was preferred on 15.12.2009 whereby challenge had been laid to an order dated 4.9.2006 i.e. an order passed more than three years prior to filing of the petition.

22. Learned counsel for 5th respondent would then contend that in the Original Application it was not only the order dated 4.9.2006 which was under challenge, but he had also challenged the order dated 26.10.2009 and, therefore, the Original Application was within time. In so far as the laying challenge to the order dated 26.10.2009 is concerned, the said order was only consequential as it only implemented the earlier order dated 4.9.2006. Even if this order is quashed, the same would be of no avail since the basic order dated 4.9.2006 would still remain operative.

23. Lastly, it would be noticed that the Tribunal below has allowed the petition only on the ground that an opportunity of hearing ought to have been afforded to 5th respondent before granting the benefit of reservation to the petitioner and then on this ground alone it has quashed the order dated 4.9.2006. We are afraid that such approach on the part of the Tribunal is not legal or even justified because at best the Tribunal could have directed the official respondents to afford an opportunity of hearing to 5th respondent before giving effect to the order dated 4.9.2006 but then in no event could the petition have been allowed in a manner as has been done in this case.

24. We cannot be unmindful of the fact that the petitioner had not taken any undue benefit at the time of recruitment by not declaring herself to be belonging to Scheduled Caste. She had applied and joined as a general category candidate without availing the benefits of the relaxed standards. She had not even consumed the roster point of Scheduled Caste candidate. It is the birth alone which is a criteria for deciding as to whether the persons belong to the Scheduled Caste or not. Since the petitioner is a Scheduled Caste by birth and this fact was not even disputed by 5th respondent, therefore, she is entitled to all the benefits as are available to the Scheduled Caste. Moreover, 5th respondent admittedly was appointed much after the petitioner and the mere fact that he had availed the benefits of reservation by itself cannot create a right in his favour that too over and above the petitioner. Therefore, it can safely be held that while granting benefit to the petitioner in terms of the order dated 4.9.2006, no rights of 5th respondent had been infringed so as to entitle him to prefer a claim before the Tribunal.

25. In view of the aforesaid discussion, we find merit in this petition and the same is accordingly allowed and the order dated 12.11.2010 passed by the learned Central Administrative Tribunal Chandigarh Bench, Chandigarh in O.A. No. 1029-HP/09 titled Janki Nand Kashyap vs. Union of India and others is quashed and set-aside and the petitioner is held entitled to all the benefits as per order dated 4.9.2006. The parties are left to bear their own costs. The pending application(s), if any, stands disposed of.

****

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

Mohd. Ali ....Appellant.

Versus

The State of Himachal Pradesh and others .....Respondents.

LPA No.209 of 2011.
Judgment reserved on : 04.11.2014.
Date of decision: 18 November, 2014.

Industrial Disputes Act, 1947- Section 25-B (2) read with Section 25-F- Workman was appointed in the year 1980 and his services was dispensed with in the year 1990- he had worked for 240 days in calendar years 1980, 1981, 1982 and 1986 to 1989 and he had not completed 240 days of services in the year of his retrenchment - held, that workman is entitled to the benefit of Section 25-B(1) if he had worked continuously or uninterruptedly for a period of 12 consecutive months and it is not necessary that he should have worked continuously or uninterruptedly from January to December in a particular year - if a workman has worked for more than 240 days during the period of 10 months prior to his retrenchment, he would be deemed to be in continuous service for a year. (Para- 16 and 17)

Cases referred:

Suraj Pal Singh and others versus P.O., Labour Court No.111 and another 2002-III-LLJ 885

Suraj Pal Singh versus The Presiding Officer and Anr. 2006 (4) SLR 191

Sur Enamel and Stamping Works Ltd. v. The Workmen (1964) 3 SCR 616

Surendra Kumar Verma etc. versus The Central Government Industrial Tribunal-cum-Labour Court, New Delhi and another AIR 1981 SC 422

Mohan Lal versus The Management of M/s Bharat Electronics Limited AIR 1981 SC 1253

For the Appellant : Mr.A.K. Gupta, Advocate.
For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr.V.S.Chauhan, Additional Advocate General and Mr.J.K.Verma & Mr.Kush Sharma, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Whether the period of 240 days as specified under Section 25-B (2) read with Section 25-F of the Industrial Disputes Act, 1947, (for short 'the Act') is restricted to immediately preceding calendar year or the said provisions would be attracted even in cases where a workman has worked for 240 days in any calendar year preceding his termination, is the moot question involved in the present appeal?

2. Undisputedly, the appellant had been appointed in 1980 and his services have been dispensed with in the year 1990. He had worked for 240 days in calendar years 1980, 1981, 1982 and 1986 to 1989 and when his services were retrenched in the year 1991, he had not completed 240 days of service. The appellant approached the Labour Court, who set aside the order of retrenchment and ordered his reinstatement in service along with seniority and continuity in service, however back wages in service were denied.

3. Aggrieved by the order passed by the Tribunal, the respondent preferred writ petition before this Court which was allowed by the learned writ Court by concluding that the respondent had not been in continuous service for one year within the meaning of sub-section (1) of Section 25-B of the Act nor he had actually worked for 240 days under the employer during the period of 12 months, preceding the date of his retrenchment within the meaning of sub-section (2) of Section 25-B of the Act, therefore Section 25-F of the Act was not attracted in this case.

4. Before we proceed any further, it will be relevant to make note of the relevant provisions of the Act as attracted to the facts of the present case. Sections 2 (oo), 25-B and 25-F of the Act read thus:-

> *"[Sec.2(oo)"retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-*
>
> *(a) voluntary retirement of the workman; or*
>
> *(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or*
>
> *[(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or]*
>
> *(c) termination of the service of a workman on the ground of continued ill-health;]"*
>
> *"[25B. **Definition of continuous service.**- For the purposes of this Chapter,-*
>
> *(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;*

(2) where a workman is not in continuous service within the meaning of clause(1) for a period of one year or six months, he shall be deemed to be in continuous service under the employer-

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.

Explanation.- For the purposes of clause(2), the number of days on which a workman has actually worked under an employer shall include the days on which-

(i) He has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under the Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.]"

*"**25F. Conditions precedent to retrenchment of workmen.**- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-*

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

[***]

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay [for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government [or such authority as may be specified by the appropriate Government by notification in the Official Gazette]."

5. The learned counsel for the appellant has vehemently argued that the learned writ Court has misinterpreted the provisions of Section 25-B as also Section 25-F of the Act because Section 25-B had to be read in conjunction with Section 25-F of the Act which provides that for each completed year of service the workman would be paid retrenchment compensation and the continuous service has been defined to be 240

days service in a calendar year and, therefore, it is not necessary that the workman should have completed the said service during the period of preceding 12 months.

6. In support of his contention, the learned counsel for the appellant has placed reliance upon decision of the learned single Judge of the Delhi High Court in ***Suraj Pal Singh and others*** *versus* ***P.O., Labour Court No.111 and another 2002-III-LLJ 885*** wherein the learned single Judge held that the period under Section 25-B read with Section 25-F of the Act cannot be restricted to immediately preceding calendar year and, therefore, the workman could not be denied the benefit on that ground as long as an employee had worked for 240 days in a calendar year preceding his termination, the employee would be entitled to the benefit, as would be clear from the following observations:-

> ***"16. I am thus of the considered view that period under Section 25-B read with Section 25-F of the Act cannot be restricted to immediately preceding calendar year and thus the petitioners cannot be denied the benefit on that ground. As long as an employee has worked for 240 days in any calendar year preceding his termination, the employee would be entitled to the benefit."***

7. No doubt, the aforesaid observations support the contention of the appellant, but then it is worthwhile to notice that this judgment was questioned in Letters Patent Appeal in ***Suraj Pal Singh*** *versus* ***The Presiding Officer and Anr. 2006 (4) SLR 191*** wherein the Division Bench did not agree with the aforesaid view of the learned single Judge.

8. While dealing with the expression "continuous uninterrupted service" and also interpretation of the word "year" in Section 25B (1), the Division Bench observed as under:-

> ***"21. In view of the above judgments, the expression "continuous" or "uninterrupted service" means and refers to the days during which the workman was employed and continued to be in service of the employer. It may be stated that absence on account of sickness, authorised leave, accident or strike, which is not illegal or lock-out is to be regarded as a period during which a workman has continued in uninterrupted service of the employer. It may also be noted here that any artificial breaks given malafidely by an employer should not be recognised and a workman should be treated to be in continuous service. (Refer Yogendra Singh Rawat v. Hemwati Nandan Bahuguna Garhwal University, (1998) 3 SCC 704: [1998 (1) SLR 712 (SC)] and Bhagwati Prasad v. Delhi State Mineral Development Corporation, reported in (1990) 1 SCC 361 : 1990 Lab IC 126 : [1992 (8) SLR 784 (SC)]. Courts and Tribunals will therefore always have power, while applying Section 25B(1) to examine whether the cessation of work was due to any fault on the part of the workman. They can ignore any artificial breaks malafidely given by an employer.***
>
> ***Interpretation of the word "year":***
>
> ***22. The words used in Section 25B(1) is "one year" but the said term has not been defined in the Act. The word "year" has been defined in the General Clauses Act, 1897. Section 3(66) of the aforesaid Act defines the term `year' to mean a period reckoned according to the British Calendar i.e. a period of 12 months from January to December. For the sake of convenience, Section 3(66) of the General Clauses Act, 1897 is reproduced below:-***
>
> ***"Year" shall mean an order reckoned according to the British calendar."***
>
> ***23. However, we do not think that the aforesaid definition as given in the General Clauses Act, 1897 is applicable and should be applied, while interpreting Section 25B(1) of the Act. If definition given in Section 3(66) of the General Clauses Act, 1897 is accepted, any workman who joins***

employment after 1st January, will be denied benefit of Section 25B(1) in the first year of employment. This will be extremely unjust and unfair and such interpretation should not be accepted as we are dealing with a social welfare and a beneficial legislation.

24. The Supreme Court in the case of Aspoinwall and Company v. Lalitha Padugady (1995) 5 SCC 642 : AIR 1996 SC 580 : [1995(5) SLR 213 (SC)] had examined the provisions of Payment of Gratuity Act, 1972 and Sections 2 and 4 thereof. The expression "continuous service for not less than 5 years" came up for consideration before the Supreme Court in the said case. After examining the said Sections the Supreme Court came to the conclusion that complete or continuous service has to be calculated with reference to the date on which an employee gets employment. It was held that this is the stage, which is starting point and thereafter the period has to be calculated. Thus, the period of continuous service is to be reckoned from the date of joining of the employment. The Supreme Court rejected the contention that this period of continuous service has to be reckoned with reference to a calendar year as defined in the General Clauses Act,1897.

25. We feel that in view of the fact that the present legislation is social, beneficial and a welfare legislation, workman should be given benefit under Section 25B(1), if he has worked for a continuously or uninterruptedly for a period of 12 consecutive months anytime during the course of his employment. It is not necessary that a worker should have continuously or uninterruptedly worked from January to December in a particular calendar year. Thus, continuous or un-interrupted employment for period of 12 consecutive months will satisfy requirement of Section 25B(1) of the Act. Whether 240 days is equal to "one year" under Section 25B(1)?

26. Section 25B(1) uses the word "one year", which in common parlance means period of 12 months or 365 days. Can we while interpreting Section 25B(1) reduce this period to 240 days?

27. Sections 25B(1) of the Act being beneficial and welfare provision has to be liberally and broadly interpreted, yet at the same time we cannot amend and modify a statutory provision by incorporating and adding words. Our role is to interpret the law as it exists and not to add and subtract words already used by the legislature or usurp the role of the legislature. The legislature in Section 25B(2) has referred to period of "240 days in the preceding year" following the date of termination as the criteria to determine and decide whether a workman has been in continuous service for a period of one year. The legislature, however, has deliberately not mentioned the period of 240 days during the period of one year as the criteria in Section 25B(1) of the Act. Section 25B(1) nowhere specifies that if a workman has worked for a period of 240 days in a period of "one year", he is deemed to be in uninterrupted service for "one year". The period of 240 days specified in Section 25B(2), cannot be legislated and read into sub-section (1). We cannot, therefore, legislate and incorporate the words "240 days" into Section 25B(1) of the Act. Our judicial pen cannot write these words into the aforesaid sub-section and read them in Section 25B(1), when the legislature has consciously and deliberately not used these words. The requirement of legislature, as far as Section 25B(1) of the Act is concerned, is clear and unambiguous. It refers to "continuous" or "uninterrupted" service for a period of one year i.e., 12 consecutive months. We cannot by judicial interpretation decrease this period of 365 days to 240 days. Of course the period of one year should be interpreted liberally as has been done in the present judgment. The two judgments, in the case of Moti Ceramic Industries (supra) and Metal Powder Co. Ltd. (supra) support and have similarly interpreted

Section 25B(1) and (2) of the Act. Bombay High Court in the case of New Great Eastern Spinning and Weaving Co. Ltd. v. Vasant Mahadeo Bidia, 2005 (1) Cur LR 50 has also taken a similar view.

28. We wish to further clarify that the above interpretation is not against workmen. The legislature has been careful and cautious to include certain periods like authorised leave, legal strikes, lock outs, periods during which the employer illegally refuses to permit the workman to do work, etc., as a period during which the workman is deemed to be in continuous or uninterrupted service. Therefore in a given case, a workman may have worked for in fact less than 240 days, but after including the specified periods mentioned in section 25B(1), his continuous or uninterrupted service might be for a period of 12 consecutive months. Accordingly, we hold that period of 240 days is not relevant as far as Section 25B(1) is concerned as the figure "240 days" is not mentioned in the said sub-section and is mentioned only in sub-section (2). It is not possible for this Court to legislate and add the words 240 days in Section 25B(1) of the Act.

Section 25B(2) of the Act:

29. Sub-section (2) of Section 25B also incorporates a deeming fiction. As per sub-section (2) to Section 25B, if a workman has worked for 240 days or 190 days (in case he is employed below ground in a mine) during the period of 12 calendar months preceding the date with reference to which calculation is to be made, he shall be deemed to be in continuous service for a period of one year. In case of a retrenchment, the reference date will be the date on which the retrenchment order is passed. Therefore, if a workman has worked for 240 days (190 days in case he has worked below ground in a mine) during the period of 12 calendar months preceding the date of his retrenchment, the said workman is deemed to have rendered continuous service for a period of one year. Section 25B(2) refers to a period of 12 months immediately preceding and counting backwards from the relevant date and not to any other period of employment. If a workman has worked for more than 240 days during this period of 12 months prior to his retrenchment, he is deemed to be in continuous service for a year. The words "preceding the date with reference to which calculation is to be made" are not redundant or otiose. The period of 12 months mentioned in Section 25B(2) is not therefore any period of 12 months but the immediately preceding 12 months with reference to which calculation is to be made.

The two Clauses 25B (1) and 25B (2) in operation:

30. Section 25B(2) as per the clause itself, comes into operation when a workman has not been in continuous service within the meaning of sub-section (1) for a period of one year. However, in practice and for all practical purposes, a workman will be entitled to protection under section 25F of the Act, if conditions mentioned in either of the two clauses are satisfied. The sub-sections are therefore in alternative. Requirement of Section 25B(1) is uninterrupted service for a period of one year and under sub-section (2) requirement is service for a period of 240 days (or 190 days in case worker is employed below ground in a mine) during the preceding 12 calendar months prior to the date of termination/retrenchment. By the deeming fiction in Section 25B(2), a workman who has worked for aforesaid period in the preceding 12 calendar months prior to the date of termination/retrenchment is deemed to have been in continuous service for not less than one year. The two provisions, namely, of Section 25B(1) and 25B(2) are separate and distinct. The requirements and conditions to be satisfied to some extent are also different."

"38.We have examined the claim statement filed by the appellant before the Labour Court. In the said claim statement, it is not mentioned and stated how and why the appellant-workman was "in continuous service for a period of one year" or more. In the affidavit filed by the appellant before the Labour Court, he has stated that he actually worked for 233 days in 1984, 258 days in 1985 and for 27 days in January, 1986. This statement does not appear to be correct as the appellant along with his writ petition had also filed a chart showing actual working days during the period of 1984-1986. As per the said chart, the appellant had worked for 223 days up to December, 1984 and 193 days between January, 1985 to December, 1985 and for 83 days from January, 1986 to September, 1986. "However, even in the affidavit filed by the appellant before the Labour Court, no attempt was made to establish and prove that the appellant was "in continuous or interrupted service for period of one year" as provided in Section 25B(1) of the Act and the conditions of the said Section were satisfied. The Labour Court also in its award has not referred to Section 25B(1) of the Act whatsoever and has only mentioned Section 25B(2) of the Act. It appears that the appellant did not claim that he is entitled to protection under Section 25B(1) of the Act. Before the learned single Judge also reliance was placed upon Section 25B(2) of the Act and the appellant herein relied upon the said provision and it was submitted that the conditions of the said provision will be satisfied if a workman has worked for period of 240 days in any year and it was not necessary that the workman should have worked for period of 240 days during the period of 12 months preceding the date of reference, i.e., date of termination. As stated above, we have rejected the contention of the appellant in this regard and have held that Section 25B(2) of the Act refers to period of 12 months from the date with reference to which calculation is to be made, which in the present case is the date of termination and not any period prior to 12 months."

9. Therefore, it is apparent from the aforesaid judgment of the Division Bench that the interpretation as given by the learned single Judge while construing provisions of Sections 25B and 25F of the Act did not find favour with the Division Bench.

10. At this stage, it will be relevant to take note of the fact that the Industrial Disputes Act, 1947 (for short, the 'ID Act'), Chapter V-A containing Sections 25A to 25J was inserted by the Industrial Disputes (Amendment) Act, 1953 (43 of 1953) w.e.f. 24th October, 1953. Section 25-B as it stood then was as under :

"25-B. Definition of one year of continuous service.- For the purposes of Sections 25-C and 25-F, a workman who, during a period of 12 calendar months, has actually worked in an industry for not less than two hundred and forty days shall be deemed to have completed one year of continuous service in the industry.

Explanation. - In computing the number of days on which a workman has actually worked in any industry, the days on which –

(a) he has been laid off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946, or under this Act or under any other law applicable to the industrial establishment, the largest number of days during which he has been so laid-off being taken into account for the purposes of this clause,

(b) he has been on leave with full wages, earned in the previous year, and

(c) in the case of a female, she has been on maternity leave; so however, that the total period of such maternity leave shall not exceed twelve weeks, shall be included."

11. The same Amending Act introduced the definition of 'continuous service' in Section 2 (eee) as under "

> ***"2.(eee) 'continuous service' means uninterrupted service, and includes service which may be interrupted merely on account of sickness or authorized leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;"***

12. Section 25-B was substituted by Industrial Disputes (Amendment) Act, 1964 (36 of 1964) w.e.f. 19-12-1964.

13. The Amending Act of 1964 deleted Section 2(eee), having incorporated in Section 25-B itself the definition of 'continuous service'. It also brought in the concept of preceding 12 calendar months. The earlier definition did not mention "preceding" with reference to period of twelve calendar months. It appears that the decision of the Hon'ble Supreme Court in ***Sur Enamel and Stamping Works Ltd. v. The Workmen (1964) 3 SCR 616*** interpreting Sections 2(eee) and 25-B led to the amendments made by Amending Act of 1964. In Sur Enamel, interpreting Sections 2(eee) and 25-B, it was held that twin conditions were required to be fulfilled before a workman can be considered to have completed one year of continuous service in an industry. It must be shown first that the workman was employed for a period of not less than 12 calendar months and next that during those 12 calendar months, he had worked for not less than 240 days. In that case, the workman had not been employed for a period of 12 calendar months. Therefore, the Hon'ble Supreme Court held that it was unnecessary to examine whether actual days of work were 240 or more for in any case the requirements of Section 25-B would not be satisfied by mere fact of number of working days being not less than 240 days. The effect was that if a workman completes actual 240 or more days of work in less than 12 calendar months, he would not be entitled to the benefit of beneficial legislation. This anomaly led to the amendment of the ID Act in the manner above stated.

14. It is, therefore, clear that the legislature had consciously used the word "preceding" in Section 25-B with reference to the period of 12 months.

15. The question posed before us is no longer *res integra* in view of Hon'ble three Judges' decision of the Hon'ble Supreme Court in ***Surendra Kumar Verma etc.*** *versus* ***The Central Government Industrial Tribunal-cum-Labour Court, New Delhi and another AIR 1981 SC 422*** which exposition of law was reiterated by the Hon'ble Supreme Court in ***Mohan Lal*** *versus* ***The Management of M/s Bharat Electronics Limited AIR 1981 SC 1253*** wherein it was held as under:-

> ***"10. It was, however, urged that Section 25F is not attracted in this case for an entirely different reason. Mr. Markenday contended that before Section 25F is invoked, the condition of eligibility for a workman to complain of invalid retrenchment must be satisfied. According to him unless the workman has put in continuous service for not less than one year his case would not be governed by Section 25F. That is substantially correct because the relevant provision of Section 25F provides as under :***
>
> ***"25F. No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until –***
>
> ***(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;***
>
> ***Provided that no such notice shall be necessary if the retrenchment is under an agreement which specifies a date for the termination of service;***

(b) the workman has been paid, at the time of retrenchment, compensation which, shall be equivalent of fifteen days' average pay (for every completed year of continuous service) or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government (or such authority as may be specified by the appropriate government by notification in the Official Gazette)."

Before a workman can complain of retrenchment being not in consonance with Section 25F, he has to show that he has been in continuous service for not less than one year under that employer who has retrenched him from service. Section 25B is the dictionary clause for the expression 'continuous service'. It reads as under :

> ***"25B. (1) a workman shall be said to be in continuous service for a period if he is for that period in uninterrupted service including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lockout or a cessation of work which is not due to any fault on the part of the workman;***
>
> ***(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-***
>
> ***(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-***
>
> ***(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and***
>
> ***(ii) two hundred and forty days, in any other case;***
>
> ***(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made has actually worked under the employer for not less than-***
>
> ***(i) ninety-five days, in the case of a workman employed below ground in a mine; and***
>
> ***(ii) one hundred and twenty days, in any other case.***

Explanation - For the purposes of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which-

> ***(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946,or under this Act or under any other law applicable to the industrial establishment :***
>
> ***(ii) he has been on leave with full wages, earned in the previous years;***
>
> ***(iii) he has been, absent due to temporary disablement caused by accident arising out of and in the course of his employment; and***
>
> ***(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.***

11. Mr. Markenday contended that clauses (1) and (2) of Section 25B provide for two different contingencies and that none of the clauses is satisfied by the appellant. He contended that subsection (1) provides for uninterrupted service and sub-section (2) comprehends a case where the workman is not in continuous service. The language employed in sub-sections (1) and (2) does not admit of this dichotomy. Sub-sections (1) and (2) introduce a deeming fiction as to in what circumstances a workman could be said to be in continuous service for the purposes of Chapter VA. Sub-section (1) provides a deeming fiction in that where a workman is in service for a certain period he shall be deemed to be in continuous service for that period even if service is interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal or a lockout or a cessation of work which is not due to any fault on the part of the workman. Situations such as sickness, authorised leave, an accident, a strike not illegal, a lockout or a cessation of work would ipso facto interrupt a service. These interruptions have to be ignored to treat the workman in uninterrupted service and such service interrupted on account of the aforementioned causes which would be deemed to be uninterrupted would be continuous service for the period for which the workman has been in service. In industrial employment or for that matter in any service, sickness, authorised leave, an accident, a strike which is not illegal, a lockout, and a cessation of work not due to any fault on the part of the workman, are known hazards and there are bound to be interruptions on that account. Sub-section (1) mandates that interruptions therein indicated are to be ignored meaning thereby that on account of such cessation an interrupted service shall be deemed to be uninterrupted and such uninterrupted service shall for the purposes of Chapter VA be deemed to be continuous service. That is only one part of the fiction.

12. Sub-section (2) incorporates another deeming fiction for an entirely different situation. It comprehends a situation where a workman is not in continuous service within the meaning of sub-section (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer for a period of one year or six months, as the case may be, if the workman during the period of 12 calendar months just preceding the date with reference to which calculation is to be made, has actually worked under that employer for not less than 240 days. Sub-section (2) specifically comprehends a situation where a workman is not in continuous service as per the deeming fiction indicated in sub-section (1) for a period of one year or six months. In such a case he is deemed to be in continuous service for a period of one year if he satisfies the conditions in clause (a) of sub-section (2). The conditions are that commencing the date with reference to which calculation is to be made, in case of retrenchment the date of retrenchment, if in a period of 12 calendar months just preceding such date the workman has rendered service for a period of 240 days, he shall be deemed to be in continuous service for a period of one year for the purposes of Chapter VA. It is not necessary for the purposes of sub-section (2) (a) that the workman should be in service for a period of one year. If he is in service for a period of one year and that if that service is continuous service within the meaning of sub-section (1) his case would be governed by sub-section (1) and his case need not be covered by sub-section (2). Sub-section (2) envisages a situation not governed by sub-section (1). And subsection (2) provides for a fiction to treat a workman in continuous service for a period of one year despite the fact that he has not rendered uninterrupted service for a period of one year but he has rendered service for a period of 240 days during the period of 12 calendar months counting backwards and just preceding the relevant date being the date of retrenchment. In other words, in order to invoke the fiction enacted in sub-section (2) (a) it is necessary to determine

first the relevant date, i.e. the date of termination of service which is complained of as retrenchment. After that date is ascertained, move backward to a period of 12 months just preceding the date of retrenchment and then ascertain whether within the period of 12 months, the workman has rendered service for a period of 240 days. If these three facts are affirmatively answered in favour of the workman pursuant to the deeming fiction enacted in sub-section (2) (a) it will have to be assumed that the workman is in continuous service for a period of one year and he will satisfy the eligibility qualification enacted in Section 25F. On a pure grammatical construction the contention that even for invoking sub-section (2) of Section 25B the workman must be shown to be in continuous service for a period of one year would render sub-section (2) otiose and socially beneficial legislation would receive a setback by this impermissible assumption. The contention must first be negatived on a pure grammatical construction of sub-section (2). And in any event, even if there be any such thing in favour of the construction, it must be negatived on the ground that it would render sub-section (2) otiose. The language of sub-section (2) is so clear and unambiguous that no precedent is necessary to justify the interpretation we have placed on it. But as Mr. Markenday referred to some authorities, we will briefly notice them.

13. In Sur-Enamel & Stamping Works (P) Ltd. v. Their Workmen. (1964) 3 SCR 616 : (AIR 1963 SC 1914) referring to Section 25B as it then stood read with Section 2 (eee) which defined continuous service, this court held as under (at p. 1917 of AIR) :

> ***"The position therefore is that during a period of employment for less than 11 calendar months these two persons worked for more than 240 days. In our opinion that would not satisfy the requirement of Section 25B. Before a workman can be considered to have completed one year of continuous service in an industry it must be shown first that he was employed for a Period of not less than 12 calendar months and, next that during those 12 calendar months had worked for not less than 240 days. Where, as in the present case, the workman have not at all been employed for a period of 12 calendar months it becomes unnecessary to examine whether the actual days of work numbered 240 days or more. For, in any case, the requirements of Section 25B would not be satisfied by the mere fact of the number of working days being not less than 240 days."***

If Section 25B had not been amended, the interpretation which it received in the aforementioned case would be binding on us. However, Section 25B and Section 2 (eee) have been the subject-matter of amendment by the Industrial Disputes (Amendment) Act, 1964. Section 2 (eee) deleted and Section 25B was amended. Prior to its amendment by the 1964 Amendment Act, S. 26B read as under :

> ***"For the purposes of Sections 25C and 25F a workman who during the period of 12 calendar months has actually worked in an industry for not less than 240 days, shall be deemed to have completed one year of continuous service in the industry."***

14. We have already extracted Section 25B since its amendment and the change in language is the legislative exposition of which note must be taken. In fact, we need not further dilate upon this aspect because in Surendra Kumar Verma v. Central Government Industrial-cum-Labour Court, New Delhi, (1980) 4 SCC 443 : (AIR 1981 SC 422) Chinnappa Reddy, J., after noticing the amendment and referring to the decision in Sur Enamel and Stamping Works (P) Ltd. case (AIR 1963 SC 1914) held as under (at p. 426 of AIR) :

"These changes brought about by Act 36 of 1964 appear to be clearly designed to provide that a workman who has actually worked under the employer for not less than 240 days during a period of twelve months shall be deemed to have been in continuous service for a period of one year whether or not he has in fact been in such continuous service for a period of one year. It is enough that he has worked for 240 days in a period of 12 months, it is not necessary that he should have been in the service of the employer for one whole year."

In a concurring judgment Pathak J. agreed with this interpretation of Section 25B (2). Therefore, both on principle and on precedent it must be held that Section 25B (2) comprehends a situation where a workman is not in employment for period of 12 calendar months but has rendered service for a period of 240 days within the period of 12 calendar months commencing and counting backwards from the relevant date, i. e. the date of retrenchment. If he has. he would be deemed to be in continuous service for a period of one year for the purpose of Section 25B and Chapter VA."

16. From the aforesaid exposition of law, the following legal position emerges:-

(i) Section 25B (1) and Section 25B (2) of the Act are separate and distinct and even requirements and conditions to be satisfied to some extent are different.

(ii) While insofar as Section 25B (1) is concerned, the workman could be given benefit under this Section if he had worked continuously or uninterruptedly for a period of 12 consecutive months any time during the course of his employment and it was not necessary that a worker should have continuously or uninterruptedly worked from January to December in a particular year. Therefore, continuous or uninterrupted employment for a period of 12 consecutive months would satisfy the requirement of Section 25B (1) of the Act.

(iii) The period of 240 days does not find mention in the provisions of Section 25B (1) and is only referred in Section 25B (2) and therefore cannot be read into Section 25B (2) and the Court had no power to legislate or incorporate the words "240 days" in Section 25B (1) of the Act.

(iv) Section 25B (2) of the Act only refers to a period of 12 months immediately preceding and counting backwards from the relevant date and not to any other period of employment. If a workman had worked for more than 240 days during this period of 12 months prior to his retrenchment, he would be deemed to be in continuous service for a year. The words "preceding the date with reference to which calculation is to be made" cannot be rendered redundant or otiose.

(v) The period of 12 months mentioned in Section 25B (2) of the Act is not therefore any period of 12 months but the immediately preceding 12 months with reference to which calculation is to be made.

17. Therefore, in view of what has been discussed above, it can safely be concluded that the provisions of Section 25-B (2) read with Section 25-F of the Industrial Disputes Act, 1947, are only applicable to workmen, who have worked for a period more than 240 days in the preceding calendar year from the date with reference to which calculation is to be made which in the present case is the date of termination and not to any other period prior to 12 months/calendar year.

18. Resultantly, there is no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their own costs.

****

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

Raj Kumar-II & others ...Petitioners.

VERSUS

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

CWP No. 3588 of 2012 a/w Ors.
Reserved on: 04.11.2014
Pronounced on:18th November, 2014.

Constitution of India, 1950- Article 226- Petitioners were appointed with requisite qualification of matriculation- Rules were changed for the post of Superintendent Grade-II on 18.7.1996 – petitioners were duly promoted to the said post and were entitled to be promoted to the post of B.D.O.- Government changed the rules on 7.10.2003 and restricted the quota of Superintendent Grade-II who were matriculate to 10%- quota was changed to 15% on 6.4.2012 and the qualification was changed to graduate- held, that amendment has deprived the petitioner of their right of promotion- some of the matriculate Superintendent are holding the post of BDO, this aspect was not taken into consideration while amending the rules - writ petitioners had experience and they had legal and legitimate expectation to get promotion- therefore, respondent directed to consider the case of petitioners for regularization.

(Para- 7 to 20)

Cases referred:

T.R. Kapur and others vs. State of Haryana and others 1986 (suppl.) SCC 584

T.N. Document Writers' Association vs. State of T.N. and another, 1995 (Suppl.) 4 SCC 415

A. Satyanarayana & ors. versus S.S. Purshotham & ors., reported in (2008) 5 SCC 416

B. N. Saxena versus New Delhi Municipal Committee and others reported in (1990) 4 SCC 205

Deepak Agarwal and anr. versus State of Uttar Pradesh and ors. (2011) 6 SCC 725

Rajni Sharma versus State of H.P. and another, reported in 2010 (2) Shim.L.C. 155

B. Manmad Reddy & ors versus Chandra Prakash Reddy & ors. (2010) 3 SCC 314

Re The Special Courts Bill, 1978 (1979) 1 SCC 380

A.S. Parmar and others vs. State of Haryana and others and connected matters 1984 (Suppl.) 1 SCC 1

Dr. (Mrs) Sushma Sharma and others vs. State of Rajasthan and others 1985 (Supl.) SCC 45

M.P. Singh, Deputy Superintendent of Police, C.B.I. and others vs. Union of India and others (1987) 1 SCC 592

Inder Singh and others vs. State of U.P. and others 1987 (Suppl.) SCC 257

Punjab Higher Qualified Teachers, Union vs. State of Punjab and others (1988) 2 SCC 407

Union of India and others vs. Anil Kumar and others (1999) 5 SCC 743

For the Petitioner(s): Mr. K.D. Shreedhar, Sr. Advocate with Y.S. Thakur, Advocate in CWP No. 3588/2012 Mr. Onkar Jairath, Advocate in CWP No.6232/2012 Mr.R.L Chaudhary, Advocate in CWP No.

2839/2012 and Mr. Ranjan Sharma, Advocate in CWP No.402/2014.

For the Respondent(s): Mr.Shrawan Dogra, Advocate General, with Mr. V.S. Chauhan, Mr. Romesh Verma, Addl. Advocate General with Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

In all these four writ petitions, the petitioner(s) have called in question Rule 11 (a) of the Recruitment and Promotion Rules, dated 6.4.2012, Annexure P4, so far the same relates to promotion to the post of Block Development Officer, on the grounds taken in the memo of writ petitions. Thus, we deem it proper to determine all these writ petitions by this common judgment.

2. Precisely, the case of the petitioner(s) is that they were appointed in terms of the Recruitment and Promotion Rules, as clerks having requisite qsualification of matriculate vide different orders of the different dates and were also designated as Senior Clerks and thereafter as Junior Assistants in the respondents department.

3. The Recruitment and Promotion Rules, hereafter referred to as "the Rules" for short, went through a sea change for the post of Superintendent Grade-II on 18.7.1996 vide Annexure P1 and promotion to the post(s) of Superintendent Grade-II was to be made by promotion from amongst Senior Assistants having 8 years regular service. The petitioner(s) came to be promoted against the said post on regular basis and that post is ladder cadre to the post of Block Development Officer Class-I Gazetted- by promotion.

4. On 7.10.2003, the Government issued Annexure P2, which contained that in terms of Rule 10, the post(s) of Block Development officer were to be filled up 50% by direct recruitment and 50% by promotion and in terms of the mandate of Rule 11 of the Rules, out of 50% promotion quota, 10% posts were to be filled up from amongst the Superintendents Grade-II, who were matriculate and who were possessed of 5 years of regular service or regular combined with continuous *ad hoc* service in the Grade. The petitioner(s) were expecting promotion against the 10% quota against the post of Block Development Officer and Seniority List was issued on 19th September, 2011, vide Annexure P3 and the petitioner(s) are figuring in the said list. The petitioners have completed the requisite service/experience but unfortunately, a notification was issued on 6.4.2012, Annexure P4 whereby the amendment to the Rules was made for the post of Block Development Officer. In terms of the said notification though, the quota of Superintendents Grade-II was increased from 10% to 15% but eligibility for promotion was restricted only for Superintendents Grade-II, who were Graduates, thereby taking away the right of the petitioner(s)-Superintendents Grade-II matriculate which is stated to be arbitrary, malafide, unjust, unfair and discriminatory. The Superintendents Grade-II Matriculate and Superintendents Grade-II Graduates are holding the same post(s) and are having the same experience but without any rationale, they have been made ineligible by providing that only Superintendents Grade-II Graduates can be promoted to the post(s) of Block Development Officer. It is also the case of the petitioner(s) that as on today, they are holding the posts of Block Development Officer(s) despite of Annexure P4, i.e., the notification dated 6.4.2012 whereby the Rules were amended.

5. The respondents have filed the reply and resisted the petitions on the ground that it is the discretion of the Government to prescribe the qualification for promotion quota and they are within their rights to make

amendments in order to have better experienced, qualified and expert officers. The respondents have given details why the amendment was made, in the preliminary objections of the reply filed by them.

6. We have gone through the documents produced by the writ petitioners and also by the respondents-State which do disclose that the writ petitioner(s) were not heard before making the amendment and it appears to have been made on the basis of notings and other things made by the interested persons, i.e., the Superintendents Grade-II Graduates. However, the amendment is made by the Government and the question is whether it can be called in question?

7. It is beaten law of the land that the amendment can be questioned provided it is shown that the same is *ultra vires* or is discriminatory.

8. While going through the record, it appears that petitioner(s) have failed to carve out a case for declaring the said amendment *ultra vires* but at the same time, they have been able to carve out a case that the amendment is discriminatory for the following reasons.

9. The petitioner(s) have given details how many officers are holding the post(s) of Superintendents Grade-II and are matriculate and how many officers are Graduates. Virtually, the amendment has deprived them from their right of promotion and it has taken their right of consideration for promotion for the post(s) of Block Development Officer. The fact that as on date, some of the Superintendents Grade-II Matriculates are holding the post(s) of Block Development Officer on *ad hoc* basis, has not been denied by the respondents-State. The petitioner(s) have placed on record AnnexureP7/1 to Annexure P7/4 in CWP No. 402 of 2014, showing that despite the amendment, some of the Superintendents Grade-II who are matriculates, are holding the post(s) of Block Development Officer and there is specific averment to this effect contained in para 12 (n) of the said petition which is also not denied by the respondents. It is apt to reproduce para 12 (n) of the said petition herein:

> *"That once even after the issuance of the amended rules of 2012 the Respondents have made the Matriculate Supdt Gr-II-alike the petitioner to perform the work of the promotional post of BDO vide Annexures P-7/1 to Annexure P-7/4 then, the impugned amendment ousting Matriculate Supdt Gr-II-petitioner from being given an equal opportunity to be considered for formal promotion as BDO is based on no classification, no rationale, is arbitrary, malafide, discriminatory and is violative of Articles 14, 16 and 21 of the Constitution of India."*

10. The learned counsel for the petitioner(s) have also argued that some of the Matriculates Superintendents Grade-II have improved their qualifications and otherwise, they can do it till the time they enters into the consideration room but the petitioners have been left high and dry for the reasons that they have no time to improve their qualifications because of pressure on their head. The learned counsel for the petitioner(s) have also cited judgment in support of their case in case titled **T.R. Kapur and others vs. State of Haryana and others 1986 (suppl.) SCC 584.** It is apt to reproduce paras 5 and 15 of the said judgment herein.

> *"5.Shri Shanti Bhushan, learned counsel for the petitioners has put forward a three-fold contention. First of these submissions is that the impugned notification which purported to amend Rule 6(b) of the Class I Rules with retrospective effect from July 10, 1964 making a degree in Engineering essential for promotion to the post of Executive Engineer in Class I service constitutes a variation in the conditions of service applicable to officers belonging to Class II service who are diploma holders like the petitioners prior to the*

appointed day i.e. November 1, 1966 to their disadvantage as it renders them ineligible for promotion to the post of Executive Engineer in Class I service and was ultra vires the State Government having been made without the previous approval of the Central Government as enjoined by the proviso to Section 82(6),of the Punjab Reorganisation Act, 1966. It is urged that any rule which affects the promotion of a person relates to his conditions of service, although mere chances of promotion may not be. The contention, in our opinion, must prevail. The second is that it was not permissible for the State Government to amend Rule 6(b) of the Class I Rules with retrospective effect under the proviso to Art. 309 of the Constitution so as to render ineligible for promotion to the post of Executive Engineer in Class I service, the members of Class II service who are diploma-holders although they satisfy the condition of eligibility of eight years' experience in that class of service. It is said that the unamended Rule 6(b) conferred a vested right on persons like the petitioners which could not be taken away by retrospective amendment of Rule 6(b). The third and the last submission is that the action of the State Government in issuing the impugned notification making retrospective amendment of Rule 6(b) of the Class I Rules was wholly arbitrary, irrational and mala fide and thus violative of Arts.14 and 16(1) of the Constitution. It is submitted that the impugned notification was calculated to circumvent the direction given by this Court in its order dated February 24, 1984 on the basis of the undertaking given by the learned Additional Solicitor General that the State Government would consider the cases of all eligible officers belonging to Class II service for promotion to the Class- I service.

6-14.....

15. More fundamental is the contention that the impugned notification issued by the State Government purporting to amend Rule 6(b) with retrospective effect from July 10,1964 which rendered members of Class II Service who are diploma holders like the petitioners ineligible for promotion to the post of Executive Engineer although they satisfied the condition of eligibility of 8 years' experience in that class of service was unreasonable, arbitrary and irrational and thus offended against Arts. 14 and 16(1) of the Constitution. It is urged that they were eligible for promotion under the unamended Rule 6(b) of the Class I Rules and had a right to be considered for promotion to the post of Executive Engineer, and a retrospective amendment of Rule 6(b) seeking to render them ineligible was constitutionally impermissible. It is said that the reason for this was obvious inasmuch as immediately prior to the reorganization of the State of Punjab i.e. prior to November 1, 1966 even a member of the Overseers Engineering Service, a Class III Service, having only a diploma was eligible for being promoted as Executive Engineer in Class I Service in due course since in the matter of promotion under the unamended Rule 6(b) it was not necessary to possess a degree in Engineering as held by this Court in A.S. Parmar's case. It follows therefore that every member of the Overseers Engineering Service was eligible for promotion first as Assistant Engineer or Sub-Divisional Officer in Class II Service and thereafter, in due course, to the post of Executive Engineer in Class I Service even without the educational qualification of a degree in Engineering. In substance, the submission is that a retrospective amendment of Rule 6(b) by the impugned notification which seeks to take away

the eligibility of members of Class II Service who are diploma-holders for purposes of promotion to the posts of Executive Engineers in Class I Service from a back date ranging over 20 years and thereby renders invalid the promotions already made is constitutionally impermissible.

11. It is apt to reproduce para 2 of the judgment in **T.N. Document Writers' Association vs. State of T.N. and another, 1995 (Suppl.) 4 SCC 415,** herein:

"2.It appears to us, however, that having regard to the sudden change in qualification prescribed by the Government, it is necessary and it will also be equitable on the part of the Government to give to the members of the Association, having their licences in earlier years, an adequate opportunity to qualify themselves as required by the amended rules. We, therefore, consider it reasonable to hold that the new rules should not be implemented in respect of persons who had been having licenses prior to August 4, 1989, unless they fail to qualify in the higher writing examination within such reasonable period not less than three years from today as the government may prescribe. We hope the Government will implement this by issuing orders to this effect immediate. The appeal is disposed of accordingly."

12. The learned counsel for the petitioner(s) have also placed reliance on the judgment reported in **A. Satyanarayana & ors. versus S.S. Purshotham & ors.,** reported in **(2008) 5 SCC 416**. It is apt to reproduce paras 23, 28, 30 and 34 of the said judgment herein:

"23. We, however, are of the opinion that the validity or otherwise of a quota rule cannot be determined on surmises and conjectures. Whereas the power of the State to fix the quota keeping in view the fact situation obtaining in a given case must be conceded, the same, however, cannot be violative of the constitutional scheme of equality as contemplated under Articles 14 and 16 of the Constitution of India. There cannot be any doubt whatsoever that a policy decision and, in particular, legislative policy should not ordinarily be interfered with and the Superior Courts, while exercising their power of judicial review, shall not consider as to whether such policy decision has been taken mala fide or not. But where a policy decision as reflected in a statutory rule pertains to the field of subordinate legislation, indisputably, the same would be amenable to judicial review, inter alia, on the ground of being violative of Article 14 of the Constitution of India. {See Vasu Dev Singh & Ors. v. Union of India & Ors. [2006 (1) SCALE 108] and State of Kerala & Ors. v. Unni & Anr. [(2007) 2 SCC 365].

24 to 27……..

28. The Superior Courts, while exercising their power of judicial review, must determine the issue having regard to the effect of the subordinate legislation in question. There must exist a rational nexus between the impugned legislation and the object of promotion. Promotions are granted to a higher post to avoid stagnation as also frustration amongst the employees. This Court, in a large number of decisions, has emphasized the necessity of providing for promotional avenues. [See Food Corporation of India. v. Parashotam Das Bansal]. The State, keeping in view that object, having found itself unable to provide such promotional avenue, provided for the scheme of Accelerated Career Progress (ACP). The validity and effect of the impugned legislation must be judged keeping in view the object and

purport thereof. This Court would apply such principle of interpretation of statute which would enable it to subserve the object in place of subverting the same.

29.....

30. Although mere chance of promotion is not a fundamental right, but right to be considered therefor is. In that view of the matter, any policy whereby all promotional avenues to be promoted in respect of a category of employees for all time to come cannot be nullified and the same would be hit by Article 16 of the Constitution of India.

31 to 33.....

34. A statutory rule, it is trite law, must be made in consonance with constitutional scheme. A rule must not be arbitrary. It must be reasonable, be it substantive or a subordinate legislation. The Legislature, it is presumed, would be a reasonable one. Indisputably, the subordinate legislation may reflect the experience of the Rule maker, but the same must be capable of being taken to a logical conclusion."

13. It appears that the Superintendents Grade-II Matriculates and Superintendents Grade-II Graduates are having the same experience and both are having sufficient experience and that is why the Superintendents Grade-II Matriculates are manning the post(s) of Block Development Officers despite the amendment, but this aspect has not been looked into while making the amendment, which is an important factor which leads in favour of the petitioner(s).

14. The apex Court in case titled **B. N. Saxena versus New Delhi Municipal Committee and others** reported in **(1990) 4 SCC 205** held that experience gained for a considerable length of time is itself a qualification. It is apt to reproduce paras 6 and 7 of the said judgment herein:

"6. The question is whether the petitioner possesses the prescribed qualification. The revised rules provide alternate qualifications for the post of Head Draftsman. The first part of the rule prescribes a diploma with a minimum of three years service as Senior Draftsman in the scale of Rs.250-400. The second limb of the revised rule refers to the service rendered by the candidate. It provides for six years of service as Senior and Junior Draftsman. The first part of the rule is almost similar to the qualification prescribed prior to the amended rules. The old rule provided:

> *"Matric with Diploma/ certificate in Draftsmanship from a recognized institution with 3 years experience in preparation of Engineering Drawings in an Electric supply undertaking or an engineering manufacturing organization."*

7. The second limb of the rule was evidently, to benefit all those persons who have gained sufficient experience as Senior and Junior Draftsmen without possessing any qualification. Experience gained for a considerable length of time is itself a qualification (See the observation in State of U.P. v. J. P. Chaurasia, 1989 (1) SCC 121 : (AIR 1989 SC 19). It would be unreasonable to hold that in addition to this considerable experience, one must also have the diploma qualification prescribed under the first part. It could not have been the intention of the rule making authority that persons who were designated as Senior Draftsmen, without any Diploma qualification should acquire such diploma qualification for further promotion. Such, a view would not be consistent and coherent with the revised rule and its object. We have no doubt that the second

limb of the revised rule is independent of the first. The High Court seems to have erred in this aspect of the matter."

15. Further reliance was placed on **Deepak Agarwal and anr. *versus* State of Uttar Pradesh and ors. (2011) 6 SCC 725** and it is apposite to reproduce paras 6 and 33 of the said judgment herein.

"6. In spite of the representation made by the appellants, the 1983 Rules were amended on 17th May, 1999. By the aforesaid amendment, the posts of Technical Officers and Statistical Officers have been excluded from the feeder cadre for promotion to the post of Deputy Excise Commissioner. This amendment came just two days before the DPC was scheduled to meet on 19th May, 1999. As a consequence of the amendment, the DPC did not consider the appellants for promotion. The justification given for the aforesaid amendment is that the State Government had taken a "conscious decision" to exclude the Technical Officers and Statistical Officers as they were not fit for the post of Deputy Excise Commissioner because of their peculiar qualifications, duties, responsibilities and work experience. However, to compensate for loss of promotion, the pay scale of these two posts has been upgraded to the level of Deputy Excise Commissioner.

7. to 32.....

33. It may be that the removal of the two posts from the feeder cadre would lead to some stagnation for the officers working on the two aforesaid posts. In fact, the Government seems to recognize such a situation. It is perhaps for this reason that the posts have been upgraded to the post of Deputy Excise Commissioner. However, mere upgradation of the post may not be sufficient compensation for the officers working on the two posts for loss of opportunity to be promoted on the post of Deputy Excise Commissioner. In such circumstances, the Government may be well advised to have a re-look at the promotion policy to provide some opportunity of further promotion to the officers working on these posts. With these observations, the impugned judgment is affirmed and the appeal is accordingly dismissed with no order as to costs."

16. The same principles have been laid in case titled **Rajni Sharma versus State of H.P. and another,** reported in **2010 (2) Shim.L.C. 155**, that the experience gained for a considerable length of time is itself a qualification.

17. The reliance is placed on the judgment reported in case titled **B. Manmad Reddy & ors versus Chandra Prakash Reddy & ors. (2010) 3 SCC 314.** It is apt to reproduce paras 15, 18 and 19 of the said judgment herein.

"15. This Court in Triloki Nath case held that a classification must be truly founded on substantial differences that distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved. Having said so, this Court observed:

> *33. Judged from this point of view, it seems to us impossible to accept the respondents' submission that the classification of Assistant Engineers into degree-holders and diploma- holders rests on any unreal or unreasonable basis. The classification, according to the appellants, was made with a view to achieving administrative efficiency in the Engineering services. If this be the object, the classification is clearly co-related to it, for higher educational qualifications are at least presumptive evidence of a higher mental equipment. This is not to suggest that*

> *administrative efficiency can be achieved only through the medium of those possessing comparatively higher educational qualifications but that is beside the point. What is relevant is that the object to be achieved here is not a mere pretence for an indiscriminate imposition of inequalities and the classification cannot be characterized as arbitrary or absurd. That is the farthest that judicial scrutiny can extend."*
>
> *The Court also observed that the classification made on the basis of educational qualifications with a view to achieving administrative efficiency cannot be said to rest on any fortuitous circumstance and one has always to bear ion mind the facts and circumstances of the case in order to judge the validity of a classification."*
>
> *16-17.....*
>
> *18. That leaves us with the question whether any imbalance among those eligible for appointment against class II category 1 posts coming from different sources and categories would itself justify a classification like the one made in Note 6. Our answer is in the negative. There is no gainsaying that classification must rest on a reasonable and intelligible basis and the same must bear a nexus to the object sought to be achieved by the statute. By its very nature classification can and is often fraught with the danger of resulting in artificial inequalities which make it necessary to subject the power to classify to restraints lest the guarantee of equality becomes illusory on account of classifications being fanciful instead of fair, intelligible or reasonable.*
>
> *19. We may gainfully extract the note of caution sounded by Krishna Iyer J. in his Lordship's separate but concurring judgment in Triloki Nath's case (supra):*
>
> > *"56.....The dilemma of democracy is as to how to avoid validating the abolition of the difference between the good and the bad in the name of equality and putting to sleep the constitutional command for expanding the areas of equal treatment for the weaker ones with the dope of "special qualifications" measured by expensive and exotic degrees. These are perhaps meta-judicial matters left to the other branches of Government, but the Court must hold the Executive within the leading strings of egalitarian constitutionalism and correct, by judicial review, episodes of subtle and shady classification grossly violative of equal justice. That is the heart of the matter. That is the note that rings through the first three fundamental rights the people have given to themselves."*

18. It is moot question whether the State has made the amendment on the foundation of substantial differences and it is also moot question whether the State has made this amendment and carved out substantial differences and has been able to distinguish persons grouped together from those left out of the group. Whether the State has taken into consideration that the classification made within the class is legally permissible.

19. The learned counsel for the petitioner(s) have also placed reliance on the judgments reported in **Re The Special Courts Bill, 1978 (1979) 1 SCC 380** *(Para 72),* **A.S. Parmar and others vs. State of Haryana and others and connected matters 1984 (Suppl.) 1 SCC 1** *(paras 9-10)* **Dr. (Mrs) Sushma Sharma and others vs. State of Rajasthan and others 1985 (Supl.) SCC 45**

(para 32) **M.P. Singh, Deputy Superintendent of Police, C.B.I. and others vs. Union of India and others (1987) 1 SCC 592** *(Paras 5, 11 and 12),* **Inder Singh and others vs. State of U.P. and others 1987 (Suppl.) SCC 257** *(Para 9),* **Punjab Higher Qualified Teachers, Union vs. State of Punjab and others (1988) 2 SCC 407** *(Paras 11-12)* and **Union of India and others vs. Anil Kumar and others (1999) 5 SCC 743** *(Para 26),* wherein same and similar principles of law have been laid down.

20. Keeping in view the aforesaid discussion, one comes to an inescapable conclusion that the writ petitioner(s) have experience and are under legal and legitimate expectation to get promotion to the post(s) of Block Development Officer read with the fact that there are some persons, who are still manning the post(s) of Block Development Officers, we deem it proper to direct the respondents-State to consider the case of the petitioner(s) for relaxation, including all those who are not in a position to seek reliefs for grant of promotion or for relaxation, so that, they may not meet with discrimination. It is also important factor which weigh with us that there is no time to improve qualification, but at the same time, by the amendment, they cannot be shown door at the whims of the State without any reasonable cause.

21. Accordingly the writ petition(s) are disposed of by directing the respondents to consider the case of the petitioner(s) for relaxation or making a provision for them, so that, they can be considered for promotion against the said post(s). The entire exercise be made within three months from today.

22. The pending application(s), if any, are also disposed of.

****

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

RFA No. 45 of 2009 along with RFA No. 46 of 2009, RFA No.47 of 2009, RFA No. 48 of 2009, RFA No.97 of 2009, Cross objection Nos. 369 of 2009, Cross objection No. 359 of 2009 and Cross Objection No.360 of 2009.
Reserved on: 10th November, 2014.
Date of Decision :18th November, 2014

1.	**<u>RFA No. 45 of 2009.</u>**	
	State of H.P. & others	.....Appellants.
	Versus	
	Hukmi Ram and others	.....Respondents.
2.	**<u>RFA No.46 of 2009.</u>**	
	State of H.P. & others	.....Appellants.
	Versus	
	Kewal Ram & others	.....Respondents.
3.	**<u>RFA No. 47 of 2009</u>**	
	State of H.P. & others	.....Appellants.
	Versus	
	Hem Singh & others	.....Respondents.
4.	**<u>RFA No. 48 of 2009</u>.**	
	State of H.P. & others	.....Appellants.
	Versus	
	Kali Ram & others	.....Respondents.
5.	**<u>RFA No. 97 of 2009</u>**	
	Kewal Ram & others	.....Appellants.
	Versus	
	State of H.P. & others	.....Respondents.

6. **Cross Objections No. 369 of 2009 in RFA No. 45 of 2009.**

State of H.P. & others .....Appellants.

Versus

Hukami Ram & ors .....Respondents/Cross objectors.

7. **Cross Objections No. 360 of 2009 in RFA No. 48 of 2009.**

State of H.P. & others .....Appellants.

Versus

Kali Ram & others .....Respondents/Cross- objectors.

8. **Cross Objections No.359 of 2009 in RFA No. 47 of 2009.**

State of H.P. & others .....Appellants.

Versus

Hem Singh & others .....Respondents/Cross Objectors.

Land Acquisition Act, 1894- Section 18- Land of the petitioner was acquired for construction of the Kayartu-Thaila road**-** A.D.J. relied upon the sale deed to determine the market value as on January, 2000 and thereafter provided a hike of 10% per annum to determine the market value- held, that in view of judgment of Hon'ble Supreme Court of India in **Ahsanul Hoda vs. State of Bihar, (2013)14 SCC 59-** it is permissible for land acquisition collector or court of law to provide a hike per year. (Para-3)

Land Acquisition Act, 1894- Section 18- District Judge had assessed different rates of compensation for different categories of land- land was acquired for construction of the road- held, that it is not permissible for the Court to apply the different rates and the Court has to assess uniform rates of compensation for different pieces of land. (Para-7)

Cases referred:

Ahsanul Hoda vs. State of Bihar, (2013)14 SCC 59

Haridwar Development Authority versus Raghubir Singh and others (2010)11 SCC 581

For the Appellants:	Mr. R.S. Thakur, Addl. Advocate General and Mr. Tarun Pathak, Dy. A.G. for the appellants in RFA Nos. 45, 46, 47, 48 of 2009.
	Mr. Mahesh Sharma, Advocate for appellants in RFA No. 97 of 2009.
For the respondents:	Mr. Mahesh Sharma, Advocate, for respondents/ Cross objectors in RFA No. 45, 47 and 48 of 2009 and for respondents in RFA Nos. 46.
	Mr. R.S. Thakur, Addl. A.G. and Mr. Tarun Pathak, Dy. A.G. for respondents in RFA No. 97 of 2009.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

All these appeals/cross objections are being disposed of by a common judgment as these pertain to acquisition of land acquired for construction of Kayartu-Thaila road by common notification issued under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act).

2. The lands of the petitioners/respondents/cross-objectors were subjected to acquisition for construction of Kayartu-Thaila road. The learned District Judge while assessing compensation qua the lands of the land owners as had come to be subjected to acquisition has assessed compensation for various categories of land at the rate hereinafter mentioned:-

Sr. No.	Kind of land	Rate per bigha
1.	Ghasni Land	Rs.66000/-
2.	Banjar Kadeem	Rs. 1,32,000/-
3.	Banjar Jadid	Rs.2,64,000/-
4.	Bhakal Deom	Rs.9,46,000/-
5.	Bhakal Awal	Rs.11,00,000/-

3. The learned Additional Advocate General contends with force before this Court that the learned District Judge while relying upon Ex.PW4/B which manifests the market value of the land existing therein as on January, 2000, had, qua the lands subjected to acquisition on 29.11.2003, untenably given the purported escalation in the market value since the reflection of the market value of the land in Ex. PW4/B prepared in January, 2000 till the land having come to be ultimately subjected to acquisition subsequently on 29.11.2003, deemed it fit in his wisdom to provide a hike of 10% over the market value of various categories of land comprised in Ex.PW4/B. The aforesaid argument addressed before this Court by the learned Additional Advocate General peels off or acquires no force in the face of the mandate of the Hon'ble Apex Court enshrined in the judgment reported in ***Ahsanul Hoda vs. State of Bihar, (2013)14 SCC 59*** where in the relevant paragraph No.17, which is extracted hereinafter, it has been mandated that where the market value as is pronounced in the reliable parameter of probative worth, pertains to years preceding the acquisition of land in accordance with law, it is permissible for the Land Acquisition Collector or Courts of law to proceed to record or provide a hike of a reasonable per centum over the market value of land displayed in the reckonable parameter of probative worth preceding the subsequent acquisition of land in accordance with law. Pragraph 17 of the judgment referred to hereinabove reads as under:-

> *"17. This Court in Saradar Jogendera Singh v. State of U.P. {(2008)17 SCC 133} (SCC p.135, para 13) noticed that the said case related to acquisition in the year 1979 and relying upon the award related on an acquisition of 1969 observed that the general increase between 1969-1979 can be taken to be around 8-10% per annum, if this increase is calculated cumulatively, the total increase in 10 years would be around 100%." (pp.63)*

The said view is anchored upon the exposition that given the acquisition of land in accordance with law subsequent to the reflection of its market value in the reckonable admissible parameter pertaining to the preceding years there is an obvious escalation in the price of land which escalation ought not to remain irrevered especially for obviating any financial hardship to the landowners whose lands are subsequently subjected to acquisition in accordance with law. Consequently given the fact that Ex.PW4/B was prepared in January, 2000, whereas, the lands of the land owners were subjected to acquisition ultimately in November, 2003, hence, when the reckonable reliable parameter of probative worth comprised in Ex.PW4/B pertains to years preceding the acquisition of the lands of the land owners in accordance with law, consequently, the hike as adjudged by the learned District Judge to the extent of 10 per centum over the market value of the land displayed in Ex.PW4/B is in tandem with the mandate enshrined in the judgment of the Hon'ble Apex Court, the relevant paragraph whereof has been extracted hereinabove. Furthermore, the hike for obviating financial hardship to the land owners, as also, is for not depriving them of the benefit of escalation in the price of the land since the preparation of Ex.PW4/B and the ultimate acquisition of their land subsequently. Consequently, the said argument is rejected.

4. The learned counsel appearing for the respondents/cross-objectors/land owners has contended with force that the learned District Judge while pronouncing the award had untenably discarded the probative worth of

Ex.PW5/B and Ex.PW5/C which unfold the factum of the lands comprised therein bearing a market value higher than the one as unfolded in Ex.PW4/B. However, the contention as addressed before this Court by the learned counsel appearing for the respondents/cross-objectors/land owners would stand vindication by this Court only in the event of it having been displayed by cogent evidence comprised in the best documentary evidence manifested by the Khaka dasti proved in accordance with law that the lands comprised in Ex.PW5/B and Ex.PW5/C located in village Nawar and Bhagoti, are situated in close proximity to the lands subjected to acquisition. However, though oral evidence exists on record revealing the factum of the lands of the respondents/petitioners/cross-objectors situated in Village Bhagoti and the lands situated in village Nawar being proximate in location which oral evidence is corroborated by khaka dasti, bearing Ex.RW2/A. Nonetheless, even then the sale exemplars comprised in Ex.PW5/B and Ex.PW5/C are not for reasons to be afforded hereinafter sacrosanct pieces of evidence to prod this Court to rely upon them. He also relied upon a judgment of the ***Hon'ble Apex Court reported in Haridwar Development Authority versus Raghubir Singh and others (2010)11 SCC 581,*** the relevant paragraphs No. 9 & 10 are extracted hereinafter, which emphatically communicate the view that the sale instances of small tracts of land constitute evidence of probative worth, on strength whereto compensation can be determined for large tracts of land. However, while computing or assessing compensation for large expanses of land on the strength of sale considerations contracted for small tracts of land, deductions upto the permissible per centum are to be made. Relevant paragraphs No.9 and 10 of the judgment aforesaid read as under:-

> "9. The Collector has referred to several sale transactions but relied upon only one document, that is, sale deed dated 19.12.1990 relating to an extent of 11,550 sq. ft of land sold for Rs.4,04,250, which works out to a price of Rs.35 per square foot. The Collector deducted 25% from the said price, as the relied upon sale transaction related to a small extent of 11,550 sq. ft and the acquired area was a larger extent of 8,45,174 sq. ft. By making such deduction, he arrived at the rate as Rs.26.25 per square foot. The Reference Court and the High Court have also adopted the said sale transaction and valuation.
>
> 10. The claimants do not dispute the appropriateness of the said sale transaction taken as the basis for determination of compensation. Their grievance is that no deduction or cut should have been effected in the price disclosed by the sale deed for arriving at the market value in view of the following factors:-
>
> > (i) that the acquired lands were near to the main by-pass and had road access on two sides;
> >
> > (ii) that may residential houses had already come up in the surrounding areas, and the entire area was already fast developing; and
> >
> > (iii) that the acquired land had the potential to be used as an urban residential area.
>
> When the value of a large extent of agricultural land has to be determined with reference to the price fetched by sale of a small residential plot, it is with reference to the price fetched by sale of a small residential plot, it is necessary to make an appropriate deduction towards the development cost, to arrive at the value of the large tract of land. The deduction towards development cost may vary from 20% to 75% depending upon various factors {see Lal Chand v. Union of India, (2009)SCC 769, SCC p.790, para 22}. Even if the acquired lands have situational advantages, the

> minimum deduction from the market value of a small residential plot, to arrive at the market value of a larger agricultural land, in the usual course, will be in the rage of 20% to 25 %. In this case, the Collector ahs himself adopted a 25% deduction which has been affirmed by the Reference Court and the High Court. We therefore do not propose to alter it." (pp.584-585)

On the strength of the aforesaid pronouncement of the Hon'ble Apex Court, the learned counsel for the landowners/cross-objectors urges that the sale instance comprised in Ex.PW5/B and Ex.PW5/C constituted a valuable guide for the learned District Judge, as also, it constituted an admissible and relevant parameter while it enjoying probative vigour for facilitating an assessment of compensation qua the land subjected to acquisition. His having omitted to rely upon them, as such, has been contended to have committed a legal misdemeanor.

5. The contentions aforesaid advanced by the learned counsel appearing for the respondents/landowners in dispelling the purported tenuous reason afforded by the learned District Judge for overwhelming the effect of Ex.PW5/A and Ex.PW5/B are extremely shaky and are, for the reasons hereinafter, construed to be not having either sinew or strength. The reasons for so concluding is that in the judgment relied upon by the counsel for the landowners/cross-objectors the lands as subjected to acquisition were for the construction of colonies for housing people. Obviously, the authority/entity for whom the lands were acquired, had an inherent profiteering motive, inasmuch as the entity would after developing the lands acquired proceed to sell them at a profit to the public, therefore, the loss, if any, as it may be beset with in paying a hefty amount of compensation to the land owners would hence be off set by its selling lands on a phenomenal or escalated price to the public. Consequently, when the objective of acquisition in the case relied upon by the learned counsel for the cross-objectors/landowners was commercial, as a corollary, then the lands of the land owners as subjected to acquisition in the cases aforesaid perceivably commanded an inherent immense escalated potentiality which escalated potentiality as compatibly pronounced in the sale considerations qua small tracts of land, was construed to be a vindicable, tenable as well as a reckonable parameter for determining the market value of large tracts of lands as were subjected to acquisition. However, while determining compensation payable for large expanses of lands on the strength of sale considerations of small tracts of land, deductions towards developmental costs were ordained to be made. However, in the instant case the marked distinction is that lands of the landowners were subjected to acquisition for a public purpose by a welfare estate, inasmuch as, the lands of the landowners have been acquired for the purpose of construction of a public road. The appellants-State subjected to acquisition the lands of the landowners for construction of a public road as a measure of providing public amenity to the public. Obviously, the appellants/State given the salutary purpose of acquisition of the lands of the landowners has no inherent profiteering motive in subjecting the lands of the land owners to acquisition nor it would rear any commercial advantage from the acquisition of land of the landowners/cross-objectors. As a corollary encumbering it with the financial liability to defray to the landowners an exorbitant amount of compensation would defeat the very purpose for which the acquisition was made rather it would put the public exchequer replenished by taxing the honest taxpayers to an unnecessary and avoidable heavy burden. Naturally then, on this score the sale consideration comprised in Ex.PW5/B and Ex.PW5/C cannot provide a reasonable, fair and just parameter for determining on their strength compensation for the entire stretch of the vast expanse of land acquired by the appellants/State for providing a public amenity. Consequently, this Court is of the considered view that the judgment as relied upon by the learned counsel for the cross-objectors/landowners is discardable. Naturally then the view as adopted by the learned District Judge in dispelling the effect of

Ex.PW5/B and Ex.PW5/C which pertain to small tracts of land, inasmuch as its not providing a valuable and reckonable parameter for determining on their strength compensation for an immense tract or a vast expanse of land, is a tenable view and ought not to be interfered with.

6. Consequently, otherwise when it has been per se displayed in Ex.PW4/B as relied upon by the learned District Judge while assessing compensation on its strength for the lands subjected to acquisition, that it comprises a reasonable as well as a tenable parameter for assessing and determining compensation for the lands of the land owners, hence, reliance upon it was appropriate. Besides when the enunciation in Ex.PW4/B has not been by adduction of cogent evidence to the contrary, falsified, as a corollary then the communications in Ex.PW4/B hold force. Therefore, reliance by the learned District Judge upon Ex.PW4/B which disclosed the average value of the land in village Nawar proved to be in contiguity as well as in close proximity to the location of village Bhagoti where the lands of the respondents/cross-objectors/petitioners are situated is reiteratedly not mis-placed, Moreover, to the contrary when otherwise, too the lands subjected to acquisition having not been convincingly proven to be in close proximity to lands whose market value is displayed in Ex.PW5/B and Ex.PW5/C, the reliance by the learned District Judge rather on Ex.PW4/B while it unfolds a proven and genuine market value of the lands comprised in it and theirs adjoining as well as situated in close proximity to the lands subjected to acquisition cannot be in any manner construed to be suffering from any taint or blemish of mis-appreciation of the evidence on record.

7. The learned District Judge while assessing compensation for the lands subjected to acquisition has assessed or determined varying/different rates of compensation for different categories of lands. However, uncontrovertedly when the lands bearing varying categories/classifications were acquired for a common purpose, hence, when it is settled law that when lands are subjected to acquisition for a common public purpose as the lands are in the instant case, theirs bearing distinct categorizations or varying classifications wanes, especially when in sequel to the completion of the purpose for which the lands were acquired, inasmuch as on completion of construction of the public road, their classifications and categorizations loses significance, rather they acquire a common/uniform potentiality, concomitantly, hence, necessitating assessment of uniform/common rates of compensation for each category of land. Obviously, then uniform rates of compensation ought to be assessed for different categories of lands or lands bearing different classifications. Since, in contravention of the settled legal position envisaging assessment of uniform rates of compensation qua lands bearing different categories/classifications, especially when lands bearing different classification were acquired for a common public purpose, the learned District Judge rather having assessed varying or distinct rates of compensation for lands bearing distinct categories or classifications, hence, has committed an impropriety. The said impropriety needs to be undone.

8. Consequently, the appeals preferred by the State bearing RFA Nos. 45, 46, 47, 48 of 2009 are dismissed and the cross objections Nos. 369 of 2009, 360 of 2009, 359 of 2009 and RFA No. 97 of 2009 preferred on behalf of the landowners are allowed and it is ordered that the rate of compensation for all categories of lands or the lands bearing different classifications shall be at the rate assessed qua Bhakal Awal i.e. Rs.11,00,000/- per bigha. The landowners in addition to the enhanced compensation are also entitled to (a) solatium at the rate of 30% on the enhanced compensation assessed hereinabove (b) interest at the rate of 9% per annum on the enhanced amount from the date of notification i.e.29.11.2003 for one year and (c) interest at the rate of 15% per annum on the enhanced amount from the date of expiry of the period of one year of the date of notification i.e. from 30.11.2004 till the date of

payment of the amount in the Court. All pending applications also stand disposed of.

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

LPA Nos. 194 and 195 of 2014.
Reserved on: 05.11.2014
Pronounced on: 18th November, 2014

1. LPA No. 194/2014:
State of H.P. and others ...Appellants.
VERSUS
Sudesh Kumari ...Respondent.

2. LPA No. 195/2014:
State of H.P. ...Appellant.
VERSUS
Alpana ...Respondent.

Constitution of India, 1950- Article 226- Petitioner, a contractual employee, was granted 12 weeks (84 days) maternity leave, whereas female regular employee are entitled to 135 days of maternity leave - held, that there is no difference between female regular employee and contractual employee- there is no occasion for making discrimination between regular and contractual employee regarding grant of maternity leave - State directed to provide maternity leave at par with the regular employee. (Para-8 to 15)

Cases referred:
Municipal Corporation of Delhi v. Female Workers and anr. (2000) 3 SCC 224
Ms. Sonika Kohli & Anr. vs. Union of India reported in 2004 (3) SLJ 54 CAT
Rattan Lal and others vs. State of Haryana and others reported in 1985 (3) SLR 548
Tasneem Firdous vs. State and others reported in 2006 (II) S.L.J 699

For the appellant (s): Mr.Shrawan Dogra, Advocate General with Mr. V.S. Chauhan, Mr. Romesh Verma, Additional Advocate Generals with Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals.
For the Respondent(s): Mr. Naresh Verma and Mr. Rajiv Jiwan, Advocates.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Ms. Alpana writ petitioner in CWP No. 3363 of 2009 had invoked the jurisdiction of this Court for quashing Office Memorandum dated 31.7.2009, Annexure P3 and order dated 2.9.2009 Annexure P4, on the grounds taken in the memo of writ petition.

2. The case of the writ petitioner is that as per law and the Rules occupying the field, all the female contractual employees are entitled to maternity leave at par with the regular employees and that is why their maternity leaves were enhanced from 84 days to 135 days in terms of Annexure P3. The petitioner while working as Lecturer, on contract basis, had availed

maternity leave. The leave availed by her was duly sanctioned in her favour. Subsequently, vide Office Memorandum Annexure P3, appended with the writ petition as also letter dated 2nd September, 2009 Annexure P4, it was decided to grant only 12 weeks (84 days) maternity leave to the female employees working on contract basis and earlier instructions Annexure P2 were withdrawn by the respondent. Thus, the petitioner had sought writ of certiorari for quashing Annexures P3 and P4 commanding the respondents-State to provide all the female contractual employees 135 days materiality leave to which regular employees are entitled to. It is apt to reproduce reliefs claimed in the writ petitions filed by Ms. Alpana herein:

> "(a) *That the order dated 2.9.2009 (Annexure P-4) effecting recovery of alleged over payment made to the petitioner on account of availing Maternity leave of 135 days may kindly be quashed by way of issuance of writ in the nature of certiorari.*
>
> *(b) That the office Memorandum dated 31.7.2009 (Annexure P-3) may also be quashed."*

3. The Writ Court, after considering the case of the petitioner, quashed the impugned order restraining the State from effecting recovery from the petitioner.

4. Ms. Sudesh Kumari, writ petitioner in another writ petition, after noticing the judgment, also filed CWP No. 1617 of 2014 for the grant of same reliefs.

5. It is also apt to reproduce reliefs claimed by writ petitioner Sudesh Kumar in the writ petition herein:

> "1.*That the writ of certiorari to quash Annexure P1 dated 31st July, 2009 (office memorandum) and specially annexure P-4 by which Annexure P-3 office order of dated 10.3.2009 vide which the maternity leave to the contractual employees was enhanced from 85 days to 135 days on the ground that there cannot be any discrimination between the regular and contractual employees, has been withdrawn.*
>
> *2.Issue a writ of mandamus directing the respondent's authorities to extend the Maternity leave to present petitioner for 135 days."*

6. The said writ petition was also granted in favour of the petitioner, in terms of the judgment passed in Alpana's case in CWP No.3363/2009, supra.

7. The State has questioned both these judgments by the medium of these LPAs, on the grounds that the petitioners were not entitled to maternity leave at par with the regular employees and the judgments made by the Writ Courts are not legally sustainable. The argument advanced by the learned Advocate General is not tenable for the following reasons.

8. In law, there is no difference between a female regular employee and a contractual employee/ *ad hoc* employee because a female employee whether regular, temporary or *ad hoc,* is a female for all intents and purposes and she has a matrimonial home, matrimonial life, and after conception, she has to undergo the entire maternity period, same treatment, pains and other difficulties which a regular employee has to undergo. Thus, there is no occasion for making discrimination and if, less period of maternity leave is granted to a contractual employee, it will amount to discrimination, in terms of Article 14 of the Constitution of India.

9. The claim of maternity leave is founded on the grounds of fair play and social justice. There cannot be discrimination and if any discrimination is made, it is in breach of Articles 14 and 15 of the Constitution. Articles 41, 42,

and 43 deals with the subject and we deem it appropriate to reproduce the said Articles herein:

> ***"41.Right to work, to education and to public assistance in certain cases***.- *The State 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.*
>
> ***42. Provision for just and humane conditions of work and maternity relief.***- *The State shall make provision for securing just and humane conditions of work and for maternity relief.*
>
> ***43. Living wage, etc., for workers***.- *The State shall endeavour to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas."*

10. In case titled **Municipal Corporation of Delhi v. Female Workers and anr. (2000) 3 SCC 224,** it has been held as under:

> *"27. The provisions of the Act which have been set out above would indicate that they are wholly in consonance with the Directive Principles of State Policy, as set out in Article 39 and in other Articles, specially Article 42. A woman employee, at the time of advanced pregnancy cannot be compelled to undertake hard labour as it would be detrimental to her health and also to the health of the foetus. It is for this reason that it is provided in the Act that she would be entitled to maternity leave for certain periods prior to and after delivery. We have scanned the different provisions of the Act, but we do not find anything contained in the Act which entitles only regular women employees to the benefit of maternity leave and not to those who are engaged on casual basis or on muster roll on daily wage basis.*
>
> *28. The Industrial Tribunal, which has given an award in favour of the respondents, has noticed that women employees have been engaged by the Corporation on muster roll, that is to say, on daily wage basis for doing various kinds of works in projects like construction of buildings, digging of trenches, making of roads, etc., but have been denied the benefit of maternity leave. The Tribunal has found that though the women employees were on muster roll and had been working for the Corporation for more than 10 years, they were not regularized. The Tribunal, however, came to the conclusion that the provisions of the Maternity Benefit Act had not been applied to the Corporation and, therefore, it felt that there was a lacuna in the Act. It further felt that having regard to the activities of the Corporation, which had employed more than a thousand women employees, it should have been brought within the purview of the Act so that the maternity benefits contemplated by the Act could be extended to the women employees of the Corporation. It felt that this lacuna could be removed by the State Govt. by issuing the necessary notification under the Proviso to Section 2 of the Maternity Act. This Proviso lays down as under :*
>
> *"Provided that the State Government may, with the approval of the Central Government, after giving not less than two*

month's notice of its intention of so doing, by notification in the Official Gazette, declare that all or any of the provisions of this Act shall apply also to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise."

29……

30. We appreciate the efforts of the Industrial Tribunal in issuing the above directions so as to provide the benefit of the Act to the muster roll women employees of the Corporation. This direction is fully in consonance with the reference made to the Industrial Tribunal. The question referred for adjudication has already been reproduced in the earlier part of the judgment. It falls in two parts as under :

(i) Whether the female workers working on muster roll should be given any maternity benefit ?

(ii) If so, what directions are necessary in this regard.

31-32……..

33. A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Women who constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work; they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre or post-natal period."

11. In **Ms. Sonika Kohli & Anr. vs. Union of India** reported in **2004 (3) SLJ 54 CAT,** it has been held in paras 12 and 13, the relevant portion of which is quoted as under:

"12. An almost a new point of controversy has been raised with regard to the admissibility of maternity leave to female teachers. In some of the O.As. it has been prayed that the benefit of maternity leave, which has hitherto been denied by the respondent-Administration, be directed to be extended in accordance with the rules. Mr. R.P. Bali, learned Counsel for some of the applicants urged that the action of the respondents in denying the benefit of maternity leave like other regular employees is violative of the principles enshrined in Articles 14 and 15 of the Constitution of India as it denies the benefit of beneficial provisions of law to a female teacher. Mr. N.K. Bhardwaj, learned Counsel for the Administration urged that maternity leave is not admissible to contract employees as they are not covered by the Punjab CSR Vol.1, Part-1. According to him, the benefit of maternity leave with pay is payable to permanent/regular female employees and that the Administration is justified in carving out a distinction between the regular female teachers and the teachers appointed on part

time or contract basis, as is in the present case. Let us examine the respective contentions of the parties.

13. The claim for maternity leave is founded on grounds of fair play and social justice. Before the advent of the Constitution and for a sufficiently long time, thereafter it was customary or say traditional for women to stick to their homes but now they seek various jobs so as to attain economic independence by utilizing their talent, education, industry etc. Sometimes the jobs are taken up by them to overcome economic hardship. For a woman to become a mother is most natural phenomenon in her life. Whatever is needed to facilitate the birth of a child to a women who is in service, the employer has to be considerate and sympathetic towards her and must realize the physical difficulties which a working women would face in performing her duties at work place while carrying a baby in the womb or while bearing a child after birth. Our constitution which, in its preamble, promises social and economic justice, enshrines certain radical provisions in the form of Articles 42 and 43 which deal with the just and humane conditions of work and maternity relief as well as living wage conditions of work ensuring a decent standard of life, and full enjoyment of leisure and social and cultural opportunities. These principles are required to be followed by the State as enjoined by Article 39. In the background of these Articles, the Parliament has enacted Maternity Benefit Act, 1961 (Act No. 53 of 1961) with a view to regulate the employment of women in certain establishments for certain periods before and after child birth and to provide for maternity benefit and certain other benefits……"

12. It is also apt to reproduce para 3 of the judgment delivered in **Rattan Lal and others vs**. **State of Haryana and others** reported in **1985 (3) SLR 548** .

"3. We strongly deprecate the policy of the State Government under which 'ad hoc' teachers are denied the salary and allowances for the period of the summer vacation by resorting to the fictional breaks of the type referred to above. These 'ad hoc' teachers shall be paid salary and allowances for the period of summer vacation as long as they hold the office under this order. Those who are entitled to maternity or medical leave shall also be granted such leave in accordance with the rules."

13. The Jammu and Kashmir High Court in case titled **Tasneem Firdous vs. State and others** reported in **2006 (II) S.L.J 699**, held that the employees working on contractual basis are also entitled to maternity leave. The relevant portion of para 6 of the judgment is reproduced as under:

"6. In subjective context the matter assumes a larger dimensions because it overflows the contours of an individual case or a singular instance and almost borders on the rights of women and obligation of the State to protect and preserve them, to which, besides statutory constitutional considerations, the international covenants also bind the government. Reference in this behalf may be made to "Convention on the Elimination of all Forms of Discrimination against Women" adopted by Community of nations on 18.12.1979 to which government of India too is a signatory……"

14. In paras 6 and 37 of the judgment *in* **Municipal Corporation of Delhi v. Female Workers and anr. (2000) 3 SCC 224,** supra, while

considering the constitutional contours of the matter, the Hon'ble apex Court observed as under:

> *"6……. It is in this background that we have to look to our Constitution which, in its Preamble, promises social and economic justice. We may first look at the Fundamental Rights contained in Chapter III of the Constitution. Article 14 provides that the State shall not deny to any person equality before law or the equal protection of the laws within the territory of India. Dealing with this Article vis-a-vis the Labour Laws, this Court in Hindustan Antibiotics Ltd. v. Workmen, AIR 1967 SC 948 : 1967 (1) SCR 652, has held that labour to whichever sector it may belong in a particular region and in a particular industry will be treated on equal basis. Article 15 provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (3) of this Article provides as under :-*
>
> *"(3) Nothing in this article shall prevent the State from making any special provision for women and children".*
>
> 7-36…….
>
> *37……."2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures :*
>
> *(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;*
>
> *(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;*
>
> *(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;*
>
> *(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.*
>
> *3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary."*

15. Having said so, the office memorandum dated 31.7.2009 and circular dated 2.9.2009, made by the State are quashed and all female employees whether on contract, *ad hoc,* permanent and temporary are held entitled to materiality leave at par with the regular employees.

16. For the reasons discussed herein above, the LPAs are dismissed along with pending applications, if any.

****

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

Shri Balak Ram ...Appellant.

Versus

State of Himachal Pradesh & others ...Respondents.

LPA No. 170 of 2014
Reserved on: 11.11.2014
Decided on: 19.11.2014

Constitution of India, 1950- Article 226- Petitioner and private respondent appeared for the post of water carrier- petitioner was denied the appointment as water carrier and the private respondent was appointed as water carrier- petitioner filed an original application before the Administrative Tribunal which was allowed and the petitioner was directed to be appointed - he was not given seniority and other services benefits- held, that petitioner was denied appointment illegally - had the private respondent not been appointed- respondent would have been in the employment right from that date when he was denied the appointment illegally- he is deemed to be appointed from the same day - hence, petitioner held entitled to seniority notionally from the date of appointment of private respondent. (Para-7 to 10)

Cases referred:

Sanjay Dhar versus J & K Public Service Commission and another, reported in (2000) 8 Supreme Court Cases 182

Hem Chand versus State of H.P. & others, reported in 2014 (3) Him L.R. 1962

For the appellant:	Mr. Onkar Jairath, Advocate.
For the respondents:	Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. Anup Rattan, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for the respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Subject matter of this Letters Patent Appeal is judgment and order, dated 27th August, 2011, passed by the learned Single Judge in CWP No. 8200 of 2010, titled as Balak Ram versus State of Himachal Pradesh and others, whereby the writ petition filed by the appellant-writ petitioner was allowed and seniority of the appellant-writ petitioner was to be reckoned with effect from 28th October, 2006, as part time water carrier with all consequential benefits (hereinafter referred to as "the impugned judgment").

2. The grievance projected by the appellant-writ petitioner in this Letters Patent Appeal is that the appellant-writ petitioner was entitled to seniority and other consequential benefits right from the date he was denied the appointment with effect from 20th August, 1997.

3. Precisely, the case of the appellant-writ petitioner was that he was denied appointment as water carrier by showing favours upon one Smt. Kala Devi, who was appointed illegally, to which the appellant-writ petitioner was entitled to.

4. The appellant-writ petitioner challenged her appointment before the erstwhile H.P. State Administrative Tribunal, Camp at Mandi (hereinafter referred to as "the erstwhile Tribunal") by the medium of Original Application, being OA (M) No. 371 of 1997, titled as Balak Ram versus State of H.P. and others, which was allowed vide judgment and order, dated 12th October, 2006, whereby the appointment of Smt. Kala Devi was quashed and the appellant-writ petitioner was allowed to be appointed. It is apt to reproduce para 12 and 13 of the judgment herein:

> *"12. This conclusion is further strengthened by the contents of letter No. SNR/STN/W/G/97-8514 from S.D.O. (Civil) Sunder Nagar addressed to the Deputy Commissioner Mandi found at leaf No. 35 of the record produced by respondents No. 1 to 3 (a photo copy whereof has been ordered to be placed on the file of the original application) which clearly and unambiguously states that 15 marks ought to have been awarded to the applicant under the head 'IRDP/handicapped' and that there were a lot of cuttings in the preliminary list prepared by Distt. Primary Education Officer and BDO, Sundernagar which appeared to have been done by some one with mala fide intention as the requisite certificates of the applicant were found enclosed with the documents of the applicant. Therefore concludes the SDM that the applicant should be selected and respondent No. 4 be removed from service immediately and after the needful reply might be filed in the Tribunal accordingly.*
>
> *13. It is unfortunate that superior authorities did nothing in the matter despite the truthful, lawful, honest and fair submissions of the SDM and on the contrary the respondents filed a reply justifying the selection and appointment of respondent No. 4 by concealing the true facts despite the fact that the record justifying the submissions made by the SDO (C) was available with their department. What is more unfortunate, distressing and shocking is that by such concealment respondents apparently deprived the applicant a poor handicapped person of the job he deserved for a period of about 9 years. Certainly it is a case where exemplary costs must be awarded against respondents for dragging the applicant to an avoidable litigation and by concealment of facts gave life of about 9 years to such litigation."*

5. The said judgment has attained finality. The appellant-writ petitioner was allowed to join, but was not granted the seniority and other service benefits with effect from 20th August, 1997, constraining the appellant-writ petitioner to file CWP No. 8200 of 2010, with a prayer that the appellant-writ petitioner be granted seniority and also wages, on the grounds taken in the writ petition.

6. Learned Single Judge has passed one-page judgment without discussing the matrix of the case and directed the respondents to grant seniority to the appellant-writ petitioner with effect from 28th October, 2006, i.e. from the date on which he joined after making success in the Original Application before the erstwhile Tribunal and has not granted the relief, i.e. seniority right from the date Smt. Kala Devi was appointed.

7. It is admitted that the appellant-writ petitioner was denied his rights and Smt. Kala Devi was appointed illegally. Had the respondents not appointed Smt. Kala Devi illegally at the particular point of time, i.e. on 20th August, 1997, the appellant-writ petitioner would have been appointed and would have been in the employment right from that date, but he was deprived of his legitimate rights by making illegal appointment order.

8. The Apex Court in a case titled as **Sanjay Dhar versus J & K Public Service Commission and another,** reported in **(2000) 8 Supreme Court Cases 182,** has dealt with the issue and held that when a candidate is deprived of appointment illegally, he is deemed to have been appointed right from the same date. It is apt to reproduce paras 14 to 16 of the judgment herein:

> *"14. .....As the appellant participated in the process of selection protected by the interim orders of the High Court and was also successful having secured third position in the select list, he could not have been denied appointment. The appellant is, therefore, fully entitled to the relief of his appointment being calculated w.e.f. the same date from which the candidates finding their place in the order of appointments issued pursuant to the select list prepared by the J&K PSC for 1992-93 were appointed and deserves to be assigned notionally a place in seniority consistently with the order of merit assigned by the J&K PSC.*
>
> *22. We have already noticed the learned Single Judge having directed the appellant to be appointed on the post of Munsif in the event of his name finding place in the select list subject to the outcome of the writ petition which order was modified by the Division Bench in LPA staying the order of the learned Single Judge but at the same time directing one vacancy to be kept reserved. The High Court and the Government of J&K (Law Department) were not justified in bypassing the judicial order of the High Court and making appointments exhausting all available vacancies. The right of the appellant, if otherwise sustainable, cannot be allowed to be lost merely because of an appointment having been made wittingly or unwittingly in defiance of the judicial order of the High Court.*
>
> *16. For the foregoing reasons the appeal is allowed. The judgment under appeal is set aside. It is directed that the appellant shall be deemed to have been appointed along with other appointees under the appointment order dated 6-3-1995 and assigned a place of seniority consistently with his placement in the order of the merit in the select list prepared by J&K PSC and later forwarded to the Law Department. During the course of hearing the learned senior counsel for the appellant made a statement at the Bar that the appellant was interested only in having his seniority reckoned notionally in terms of this order and was not claiming any monetary benefit by way of emoluments for the period for which he would have served in case he would have been appointed by order dated 6-3-1995. We record that statement and direct that the appellant shall be entitled only to the benefit of notional seniority (and not monetary benefits) being given to him by implementing this order. The appeal is disposed of accordingly. The contesting respondents shall pay the appellant costs quantified at Rs. 5,000/-."*

9. A learned Single Judge of this Court in a case titled as **Hem Chand versus State of H.P. & others,** reported in **2014 (3) Him L.R. 1962,** has taken the same view. It is apt to reproduce paras 3 and 4 of the judgment herein:

> *"3. Admittedly, the appointment of the petitioner was delayed for no fault of his and came to be appointed only in the year 2009, that too after the intervention of this Court. The result of delayed appointment of the petitioner is that he has been paid less salary and denied the seniority over a long period of time. It has been consistently opined that in case a candidate is wrongly denied appointment for no fault on his part, he cannot be denied*

appointment from due date and consequential seniority. Reference in this regard can conveniently be made to ***1996 (8) SCC 637, Pilla sitaram Patrudu & others vs. Union of India and others, 2000 (8) SCC 182 Sanjay Dhar vs. J&K Public Service Commission & another, 1991 (6) Vol. 76, Services Law Reporter 753, Hawa Singh Sangwan vs. Union of India & others and 1996 (6) vol. 116, Services Law Reporter, 335, Hawa Singh and others vs. The Haryana State Electricity Board.*** *Moreover, it is not the case of the respondents that the petitioner was not recommended to be appointed on 26.6.2004 but the only ground taken is that it was the Pradhan, Gram Panchayat Sawindhar, Tehsil Karsog, who delayed the appointment of the petitioner. This is the precise reason that the petitioner is entitled for the seniority from the date of offer of appointment, as held by the Division Bench of this Court in similar circumstances, in case titled as* ***Chatter Singh vs. State of H.P. & others, CWP No. 188 of 2012-I:-***

> *"3. No doubt, the petitioner joined duty only on 13.5.2003. But in his favour admittedly there is an order by the Appointing Authority on 8.8.2002 to give appointment, as has been noted by the Tribunal in Annexure P-1, order. It is that order, which has been upheld by the Tribunal and the direction issued by the Tribunal is for implementing the said order. Therefore, for all purposes, the petitioner shall be deemed to be appointed on 8.8.2002, on the date admittedly the petitioner was directed to be appointed by the Sub Divisional Magistrate. However, taking note of the fact that the petitioner has joined duly on 13.5.2003 after the order was issued to him, the entitlement of the petitioner for actual monetary benefit shall be only from 13.5.2003. In order to avoid any ambiguity, it is made clear that the petitioner shall be deemed to be appointed in the post of Gramin Vidya Upasak on 8.8.2002 for all purposes; but from 8.8.2002 to 13.5.2003, the benefits shall only be notional and from 13.5.2003, the petitioner shall be entitled to all monetary benefits."*
>
> *4. In view of the exposition of the law referred to above, the petitioner is entitled to be treated as having been appointed as a Part Time Water Carrier at Government Primary School Alyas, Gram Panchayat, Sawindhar, Karsog-II, District Mandi from 30.6.2004, pursuant to the recommendation of the Government of H.P., as per order dated 26.6.2004 for the purpose of seniority. However, the entitlement of the petitioner for actual monetary benefits shall be only from 9.6.2009. In order to avoid any ambiguity, it is made clear that the petitioner shall be deemed to be appointed as Part Time Water Carrier from 30.6.2004 for all purposes, but from 30.6.2004 to 9.6.2009, the benefits shall only be notional and w.e.f. 9.6.2009, the petitioner shall be entitled to all monetary benefits."*

10. Having said so, we are of the considered view that the impugned judgment needs to be modified by providing that the appellant-writ petitioner is entitled to seniority notionally (not monetary benefits) right from the date Smt. Kala Devi was appointed, i.e. 20th August, 1997.

11. Accordingly, the appeal is allowed and the impugned judgment is modified, as indicated hereinabove. Pending applications, if any, are also disposed of.

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

Sanjay Prashar & others. ....Appellants
versus
Subhash Chander & others. ....Respondents.

FAO No. 159 of 2014
Decided on: 19.11.2014

Code of Civil Procedure, 1908- Order 43 Rule 1(i)- Appeal under Order 22 Rule 10 read with Order 1 Rule 10 and Section 151 of CPC was filed before the Learned District Judge, which was disposed of by him in the capacity of Sessions Judge- held, that Sessions Judge cannot pass any order in civil proceedings- order should have been passed in the capacity of a District Judge- Order set aside and the case remanded to District Judge with the direction to decide the matter afresh.

For the appellants : Mr. Ajay Sharma, Advocate.
For the respondents : Mr. Prashant Chaudhary, Advocate, for respondent No.1.
Mr. R.K. Gautam, Sr. Advocate with Mr. Gaurav Gautam, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Appeal filed under Order 43 Rule 1 (i) of the CPC against the order dated 2.4.2014 passed in CMA No. 56 of 2014, Civil Appeal No. 42-D/XII/2013 pending before the learned District Judge, Kangra at Dharmshala. Heard. Court has perused the order dated 2.4.2014 passed by the learned First Appellate Court. It is proved on record that Civil Appeal No. 42-D/XII/2013 was relating to Civil Suit and it is also proved on record that learned First Appellate Court has passed the order in the capacity of Sessions Judge, Kangra at Dharmshala. It is well settled law that Sessions Judge cannot pass any order in civil proceedings. Court is of the opinion that learned First Appellate Court should have passed the order in the capacity of District Judge Kangra at Dharmshala. In view of the above stated facts order dated 2.4.2014 passed in application filed under Order 22 Rule 10 read with Order 1 Rule 10 and Section 151 CPC is set aside in the ends of justice and learned District Judge Kangra at Dharmshala is directed to dispose of the application filed under Order 22 Rule 10 read with Order 1 Rule 10 and Section 151 CPC afresh strictly in accordance with law after hearing both the parties. My observations in the order will not affect the merits of the case as well as application in any manner. Appeal is disposed of. Record of learned trial Court as well as learned First Appellate Court be transferred forthwith along with certified copy of this order. Parties are directed to appear before the learned District Judge Kangra at Dharmshala on **19.12.2014.** Pending application(s), if any also stands disposed of.

****

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

Amrit Lal. ...Petitioner.
Versus
Himachal Road Transport Corporation and others. ...Respondents.

CWP (T) No. 2 of 2014
Reserved on: 19.11.2014
Decided on: 20.11.2014

Central Civil Services (Classification, Control and Appeals) Rules, 1965 - Disciplinary proceedings were initiated against the petitioner- Inquiry Officer submitted his findings that the charges were not proved- Disciplinary Authority disagreed with the findings of the Inquiry Officer and imposed penalty of stoppage of two increments for two years with cumulative effect- held, that the Disciplinary Authority has to record the reason for disagreeing with the findings of the Inquiry Officer which reasons are required to be supplied to delinquent officer- since, the procedure was not followed, therefore, order was set aside. (Para- 2 to 5)

Case referred:
Punjab National Bank and others vs Kunj Behari Misra, (1998) 7 SCC 84

For the Petitioner: Mr. Onkar Jairath, Advocate.
For the Respondents: Mr. G.S. Rathore, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Disciplinary proceedings were initiated against the petitioner under rule 14 of the Central Civil Services (Classification, Control and Appeals) Rules, 1965 vide memo dated 17.7.1999. The Regional Manager (Inquiry) was appointed as the Inquiry Officer. The charges were framed against the petitioner on 28.10.1997. The Regional Manager (Inquiry) submitted his findings to the Disciplinary Authority vide report dated 28.4.2000. According to the report, Charges No.1 and 2 were not proved. The Disciplinary Authority, i.e. Deputy Divisional Manager disagreed with the findings of the Inquiry Officer and held the charges to be proved against the petitioner. The Disciplinary Authority has imposed penalty of stoppage of two increments for two years with cumulative effect vide office order dated 22.5.2000. The stoppage of two increments for two years with cumulative effect is a major penalty. The Disciplinary Authority has to record the tentative reasons for disagreeing with the inquiry report and thereafter the reasons are required to be supplied to the delinquent officer to represent against the same and only after receipt of the representation, the findings are to be recorded.

2. In the instant case, the Disciplinary Authority has disagreed with the inquiry report without recording tentative reasons. The well settled procedure has not been followed by the Disciplinary Authority. There is violation of principles of natural justice. In this case, the penalty has been imposed without following the procedure, discussed hereinabove.

3. Their Lordships of the Hon'ble Supreme Court in ***Punjab National Bank and others vs Kunj Behari Misra***, (1998) 7 SCC 84 have held that the Disciplinary Authority must record its tentative reasons for disagreement with the inquiry report and thereafter the reasons are required to be supplied to the delinquent officer to represent against the same and only after receipt of the representation, the findings are to be recorded. Their Lordships have held as under:

> **"19. The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7 (2). As a result thereof whenever the disciplinary authority disagrees with**

the inquiry authority on any article of charge then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the inquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the inquiry officer. The principles of natural justice, as we have already observed, require the authority, which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file representation before the disciplinary authority records its findings on the charges framed against the officer."

4. We have gone through office order dated 22.5.2000. Charge levelled against the petitioner was that though the fare was Rs. 3, however, he has issued tickets of Rs. 5/- denomination. It is not the case that petitioner has pocketed money by over-charging etc.

5. Accordingly, the petition is allowed. Annexure P-3 dated 22.5.2000 is quashed and set aside. In normal circumstances, we would have permitted the Disciplinary Authority to proceed with the matter by seeking comments of the petitioner; however, taking into consideration that the petitioner has already superannuated from service and the charge was trivial in nature, the proceedings are closed. 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 DHARAM CHAND CHAUDHARY, J.

LPA No.621 of 2011 & LPA No.9 of 2012.
Reserved on: November 13, 2014.
Pronounced on: November 20, 2014.

LPA No.621 of 2011:
H.P. State Electricity Board Limited and others .....Appellants.
versus
Jagmohan Singh .....Respondent.
LPA No.9 of 2012:
Jagmohan Singh .....Appellant.
versus
H.P. State Electricity Board Limited and others .....Respondents.

Constitution of India, 1950- Article 226- Petitioner claimed work charge status- his application before Administrative Tribunal was ordered to be treated as a representation- representation was rejected by the respondent- Learned Single Judge held that representation was wrongly rejected and directed the respondent to consider the case of the petitioner for conferring work charge status with all consequential benefits- held, that case of the petitioner was to be considered in accordance with judgment of Hon'ble Supreme Court of India in **Mool Raj Upadhyaya vs. State of H.P. and others, 1994 Supp.(2) SCC 316** the direction was rightly passed by Learned Judge- Appeal dismissed. (Para-4 to 12)

Case referred:

Mool Raj Upadhyaya vs. State of H.P. and others, 1994 Supp.(2) SCC 316

For the Appellants: Mr.N.K. Sood, Senior Advocate, with Mr.Satyan Vaidya, Advocate, in LPA No.621 of 2011
Mr.A.K. Gupta, Advocate, in LPA No.9 of 2012.

For the respondents: Mr.N.K. Sood, Senior Advocate, with Mr.Satyan Vaidya, Advocate, in LPA No.9 of 2012.
Mr.A.K. Gupta, Advocate, in LPA No.621 of 2011.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Both these appeals are the outcome of the judgment and order, dated 13th June, 2011, passed by a learned Single Judge of this Court, in CWP(T) No.4 of 2011, titled Jag Mohan Singh vs. The H.P. State Electricity Board and Ors., whereby it was held that the case of the writ petitioner (appellant in LPA No.9 of 2012) was covered by the decision of the Apex Court in **Mool Raj Upadhyaya vs. State of H.P. and others, 1994 Supp.(2) SCC 316** and the writ respondents (appellants in LPA No.621 of 2011) were directed to consider the case of the writ petitioner for grant of work charge status w.e.f. 1.1.1997, with all consequential benefits such as seniority and pay fixation.

2. Facts of the case necessary for the disposal of present appeals are thus. Initially, the writ petitioner, namely, Jag Mohan Singh filed an Original Application bearing No.165 of 2006 before the H.P. State Administrative Tribunal, which was granted by the Tribunal on 7th April, 2006 with a direction to the writ respondents to treat the said Original Application as representation and examine the same within three months. The said order is reproduced hereunder:

> *"The only grievance of the applicant in the instant case is that the applicants were working with the respondent/Board for the last ten years as T.mate on daily wage basis with 240 days in each calendar year, but their services were not brought on the work charged establishment from due date after the said span.*
>
> *At the request of learned counsel for the applicants and in the peculiar circumstances of the case the present original application itself is directed to be treated as representation to the Secretary, HPSEB with a direction to decide the same within a period of three months from the passing of this order. He is further directed to consider the case of the applicants for work charge status in view of the law laid down by the Hon'ble Apex Court in Mool Raj Upadhayay vs. State of H.P. 1994(2) SLR 377. The Division Bench of this Tribunal has also decided the similarly situated case titled as Jagdish Ram vs. State of H.P. OA-3/2004 on 6.12.2005."*

3. The writ respondents examined the said representation and rejected the case of the writ petitioner vide order, dated 30th May, 2006, constraining the writ petitioner to file another Original Application, bearing No.2511 of 2007 before the Tribunal, which, on abolition of the Tribunal, was transferred to this Court and was diarized as CWP(T) No.4 of 2011.

4. The learned Single Judge, after examining the material placed on the writ file, held that the representation was wrongly rejected by the writ respondents and that the case of the writ petitioner was covered in terms of paragraph 4(2) of the decision of the Apex Court in the case of **Mool Raj Upadhyaya (supra).** It is apt to reproduce paragraph 8 of the impugned judgment hereunder:

"8. The case of the petitioner is covered under Para-4(2) above for giving him work charged status. In view of facts which have come on record, the petitioner is entitled to work charged status with effect 01.01.1997 with all consequential benefits such as seniority and pay fixation. The Board has not properly considered the representation of the petitioner while rejecting the representation of petitioner on 30th May, 2006 and, therefore, order dated 30th May, 2006 is liable to be quashed."

5. The learned Single Judge directed the writ respondents to consider the case of the writ petitioner for conferring work charge status w.e.f. 1.1.1997, with all consequential benefits, such as, seniority and pay fixation.

6. The writ respondents resisted the claim of the writ petitioner on the ground that the judgment of the Apex Court in the case of **Mool Raj Upadhyaya (supra)** was not applicable in the case of the writ petitioner. The contention of the writ respondents is not tenable for the simple reason that the erstwhile Tribunal had directed the writ respondents to consider the case of the writ petitioner in light of the judgment in **Mool Raj Upadhyaya's** case (supra) and the writ respondents have accepted the judgment, have not questioned the same, thus, has attained finality. The writ respondents examined the claim of the writ petitioner in compliance to the said judgment, cannot make U-turn now.

7. The learned counsel for the writ respondents (appellants in LPA No.621 of 2011) has frankly conceded that the case of the writ petitioner was to be considered in terms of **Mool Raj Upadhyaya's** case (supra), in view of the earlier litigation. It was further submitted that it may not be treated as precedent.

8. On the other hand, the learned counsel for the writ petitioner argued that this Court, in **LPA No.490 of 2011, titled Himachal Pradesh Housing and Urban Development Authority and others vs. Baldev Chand**, decided on 15th May, 2012, has already held that the decision rendered in **Mool Raj Upadhyaya's** case (supra) is applicable to the employees of Corporations and other Government Institutions etc.

9. Having said so, the learned Single Judge has rightly passed the impugned judgment.

10. Learned counsel for the writ petitioner (appellant in LPA No.9 of 2012) also argued that the learned Single Judge has held the writ petitioner entitled to all consequential releifs such as seniority and pay fixation, that does not mean that the writ petitioner is not held entitled to actual back-wages.

11. The argument of the learned counsel for the petitioner is forceful for the reason that the learned Single Judge has held the writ petitioner entitled to all consequential reliefs such as seniority and pay fixation, which does not mean that the writ petitioner was denied back-wages. Therefore, it is held that writ petitioner is also entitled to back-wages.

12. With the above observations, the impugned judgment is upheld and the writ respondents are directed to consider the case of the writ petitioner in light of the decision in **Mool Raj Upadhyaya's** case (supra) and pass the consideration order in terms of the impugned judgment read with the observations made hereinabove within three weeks**.**

13. Both the appeals stand disposed of, as indicated above, with all pending CMPs, if any.

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

Krishan Chand .....Petitioner.
VERSUS
State of H.P. & Ors. .....Respondents.

CWP No.5055 of 2014.
Reserved on : 13.11.2014.
Decided on: 20.11.2014.

Constitution of India, 1950- Article 226- Respondent No. 3 submitted an application asserting that the land was recorded in the joint ownership of his mother and the name of father of Respondent No. 4 as per jamabandi for the year 1954-55- mother of the respondent No. 3 was allotted the land to the extent of 4 kanals and 1 marla towards the western side and it was wrongly recorded in the map/tatima that the land was given towards eastern side- application was allowed and the land was allotted to respondent No. 3- appeals were preferred which were dismissed- held, that respondents No. 4 and 5 had admitted the case of the respondent No. 3 and, therefore, it is not permissible for the petitioner to assail the same. (Para-2)

For the Petitioner: Mr. Dushyant Dadwal, Advocate.
For the Respondents: Mr. Anup Rattan, Additional Advocate General with Mr. Ramesh Thakur, Asstt. Advocate General for respondents No. 1 and 2.
Ms. Chetna, Advocate, for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Per Justice Sureshwar Thakur, J.

Respondent No.3 submitted an application comprised in Annexure P-I before the Consolidation Officer, Hamirpur, averring therein that land comprised in Khasra No. 2121 is recorded in the joint ownership of his mother Fulan and in the name of the father of respondent No.4, as divulged by Jamabandi for the years 1954-55, which pertains to the pre-consolidation year. He continued to aver therein that during the course of consolidation operations as were carried out in the Ilaqua/Mauja where the suit land is situated, the mother of respondent No.3 was allotted land to the extent of 4 kanals and one 1 marla towards the western side of the field. However, while preparing map and carving out Tatima the respondent No.3 and his mother have been untenably depicted to have been given land towards Eastern side wherefrom new Khasra Nos. 862 and 863 have been carved out. On his application, the staff of the consolidation department visited the site of the Khasra Numbers and recorded the statements of respondents No. 4 and 5, the father and brother of the petitioner. On strength of the statements of the father and brother of the petitioner, who are respondents No. 4 and 5, land measuring to the extent of 4 kanals and 1 marla belonging to the petitioner and respondents No. 4 and 5 was evacuated from the ownership of the petitioner, respondent No.4 and 5 and untenably allotted to respondent No.3. The order rendered by the Consolidation Officer was appealed by the petitioner before the Settlement Officer who, however, in his orders comprised in Annexure P-4 affirmed the orders rendered by the Consolidation Officer. The Divisional Commissioner, Mandi, while seized of the appeal, preferred under Section 54 of the H.P.Land Consolidation (Consolidation and Fragmentation) Act, 1971 as preferred against the orders

comprised in Annexure P-4 did not in his wisdom deem it fit to interfere with the orders rendered in Annexure P-4. The petitioner is aggrieved by the orders rendered in Annexures P-2, P-4 and P-5 and prays for theirs being quashed and set-aside.

2. In trite, the focused submission of the learned counsel for the petitioner in seeking the indulgence of this Court for quashing and setting aside the impugned annexures is anchored upon the factum of Annexure P-2 anvilled upon the statements of respondents No. 4 and 5, the father and the brother of the petitioner, comprised in Annexure P-3, carrying no effect in either whittling his right in the suit land nor being fastenable against him so as to dilute his rights therein, especially when he remained unheard. The submission aforesaid in repudiating and repulsing the impugned annexures gets waned in the face of respondents No. 4 and 5, the father and brother of the petitioner, too, having an interest common with the petitioner in the suit land, having recorded statements comprised in Annexure P-3. There is no communication by either respondents No. 4 and 5 that the statements attributed to them comprised in Annexure P-3 arise from exercise of compulsion or duress upon them by the staff of the Consolidation department. For omission of the above evidence, truth is to be imputed to their statements comprised in Annexure P-3, besides their statements are to be construed to be volitional. Apart there-from, when respondents No. 4 and 5 have an interest in the suit land common with the petitioner unless there was demonstrable evidence that there was no authority vested in them by the petitioner to, on his behalf record a statement before the Consolidation Officer, in sequel, in absence of the above material on record an invincible conclusion which ensues is that both respondents No. 4 and 5, the father and brother respectively of the petitioner, enjoyed an express or implied authorization imparted to them by the petitioner to record statements comprised in Annexure P-3. Naturally then, the effect of the statement of the father and brother of the petitioner is to be fastened also upon the petitioner. The natural concomitant effect of their statements is of theirs diluting and whittling his right in the suit land. Preponderantly, an examination of the record, as produced before this Court at the time of hearing of the petition unravels the fact that the petitioner has omitted to at an earlier stage urge before the authorities concerned who were seized of the lis that the statements attributed to respondents No. 4 and 5 were made by them in their individual capacity without theirs having carried his implied and explicit authorization hence statements comprised in Annexure P-3 are not binding upon him. In absence of the petitioner having initially omitted to raise the above ground for assailing the impugned orders baulks as well as estops him from agitating the efficacy of the orders on strength aforesaid. Moreover, it constitutes a waiver and abandonment of the above ground of attack. Consequently, he is barred from now assailing the orders on the score herein before referred.

3. In view of the above discussion, we find no merit in the petition, which is accordingly dismissed, so also the pending application(s), if any. No costs.

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

Smt. Sandhya Bansal ..... Petitioner.

Vs.

State of H.P. & ors. ..... Respondent

Cr.MMO No.141 of 2014.

Date of decision: 20.11.2014.

Code of Criminal Procedure, 1973- Section 482- Petitioner claimed that she and her family members were meted out with brutal treatment by

the police and they were kept in illegal confinement for more than 36 hours in police Station- police had lodged an FIR against the petitioners to save their skin - FIR does not disclose the commission of any cognizable offence- police had already submitted charge-sheet under Section 173 of Cr.P.C to the Magistrate after the completion of the investigation, held, that when the Magistrate is seized of the matter, High Court should not quash the FIR in exercise of its inherent powers- further, investigation cannot be transferred to CBI without any material especially when the charge-sheet had already been filed. (Para-6, 7 and 10)

Case referred:
State of Bihar and another etc. vs. Shri P.P.Sharma and another etc. etc. AIR 1991 SC 1260

For the petitioner	:	M/s Som Dutt Vasudeva and Sanjay Dutt Vasudeva, Advocates.
For the respondent	:	Mr. Virender Kumar Verma, Mr. Rupinder Singh and Ms. Meenakshi Sharma, Additional Advocate Generals for respondents No. 1 to 3. Ms. Jyotsna Rewal Dua, Advocate, for respondents No. 4 to 13. Inspector Raghubir Singh, SHO, Police Station, Dharampur.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral):

By medium of this petition preferred under section 482 of the Code of Criminal Procedure, the petitioner has sought quashing of FIR No. 77 of 2013, registered against the petitioner and others at Police Station, Parwanoo, under sections 353, 332, 34 IPC and has further sought transfer of investigation of case FIR No. 20 of 2013 registered with Police Station CID on 11.9.2013 to the Central Bureau Investigation. The petitioner claims that she and her family members including her husband and her two children as well as two other children were meted out with brutal treatment by the police personnels on the mid night of September 4th and 5th 2013 near Chakki Mor, Police Station, Parwanoo. It is further alleged that they were kept in illegal confinement in Police Station, Parwanoo lock up for two nights and one day (more than 36 hours). The precise case of the petitioner is that she alongwith her husband was going towards Shimla in their own car and had some altercation with some truck driver and for which purposes he went to lodge a complaint with the two young policemen standing at the Sales Tax Barrier at Chakki Mor. Those police personnels instead of discharging their statutory function, asked the son of the petitioner who was driving the car to park the same by the side of the road. It is thereafter alleged that the police officials started making uncalled for inquiries and used most filthy and derogatory language and then without any provocation gave forceful slap on the face of the petitioner, due to which blood oozed out from her mouth. The petitioner's son objected to this unruly behaviour, but it had no impact. Certain other allegations have been set out in the petition and it is alleged that since the accused happened to be the policemen, therefore, they are not cooperating and have falsely registered an FIR No. 77 of 2013 against her, while on the other hand, the petitioner with great difficulty, could lodge FIR No. 20 of 2013 against the police personnels.

2. It is contended that a bare reading of the contents of the FIR shows that no cognizable offence stands disclosed and the facts narrated

therein do not show in which manner the petitioner and other family members deterred the complainant from discharging his duty. It is further alleged that it cannot be believed that a woman would dare to assault a police functionary and it is only to save (his/their skin) that this FIR has been registered, because the medical examination conducted upon petitioner and other family members would reveal the brutal manner in which they have been assaulted. The FIR has been lodged out of vindictiveness and its contents are so absurd and inherently improbable that on the basis of which no prudent person can reach to a just conclusion that there are sufficient grounds for proceedings against the petitioner and her family members.

3. The Secretary (Home) to the Government of Himachal Pradesh and Director General of Police, Himachal Pradesh filed their reply, wherein the allegations leveled by the petitioner have been denied in the following manner:-

> "1. That the contents of this para are wrong hence denied. It is submitted that on dated 5.9.2013 constable Dalip Singh No. 377 6th IRBN Kolar District Sirmour was deputed along with Constable Ravinder Singh No. 359 at Chakki More Barrier and was present on duty. Constable Dalip Singh No. 377, 6th IRBN Kolar went to clear the jam near about 100 meters from excise barrier towards Parwanoo. A car arrived from Parwanoo side, the occupant of the car told Constable Dalip Singh that a Truck driver had misbehaved and when he enquired the No. of truck which they did not disclose and drove up words. The car come to him, thereafter when he was clearing the jam and one of the occupant of the car told him that he had taken the bride and allow the truck to flee. In the mean a women alighted from the car and started arraying with him. He told the lady to keep distance what she resorted to quarrel with him and told him to disclose his name and that she would get him dismissed being a daughter of SP. In the meanwhile four occupant of the car also came out and started scuffling with him and the women gave him a blower his mouth and nose which hurt him. He wanted to run that but these people caught him and hearing the noise constable Ravinder Singh come to the spot and he and truck driver who had parked their truck rescued him from them. Some local were also there who's names are Amit Sharma, Devidayal when the said women and her five associates were giving beating to him truck driver scuffle with them while rescuing him. Later on he came to know the name of the women who gave beating to him is Sandhya where as the name of the men were Tushan, Satish, Manoj, Prashant Bansal. A boy escaped after giving beating. During scuffle the two button of the shirt of constable Dalip Singh were broken and regarding this constable Dalip Singh lodge a FIR at PS Parwanoo bearing registration No. 77/2013 U/S 353, 332, 34 IPC. These person gave beating to the Constable Dalip Singh and cause obstruction in the discharge of his official duties. Investigation of this case was carried by Sh. Sushil Kumar, SDPO Parwanoo. During the course of investigation statements of witnesses have been recorded. Who stated in their statement that accused persons were arguing with Constable Dalip Singh and the woman who was sitting in the car stated that she was the daughter of the SP and told him disclose his name and she would get him dismissed and also gave beating to constable Dalip Singh I/O also during the investigation taken in to possession the uniform and broken two buttons of constable Dalip Singh and also taken in to possession by seizure memo car bearing No. CH-01AA-4517 along with documents alongwith key. Thereafter the case was transferred to CID by the order of Director General of Police HP Shimla vide their office order Endst No. CB-3-20(TPR of Case)/2013-13000-1 dated 12-9-2014."

4. To the similar effect is the reply filed by the Additional Director General of Police (CID), who has been arrayed as respondent No.3. The petitioner has filed rejoinder and reiterated the averments made in the petition.

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

5. Mr. Virender Kumar Verma, learned Additional Advocate General assisted by Mr. Rupinder Singh and Ms. Meenakshi Sharma, learned Additional Advocate Generals, for respondents No.1 to 3 and Ms. Jyotsna Rewal Dua, learned counsel for respondents No. 4 to 13 have raised a preliminary objection regarding the very maintainability of the petition on the ground that the only relief sought by the petitioner is for quashing the FIR, whereas the police after completion of investigation has forwarded the report under section 173 Cr.P.C. to the concerned Magistrate and according to him this court would have no jurisdiction to entertain this petition at this stage.

6. Now at this stage when the police report under section 173 Cr.P.C. has been forwarded to the Magistrate after completion of the investigation and the material collected by the Investigating Officer is under judicial scrutiny, can this court undertake quashing proceedings in exercise of its inherent jurisdiction? The answer to this is in the negative, as would be clear from the following observations of the Hon'ble Supreme Court in **State of Bihar and another etc. etc.** vs. **Shri P.P.Sharma and another etc. etc. AIR 1991 SC 1260**:-

> *"33. ……. We are of the considered view that at a stage when the police report under S. 173, Cr.P.C. has been forwarded to the Magistrate after completion of the investigation and the material collected by the investigating officer is under the gaze of judicial scrutiny, the High Court would do well to discipline itself not to undertake quashing proceedings at that stage in exercise of its inherent jurisdiction. We could have set aside the High Court judgment on this ground alone but elaborate argument having been addressed by the learned counsel for the parties we thought it proper to deal with all the aspects of the case."*

7. In so far as the allegations regarding the tainted investigation are concerned, I need not delve on the same lest it prejudices the cases of either of the parties. Since I have already held that at this stage when the police report under section 173 Cr.P.C. has already been forwarded to the Magistrate after completion of the investigation and the material collected by the Investigating Officer is under the gaze of judicial scrutiny, this court will not undertake quashing proceedings by exercising its inherent jurisdiction.

8. Now so far as the claim of the petitioner for transferring FIR No. 20 of 2013 to CBI is concerned, it has to be remembered that power of transfer of such investigation has to be exercised in rare and exceptional cases where the court finds it necessary in order to do justice between the parties and to instil confidence in the public mind or where the investigation by the State police lacks credibility and it is necessary for having a fair, honest and complete investigation and particularly when it is imperative to retain public confidence in the impartial working of the State agencies, but where the investigation has already been completed and charge sheet has been filed, ordinarily superior courts would not re-open the investigation and it has to be left open to the court where the charge sheet has been filed to proceed with the matter in accordance with law. Under no circumstances, should the court make any expression of its opinion on merits relating to any accusation against an individual.

9. The case in hand is already with the specialized wing of State Investigation Agency i.e. CID and there is no material placed before this court whereby it can be gathered that investigation in this FIR is not being conducted in a fair and honest manner. Moreover, the investigation has already been

completed and the charge-sheet has been filed. As warned by the Hon'ble Supreme Court, the extra ordinary powers to transfer the investigation from one Investigating Agency to the other Investigating Agency must be exercised sparingly and cautiously and in exceptional situation. No such exceptional circumstances, have been brought out in this case.

10. Accordingly, I find no merit in this petition and the same is accordingly dismissed. However, before parting it may be clarified that this order will not debar the petitioner from approaching the Magistrate for the redressal of her grievances, which needless to say shall be redressed strictly in accordance with law and uninfluenced by any observation made hereinabove.

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

Hari Om son of Shri Bhagat Ram ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1260 of 2014
Order Reserved on 13th November, 2014
Date of Order 21st November, 2014

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offence punishable under Section 15 of N.D.P.S. Act- held, that investigation is complete- challan has already been filed in the Court, therefore, no useful purpose would be served by detaining the applicant in prison - bail granted. (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 Apex Court DB 702,

For the Applicant: Mr. Ramakant Sharma, Advocate
For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General with 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. 106 of 2014 dated 23.4.2014 registered under Section 15-61 of Narcotic Drugs and Psychotropic Substances Act 1985 in Police Station Baddi District Solan (H.P.).

2. It is pleaded that applicant is innocent and applicant did not commit any offence as alleged by prosecution. It is pleaded that applicant will not tamper with prosecution witnesses in any manner and will abide by the directions passed by the Court. It is pleaded that no recovery is to be effected from the applicant and further pleaded that age of applicant is 27 years and applicant is sole earning member of the family. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. As per police report, FIR No. 106 of 2014 dated 23.4.2014 has been registered against the applicant under Section 15-61 of Narcotic Drugs and Psychotropic Substances Act 1985. There is recital in police report that on dated 23.4.2014 at about 5.15 AM a vehicle having registration No. HP-12-F-5332 came from Pinjore side. There is further recital in police report that vehicle was checked and in dickey a plastic bag was found. There is recital in police report that in plastic bag 38 Kg. 500 grams of poppyhusk was recovered. There is further recital in police report that applicant could not produce any licence/permit. There is recital in police report that after registration of case photographs took and site plan was also prepared and statements of prosecution witnesses were also recorded. There is further recital in police report that report from FSL Junga also obtained and as per chemical report sample was of poppyhusk. There is also recital in police report that investigation is complete and challan has been filed on dated 24.7.2014. There is further recital in police report that applicant is a hardened criminal and there are also criminal cases against the applicant vide FIR No. 80 of 2010 dated 29.6.2010 under Sections 366, 376, 120B, 34 IPC P.S. Baddi District Solan and FIR No. 177 of 2012 dated 21.7.2012 under Section 15-61 of ND&PS Act 1985 P.S. Baddi District Solan. Prayer for rejection of bail application is 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:-

Point No. 1

Whether the bail application filed under Section

439 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail application?

Point No. 2

Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and 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 investigation is complete in present case and challan has already been filed in the Court on dated 24.7.2014 and no recovery is to be effected from the applicant and on this ground bail application filed under Section 439 Cr.P.C. be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 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. Court is of the

opinion that trial in present case will be concluded in due course of time and Court is of the opinion that in view of the fact that challan has been filed in Court and in view of the fact that investigation is complete and in view of the fact that no recovery is effected from the applicant and in view of the fact that poppyhusk recovered from the applicant did not fall within commercial quantity it would be expedient in the interest of justice if the applicant is released on bail. It is held that if applicant is released on bail then interest of State and general public will not be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of non-applicant that if bail is granted to applicant then applicant will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that condition will be imposed in the bail order to the effect that applicant will not induce and threat the prosecution witnesses and another condition will also be imposed upon the applicant that applicant will attend the trial of the case regularly. 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.

9. Another submission of learned Additional Advocate General appearing on behalf of the non-applicant that two FIRs i.e. FIR No. 80 of 2010 dated 29.6.2010 and FIR No. 177 of 2012 dated 21.7.2012 already stood registered against the applicant and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that accused is presumed to be innocent till convicted by competent Court of law. There is no evidence on record in order to prove that applicant has been convicted by any criminal Court of law as of today. Court is of the opinion that simply pendency of criminal cases relating to two FIRs against the applicant is not a sufficient ground for declining the bail. As per law accused is presumed to be innocent till criminal charges are not proved against the accused in accordance with law. In view of above stated facts, point No.1 is answered in affirmative.

Point No. 2

Final Order

10. In view of my findings on point No.1 bail application filed by applicant under Section 439 Cr.P.C. is allowed and applicant is ordered to be released on bail subject to furnishing personal bond to the tune of Rs. 1 lac with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That the applicant will attend the proceedings of learned trial Court regularly till conclusion of trial in accordance with law. (ii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That the applicant will not leave India without the prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address in written manner to the Investigating Officer and Court. Applicant be released only if he is not required in any other criminal case. Bail application filed under Section 439 Cr.P.C. stands disposed of. 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 439 of Code of Criminal Procedure 1973. All pending application(s), if any also disposed of.

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

FAO No.482 of 2010 a/w
FAO No.158 of 2011
Decided on : 21.11.2014.

1. FAO No.482 of 2010.

Janku Devi & Ors. ...Appellants.

VERSUS

Managing Director, Himachal Road Transport Corporation ...Respondent.

2. FAO No.158 of 2011.

Himachal Road Transport Corporation ...Appellant.

VERSUS

Janku Devi & Ors. ...Respondents.

Motor Vehicle Act, 1988- Section 166- Deceased was employed in electricity board and her monthly salary was Rs.12,800/- - Tribunal held the loss of dependency to be Rs. 75,000/- per annum and applied multiplier of 7- held, that the compensation was rightly determined. (Para-10)

For the Appellant(s):	Mr.Kunal Verma, Advocate, for the appellants in FAO No.482 of 2010.
	Mr.Jagdish Thakur, Advocate, for the appellant in FAO No.158 of 2011.
For the Respondent(s):	Mr.Jagdish Thakur, Advocate, for the respondent in FAO No.482 of 2010.
	Mr.Kunal Verma, Advocate, for the respondents in FAO No.158 of 2011.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Challenge in these appeals is to the award, dated 18th June, 2010, passed by the Motor Accident Claims Tribunal(II), Shimla, Camp at Rohru, (for short, the Tribunal), in claim petition No.5-R/2 of 2007, titled Janku Devi and others vs. The Managing Director, Himachal Road Transport Corporation, whereby and whereunder compensation to the tune of Rs.5,35,000/-, with interest at the rate of 6% per annum from the date of filing of the Claim Petition till its realization, came to be awarded in favour of claimant No.1 Janku Devi and against the respondent/Himachal Road Transport Corporation, (for short, the impugned award).

2. Facts of the case, in brief, are that Miss Laxmi Devi was traveling in the bus bearing registration No.HP-14B-7501, on 2nd December, 2006, which was being driven by the driver rashly and negligently, met with the accident at Jakhru Mode, Salogra, District Solan, H.P., resulting into the death of Miss Laxmi Devi on the spot. The claimants, being dependants on the deceased, filed the claim petition for grant of compensation to the tune of Rs.10.00 lacs, as per the break-ups given in the claim petition.

3. The respondent filed reply to the claim petition and resisted the same on various grounds.

4. On the pleadings of the parties, the following issues were settled by the Tribunal:

> *"1. Whether Miss Laxmi Devi died because of rash and negligent driving of vehicle No.HP-14B-7501 by its driver? OPP*
>
> *2. If issue No.1 is proved, what amount of compensation the petitioners are entitled to? OPP*
>
> *3. Whether the petition is neither competent nor maintainable? OPR*
>
> *4. Whether the petition is bad for non-joinder of necessary parties? OPR*
>
> *5. Relief."*

5. In order to prove their case, the claimants examined Janku Devi, Jaswan, Sunil Kumar and Bachan Singh as PW-1 to PW-4, respectively. The respondent, on the other hand, examined Krishan Lal as RW-1. Parties have also placed on record documents i.e. copy of postmortem report (Ext.PB), copy of legal heir certificate (Ext.PW-1/A), death certificate (Ext.PW-1/B), copy of FIR (Ext.PW-3/A), salary certificate (Ext.PW-4/A), copy of pariwar register (Ext.PA) and inquiry report (Ext.RW-1/A).

6. The Tribunal, after scanning the entire evidence, oral as well as documentary, came to the conclusion that the driver had driven the offending vehicle rashly and negligently and caused the accident in which Miss Laxmi Devi lost her life and awarded compensation to the tune of Rs.5,35,000/-.

7. Feeling aggrieved, the claimants challenged the impugned award by way of FAO No.482 of 2010 on the ground of adequacy of compensation, while the original respondent/Corporation challenged the same by the medium of FAO No.158 of 2011, on the grounds taken in the memo of appeal, and prayed for the dismissal of the claim petition.

8. I have gone through the evidence and am of the considered view that the claimants have proved, by leading evidence, that the accident was the outcome of rash and negligent driving of the driver of the offending bus and no evidence was led by the respondent/Corporation to the contrary. Therefore, the findings recorded on issue No.1 by the Tribunal are upheld.

9. Before issue No.2 is taken up, I deem it proper to deal with issues No.3 and 4. Onus to prove both these issues was upon the respondent/Corporation, which the respondent has failed to discharge. However, I have gone through the claim petition. The claimants have pleaded and proved that the accident was the outcome of rash and negligent driving of the driver of the offending bus and the claimants are the victims of the vehicular accident. Accordingly, the findings recorded on issue No.3 are upheld. Findings under issue No.4 are also upheld being not pressed by the learned counsel for the respondent/Corporation.

10. Coming to issue No.2, admittedly, the deceased was employed in the Electricity Board and her monthly income was Rs.12,800/-, as per salary certificate Ext.PW-4/A and after making deductions, the Tribunal held that the claimants lost source of dependency to the tune of Rs.75,000/- per annum and applied the multiplier of 7 keeping in view the age of the deceased and the claimants.

11. I am of the considered view that, while awarding compensation under the head 'loss of source of dependency, the Tribunal has rightly recorded findings in paragraph 19 of the impugned award. It is apt to reproduce paragraph 19 of the impugned award hereunder:

> *"19. So far as the income of the deceased is concerned it is the admitted fact that she was serving in HPSEB, Shimla and as per salary certificate Ext.PW-4/A she was drawing a total salary of Rs.12,835/- per month.*

After deducting the special allowance/pay etc. it can be said that the monthly income of the deceased was atleast Rs.12,500/- per month or say she was earning 1.5 lacs per annum. Admittedly, the deceased was unmarried and 38 years old and so out of her total earning she must be spending at least 50% of her income on herself. In this manner the loss of income for the purpose of dependency comes to Rs.75,000/- per annum. Keeping in view the age of the petitioner No.1 the multiplier of 7 (seven) will be appropriate and on this basis the total loss of income comes to Rs.5,25,000/- and the petitioner is entitled to this much amount as compensation. In addition, she is also entitled to Rs.10,000/- as conventional amount. Hence, the total compensation payable by the respondent to petitioner No.1 comes to Rs.5,35,000/-."

12. In view of the above discussion, it is held that the compensation amount awarded by the Tribunal is neither excessive nor inadequate, rather is just and appropriate.

13. Learned counsel for the appellant/claimants argued that the Tribunal has awarded interest at the rate of 6% per annum, which is on the lower side. I deem it proper to enhance the rate of interest from 6% to 7.5% per annum from the date of the claim petition till realization. The enhanced amount be deposited by the respondent/Corporation in the Registry within a period of eight weeks and the Registry is directed to release the award amount strictly in terms of the impugned award.

14. The appeal (FAO No.158 of 2011) filed by the original respondent/Corporation is dismissed and the appeal (FAO No.482 of 2010) is allowed to the extent, as indicated above.

15. Both the appeals stand disposed of accordingly.

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

FAOs (MVA) No. 367 & 368 of 2007
Date of decision: 21st November, 2014.

1. FAO No. 367/2007.

Shri Jaswant Singh .....*Appellant*

Versus

Sh. Jagat Ram and others ...*Respondents*

2. FAO No. 368/2007.

Shri Jaswant Singh .....*Appellant*

Versus

Sh. Sukhdev Ram and others ...*Respondents*

Motor Vehicle Act, 1988- Section 149- Deceased and two labrourers sustained injuries in an accident of the tractor- Tribunal held that insurance company liable to pay compensation with the right of recovery- held, that as per registration certificate and the insurance policy tractor was meant for agricultural purposes of the insured and not for any other purposes- deceased and two labrourers were employees and had loaded bricks in the tractor- they were travelling in the vehicle as labourers and had sustained injury-therefore, it was duly proved that insured had violated the terms and conditions of the insurance policy- appeal dismissed. (Para-7 to 9)

For the appellant(s): Mr. Jagdish Thakur, Advocate.

For the respondents: Mr. Dheeraj Vashisht, Advocate, for respondent No.1. in both the appeals.

Mr. Onkar Jairath , Advocate, for respondent No. 2 in FAO No. 368/2007 and for respondent No. 3 in FAO No. 367/2007.
Mr. Harish Behl, Advocate, for respondent No. 3 in FAO No. 368/2007 and for respondent No. 4 in FAO NO. 367/2007.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

These two appeals are outcome of one accident, which was allegedly caused by driver, namely Sukhwinder Singh, on 23.11.2001, while driving tractor *No.* PB-47-A-0486 whereby two labourers, namely, Naresh Kumar and Balbir Singh sustained injuries and succumbed to the same. The dependents of the deceased filed two separate claim petitions before the Tribunal, for the grant of compensation and the Tribunal determined both the claim petitions by passing two separate awards of the same date in MAC Petitions No. 16/03 RBT 67/05/03 and 17/03 RBT 81/05/03, respectively, whereby and whereunder the insurer was saddled with the liability with right of recovery from the owner, hereinafter referred to as "the impugned awards", for short. Thus, I deem it proper to determine both these appeals by this common judgment.

BRIEF FACTS.

2. A perusal of the record do disclose that the claimants have filed two claim petitions against the brick-kiln owner and driver of the offending tractor and the particulars of the insurance company was not known. The respondents have filed objections, particularly owner-appellant herein and the particulars of the insurance company and also the owner of the offending vehicle Jaswant Singh were disclosed. It is stated that Jaswant Singh was lateron arrayed as party respondent in the claim petitions before the Tribunal.

3. The respondents in the claim petitions, resisted and contested the claim petitions and following issues, on the pleadings of the parties, came to the framed in **FAO No.367/2007:**

(i) Whether Balbir Singh on dated 23.11.2001 at about 10 a.m. was travelling in tractor No. PB-47-A-0486 being driven by respondent No. 2 Sukhwinder Singh rashly and negligently at place Haroli-Jaijon road met with an accident in which Balbir Singh sustained fatal injuries to his person and died on the spot?.....OPP

(ii) If issue No. 1 is proved in affirmative whether the petitioners are entitled to compensation, if so to what amount and which of the respondents?....OPP

(iii) Whether the tractor trolly in question was being used other than the agriculture purpose and thereby violated the terms and conditions of the insurance policy? .....OPR-3.

(iv) Whether the respondent No. 2 was not holding a valid and effective driving licence to drive the tractor at the relevant time as alleged? ..OPR-3.

(v) Whether the tractor was being driven without valid R.C. and insurance etc. ? .....OPR3.

(vi) Relief.

4. The following issues came to be framed in **FAO No. 368 of 2007**.

(i) *Whether Naresh Kumar on dated 23.11.2001 at about 10 a.m. was travelling in tractor No. PB-47-A-0486 being driven by respondent No. 2 Sukhwinder Singh rashly and negligently at place Haroli-Jaijon road and as such met with an accident in which Naresh Kumar sustained fatal injuries to his person and died on the spot?.....OPP*

(ii) If issue No. 1 is proved in affirmative whether the petitioners are entitled to compensation, if so to what amount and which of the respondents?....OPP

(iii) Whether the tractor trolly in question was being used other than the agriculture purpose and thereby violated the terms and conditions of the insurance policy? .....OPR-3.

(iv) Whether the respondent No. 2 was not holding a valid and effective driving licence to drive the tractor at the relevant time as alleged? ..OPR-3.

(v) Whether the tractor was being driven without valid R.C. and insurance etc. ? .....OPR3.

(vi) Relief.

5. During the course of trial, Ram Nath appeared in the witness-box and stated that he had hired the tractor for carrying bricks for the construction of fodder storage shed in the village where he was carrying on agriculture vocations.

6. The Tribunal, after scanning the evidence, held that the claimants have proved by leading evidence that the driver of the offending vehicle has driven the vehicle rashly and negligently, accordingly decided issues in favour of the claimants and against the respondents.

7. In terms of the Registration Certificate and the insurance policy, copy of which are on the record, the tractor was only meant for agriculture vocations and, that too, of the insured and the insured was permitted to utilize the tractor for his own agriculture vocations, for the reasons that he is an agriculturist and accordingly, the insured, in terms of the terms and conditions contained in the Registration Certificate, executed the contract with the insurer. Thus, it is admitted fact of the parties that the tractor was meant only for agriculture vocations, that too, of the insured and not for any other purpose.

8. The claimants have specifically averred in the claim petitions that deceased were labourers in the brick-kiln and they had loaded the bricks in the offending tractor and were travelling on the same which met with an accident and they sustained injuries and succumbed to the injuries. It is not the case of the claimants that the deceased were labourers of the owner Jaswant Singh or it is also not the case of the claimants that the tractor was being used for agriculture vocations at that relevant point of time by the insured and even the bricks were being used for raising construction in relation to the agriculture vocations of the insured. Thus, the Tribunal has rightly held that the insured has committed willful breach.

9. Mr. Jagdish Thakur, Advocate, for the appellant(s) argued that it was for the insurer to plead and prove that the owner/insured has committed breach of the terms and conditions of the insurance policy. The case, as admitted by the parties, is that the vehicle was being used in violation of the terms and conditions of the Registration Certificate not to speak of breach of the terms and conditions of the insurance policy. Had there been any willful breach committed by the owner, i.e., that the driver was not having a valid and effective driving licence or any other breach, in terms of Section 149 of the Motor

Vehicles Act, the question of pleading and proving the factum by the insurer would have arisen.

10. On going through insurance policy, prima facie it reveals that the vehicle was meant only for the purpose of agriculture vocations, that too, for the owner/insured only.

11. The Tribunal has awarded a meager amount of compensation in favour of the claimants. Unfortunately, the claimants have not questioned the same and is upheld.

12. Accordingly, the appeals are dismissed alongwith pending applications if any, and the impugned awards are upheld.

13. The insurance company has already deposited the amount, the same be released in favour of the claimants, strictly in terms of the conditions contained in the impugned awards, through payee's cheque account. The insurer is at liberty to lay motion before the Tribunal for effecting recovery from the owner. The Registry is directed to place a copy of this judgment in the connected appeal.

14. Send down the record forthwith.

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

Kulwinder Kumar alias Billa son of Shri Paramjit Pal ….*Applicant*

Versus

State of H.P. ….*Non-applicant*

Cr.MP(M) No. 1259 of 2014
Order Reserved on 13th November, 2014
Date of Order 21st November, 2014

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offence punishable under Section 392 read with Section 34 of IPC and Section 25 of Arms Act- as per prosecution case, petitioner is hardened criminal and many FIRs have been registered against him- held, that while granting the bail nature and seriousness of offence, the character of the evidence, circumstances which are peculiar to the accused, Possibility of the presence of the accused at the trial or investigation, reasonable apprehension of witnesses being tampered with and the larger interests of the public are to be seen- object of bail is to secure the appearance of the accused person at the trial- grant of bail is the rule and committal to jail is exception- challan has already been filed in the Court and, therefore, it would be futile to keep the applicant in jail- pendency of criminal cases is not a ground to decline the bail. (Para-7 to 10)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179

The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702,

For the Applicant: Mr. N.K. Thakur, Sr. Advocate with Mr. Rohit Bharoll, Advocate

For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General with 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. 82 of 2014 dated 3.4.2014 registered under Sections 392 read with Section 34 IPC and Section 25-54-59 of the Arms Act in Police Station Una District Una (H.P.).

2. It is pleaded that applicant has been falsely implicated in present case. It is pleaded that investigation is complete and challan is also filed in the Court. It is further pleaded that applicant undertakes to abide by all terms and conditions imposed by the Court. Prayer for acceptance of bail application filed under Section 439 Cr.P.C. is sought.

3. Per contra police report filed. As per police report, FIR No. 82 of 2014 dated 3.4.2014 registered under Sections 392 read with Section 34 IPC and Section 25-54-59 of the Arms Act in Police Station Una District Una (H.P.) against the applicant. There is recital in police report that on dated 3.4.2014 at about 6.30 PM complainant Kishan Pal and his father went to see the wheat field upon Pulsar motor cycle having registration No. HP-36A-3101. There is recital in police report that father of complainant went into the field of wheat and complainant namely Kishan Pal remained sitting upon the motor cycle. There is further recital in police report that two persons came upon another Pulsar motor cycle of black colour. There is further recital in police report that thereafter driver of motor cycle boarded down from the motor cycle and pillion rider kept the motor cycle in a motion. There is further recital in police report that thereafter the person who boarded down from the motor cycle placed pistol upon the ears of complainant namely Kishan Pal and told the complainant namely Kishan Pal to board down from the motor cycle No. HP-36-A3101 otherwise he would kill him. There is further recital in police report that thereafter motor cycle No. HP-36-A3101 which was in possession of complainant was snatched and thereafter both accused persons went towards Ghaluwal side. There is further recital in police report that complainant Kishan Pal had purchased the motor cycle No. HP-36-A3101 from Surender after paying sale consideration amount. There is further recital in police report that criminal case was registered and investigation was conducted by Ex-Inspector/SHO Krishan Lal. There is further recital in police report that information was received through telephone that snatched motor cycle No.HP-36A-3101 and accused persons were detained at place Bankhandi. There is further recital in police report that motor cycle No. HP-36-A3101 and pistol 7.65 MM were recovered and were sealed. There is further recital in police report that accused persons informed that pistol was purchased from Saharanpur U.P. but no licence was produced. There is also recital in police report that accused persons refused for identification parade. There is further recital in police report that place of incident was located at the instance of accused persons. There is further recital in police report that co-accused Kulwinder told to Investigating Agency that his accomplice was Gurpreet Singh son of Satpal. There is also recital in police report that applicant is hardened criminal and is resident of Punjab and following cases have been registered against the applicant. (1) FIR No. 190/06 dated 10.11.2006 under Section 379 IPC P.S. Adampur Punjab. (2) FIR No. 221/07 dated 18.10.2007 under Sections 382, 34 IPC P.S. Mahalpur District Hoshiarpur Punjab. (3) FIR No. 158/08 dated 3.7.2008 under Sections 332, 307, 186, 353, 34 IPC P.S. Sadar Hoshiarpur Punjab. (4) FIR No. 74/10 dated 9.6.2010 under Section 411 IPC P.S. Goraya Punjab. (5) FIR No. 45/11 dated 23.6.2011 under Sections 382, 34 IPC P.S. Haryana District Hoshiarpur Punjab (6) FIR No. 84/11 dated 10.8.2011 under Section 22-61-85 of ND&PS Act P.S.

City Hoshiarpur Punjab. There is further recital in police report that on dated 18.4.2014 ASI Saravjit Singh P.S. Vilga District Jalandhar came to police station and told that accused persons Kulwinder and Gurpreet have committed dacoity during night period in the Filling Station situated at Tarwal road Noormahal and they have fired from pistol of 7.65 MM. There is further recital in police report that thereafter custody of accused persons was handed over to police officials posted at Jalandhar through production warrant qua FIR No. 24/2014 dated 2.4.2014 registered under Section 394 IPC. There is further recital in police report that cartridge and pistol were sent for chemical examination. There is further recital in police report that motor cycle No. PB-07AG-2067 used for commission of criminal offence has been taken into possession by Investigating Agency of P.S. Vilga District Jalandhar in FIR No. 24/2014. There is further recital in police report that challan has been filed in the Court of Judicial Magistrate Court No. 1 Una on dated 30.6.2014. There is further recital in police report that applicant Kulwinder Singh is in judicial custody. There is also recital in police report that applicant Kulwinder is resident of another State and is a hardened criminal and in Punjab different cases have been registered against the applicant. There is also recital in police report that if bail is granted to the applicant then applicant will conceal himself and will also threat the prosecution witnesses. Prayer for rejection of bail application is 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:-

Point No. 1

Whether the bail application filed under Section

439 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail application?

Point No.2

Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and 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 investigation is complete in present case and challan has already been filed in the Court on dated 30.6.2014 and any condition imposed by Court upon the applicant will be binding upon applicant and on this ground bail application filed under Section 439 Cr.P.C. be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In present case investigation is complete and applicant is not required for any investigation purpose. Trial of the case will be completed in due course of time. 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.

8. In view of the fact that investigation has been completed in present case and in view of the fact that challan has been filed in present case and in view of the fact that trial will be concluded in due course of time it is held that it is not expedient in the ends of justice to keep the applicant in jail. It is further held that if applicant is released on bail at this stage then interest of State and general public will not be adversely affected in present case.

9. Submission of learned Additional Advocate General appearing on behalf of non-applicant that if bail is granted to applicant then applicant will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that condition will be imposed in the bail order to the effect that applicant will not induce and threat the prosecution witnesses and another condition will also be imposed upon the applicant that applicant will attend the trial of the case refulgarly. 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.

10. Another submission of learned Additional Advocate General appearing on behalf of the non-applicant that six criminal cases have been registered against the applicant as of today and bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that accused is presumed to be innocent till convicted by competent Court of law. There is no evidence on record in order to prove that applicant has been convicted by any criminal Court of law as of today in any of criminal cases. It is also well settled law that pendency of criminal cases is not a ground for declining the bail. As per law accused is presumed to be innocent till criminal charges are not proved against the accused in accordance with law. In view of above stated facts, point No.1 is answered in affirmative.

Point No.2

Final Order

11. In view of my findings on point No.1 bail application filed by applicant under Section 439 Cr.P.C. is allowed and applicant is ordered to be released on bail subject to furnishing personal bond to the tune of Rs. 1 lac with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That the applicant will attend the proceedings of learned trial Court regularly till conclusion of trial in accordance with law. (ii) That applicant will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That the applicant will not leave India without the prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address in written manner to the Investigating Officer and Court. Applicant be released only if not required in any other criminal case. Bail application filed under Section 439 Cr.P.C. stands disposed of. 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 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of.

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

FAO No.182 of 2007 a/w FAO No.250 of 2007
Reserved on : 14.11.2014.
Pronounced on: November 21, 2014.

1. FAO No.182 of 2007.

New India Assurance Company Ltd. ...Appellant.

VERSUS

Randeep Singh Rana and others. ...Respondents.

2. FAO No.250 of 2007.

Randeep Singh. ...Appellant.

VERSUS

The New Shivalik Transport Company and others. ...Respondents.

Motor Vehicle Act, 1988- Section 166- Tribunal held that accident was not the result of contributory negligence of the drivers of the bus and truck and was due to the rash and negligent driving of the driver of the bus- tribunal saddled the owner of the bus with liability and directed the insurer to indemnify the insured- held, that no appeal was preferred by the owner/driver of the bus and, therefore, it was not permissible for insurer to claim that the accident was not outcome of rash and negligent driving of the bus driver. (Para-15)

For the Appellant(s): Mr. B.M. Chauhan, Advocate, for the appellant in FAO No.182 of 2007.

Mr. Tara Singh Chauhan, Advocate, for the appellant in FAO No.250 of 2007.

For the Respondents: Mr. Neeraj Gupta, Advocate, for respondent No.2 in FAO No.182 of 2007 and for respondent No.1 in FAO No.250 of 2007.

Ms. Sunita Sharma, Advocate, for respondent(s) No.4 in FAO No.182 of 2007 and FAO No.250 of 2007.

Mr. M.L. Sharma, Advocate, for respondent No.5 in FAO No.182 of 2007 and FAO No.250 of 2007.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Challenge in these appeals is to the award, dated 5th March, 2007, passed by the Motor Accident Claims Tribunal, Bilaspur, (for short, the Tribunal), whereby and whereunder compensation to the tune of Rs.11,94,680/-, 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 and the insurer was saddled with the liability, (for short, the impugned award).

2. Facts of the case, in brief, are that the Claimant Randeep Singh Rana invoked the jurisdiction of the Tribunal for grant of compensation to the tune of Rs.25.00 lacs, as per the break-ups given in

the claim petition, on the ground that he became victim of a vehicular accident which took place on 22nd April, 2003 at about 1.00 p.m. near village Targhel, District Bilaspur, H.P. It was alleged that on the given day, the claimant was traveling in bus bearing registration No.HP-40-9942 and when the said bus reached at village Targhel, a truck bearing registration No.HP-13-0669 came from opposite direction and struck with the bus, as a result of which the claimant sustained injuries, was taken to Zonal Hospital, Hamirpur and his arm was amputated, hence the Claim Petition filed by the claimant.

3. The respondents filed replies to the claim petition and resisted the same on various grounds.

4. On the pleadings of the parties, the following issues were settled by the Tribunal:

> *"1. Whether the accident took place due to the rash or negligent driving of respondents No.2 and 5, as alleged? OPP*
>
> *2. If issue No.1 is proved, to what amount of compensation the petitioner is entitled to and from which of the respondents? OPP*
>
> *3. Whether the respondents No.2 and 5 were not having valid and effective driving license, as alleged, if so its effect? OPR-3&6*
>
> *4. Whether the truck in question was insured, as alleged? OPR-4*
>
> *5. Relief."*

5. In order to prove his case, the claimant examined four witnesses, while the respondents examined seven witnesses in all.

6. The Tribunal, after scanning the entire evidence and the record, held that the accident in question was not the outcome of contributory negligence of the drivers of the bus and the truck, but the accident occurred only due to the rash and negligent driving of the bus driver. Accordingly, the Tribunal saddled the owner of the bus with the liability and directed the insurer to indemnify. The owner and the driver of the truck stand exonerated by the Tribunal.

7. The insurer of the bus, feeling aggrieved, has questioned the impugned award on the ground that the accident was the outcome of contributory negligence and the Tribunal has fallen in error in holding that the accident had occurred only due to the negligence of the bus driver.

8. The claimant has questioned the impugned award on the ground of adequacy of compensation.

9. The owner and the driver of the offending bus have not questioned the impugned award on any count, thus the same has attained finality insofar as it relates to them.

10. The question to be determined in FAO No.250 of 2007, (appeal of the claimant), is - whether the amount awarded by the Tribunal is inadequate?

11. I have gone through the impugned award. The entire income of the claimant/injured has been taken into consideration while granting the compensation. Despite the fact that the

claimant was injured, is still in service and receiving the salary. However, it is also the fact that due to the aforesaid accident, the injured/claimant suffered permanent disability, which has rendered his life miserable, has lost marriage prospects, charm and amenities of life and even his physical frame was also shattered. Thus, the Tribunal has held the claimant entitled to the sum of Rs.11,94,680/- under various heads as under:

"i) Estimated future loss of income	*Rs.11,16,900/-*
ii) Pain and suffering	*Rs.25,000/-*
iii) Loss of amenities of life	*Rs.50,000/-*
iv) Transportation charges	*Rs.2,780/-*
Total:	*Rs.11,94,680/-."*

12. While calculating the compensation, the Tribunal has rightly made observations in paragraphs 32 to 40 and no fault can be found with the said findings recorded by the Tribunal.

13. Having said so, the amount cannot be said to be inadequate, is rather just and appropriate. Accordingly, the appeal filed by the claimant merits to be dismissed and the same is dismissed as such.

14. Coming to FAO No.182 of 2007, the learned counsel for the appellant/insurer has argued that the Tribunal has fallen in error in fastening the liability upon the appellant solely, while the accident was the outcome of contributory negligence of both the offending vehicles. The argument is devoid of any force for the following reasons.

15. The Tribunal has recorded reasons in paragraph 18 of the impugned award for holding that the accident was the outcome of rash and negligent driving of the bus driver. The said finding recorded by the Tribunal has neither been questioned by the owner of the bus nor by the driver. Therefore, it does not lie in the mouth of the insurer to claim that the accident was not the outcome of rash and negligent driving of the bus driver, but was the outcome of contributory negligence. It is apt to reproduce paragraph 18 of the impugned award hereunder:

> *"18. In clear and unequivocal terms, PW-2 has admitted that the truck was stopped and was stationary on the left side of the road at the place of accident and after seeing the deep gorge, he negotiated the vehicle towards his side. He has also admitted that he has negotiated the same to its extent. Though he has denied that after causing the accident, he stopped the vehicle after 100 Mts. away, but volunteered the same was stopped at about 20 yards. He has denied that he could not apply the brakes, as such, caused the accident."*

16. The claimant in paragraph 24 of the Claim Petition has pleaded that the driver of the truck came from opposite side in a very high speed and struck with the bus. However, the claimant, while appearing in the witness box as PW-1, has specifically stated that the accident occurred due to the rash and negligent driving of both the drivers.

17. The owner and the driver of the bus, (respondents No.1 and 2 before the Tribunal), have filed joint reply and denied their liability, and pleaded that the accident was the outcome of rash and negligent driving of the truck driver. The owner and the driver of the truck have also filed separate replies and pleaded that the truck was stationary and was not being driven at the relevant point of time.

18. I have also gone through the statement of the driver of the bus, who appeared in the witness box as RW-2 (wrongly recorded as PW-2 in paragraph 18 supra). He has admitted in his cross examination that the truck was stationary at the time of accident. It was also admitted by this witness that he stopped the bus at a distance of 20 meters after it was hit with the truck. Thus, the question of contributory negligence does not arise.

19. Having said so, the Tribunal has rightly held that the bus driver had driven the offending bus rashly and negligently and caused the accident. Therefore, the liability to indemnify was rightly fastened on the insurer/appellant.

20. It may be placed on record that the challan was presented against the truck driver, which too, has resulted in his acquittal.

21. As a consequence of the above discussion, the appeal filed by the insurer i.e. FAO No.182 of 2007 merits to be dismissed and the same is dismissed as such.

22. Both the appeals are dismissed accordingly.

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

M/S Oriental Insurance Company ...Appellant.
Versus
Smt. Manu Devi & others ...Respondents.

FAO No. 248 of 2007
Reserved on : 14.11.2014
Decided on: 21.11.2014

Motor Vehicle Act, 1988- Section 166- Son of the claimants had died in a motor vehicle accident- MACT awarded amount of Rs. 2,10,000/-- claimants had pleaded that deceased was earning Rs. 5,000/- per month, however, MACT had assessed income as Rs. 2,500/- per month- held, that even if, he was working as labrourer his wages cannot be less than Rs. 200/- per day- he would not have earned less than Rs.4,500/- and the loss of dependency would not be less than Rs. 3,000/- per month- multiplier of 10 would be applicable- thus, the tribunal had assessed the compensation on the lower side. (Para-14 and 15)

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

For the respondents: Mr. V.S. Chauhan, Advocate, for respondents No. 1 and 2.
Mr. Bhupender Pathania, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Appellant has called in question the award, dated 29th March, 2006, made by the Motor Accident Claims Tribunal-II, Shimla, H.P. (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 7-R of 04/02, titled as Smt. Manu Devi and another versus Sh. Suresh Kumar and another, whereby compensation to the tune of Rs. 2,10,000/- with interest @ 7.5% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the appellant-insurer was saddled with liability (hereinafter referred to as "the impugned award"), on the grounds taken in the memo of appeal.

2. The claimants and the driver-cum-owner 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 amount awarded is excessive and the driver was not having valid and effective driving licence and had driven the vehicle in breach of the mandate of law and the insurance policy.

Brief facts:

4. Shri Surjeet Singh, son of the claimants, was travelling in Armada Jeep, bearing registration No. HP-10-907, on 18th February, 2002, at about 3.30 p.m., was being driven by its owner-cum-driver, namely Shri Suresh Kumar, rashly and negligently, met with the accident near Summerkot, Tehsil Rohru, District Shimla and rolled down into a nullah. He sustained injuries, was taken to Civil Hospital, Rohru and died. FIR No. 19 of 2002 was lodged at Police Station Rohru.

5. The claimants have sought compensation to the tune of Rs.10,40,000/-, as per the break-ups given in the claim petition, on the ground that he was the only son of the claimants, was undergoing education and was also having income from agricultural and horticultural vocations.

6. The insurer and the driver-cum-owner have contested the claim petition on the grounds taken in the respective memo of objections.

7. Following issues came to be framed by the learned Tribunal on 16th January, 2003:

> *"1. Whether respondent No. 1 was driving jeep bearing No. HP-10-0907, on 18.2.2002 at about 3:30 PM near Samarkot, Distt. Shimla, HP in rash and negligent manner resulting in death or deceased Surjeet Singh, as alleged? OPP*
>
> *2. If issue No. 1 is proved, whether the petitioners are entitled for compensation? OPP*
>
> *3. Whether claim petition is not legally maintainable, as alleged? OPR*
>
> *4. Whether vehicle in question was being driven in violation of the terms and conditions of Insurance policy and without effective driving licence, as alleged? OPR*
>
> *5. Relief."*

Issue No. 1:

8. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that Shri Suresh Kumar,

driver of the offending vehicle, had driven the offending vehicle rashly and negligently on 18th February, 2002, caused the accident, which resulted the death of Shri Surjeet Singh. The findings returned by the Tribunal on issue No. 1 are not in dispute. Accordingly, the same are upheld.

9. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 and 4.

Issue No. 3:

10. The respondents have not led any evidence to prove that the claim petition was not maintainable. However, I have gone through the record. The claimants, being the victims of the motor vehicular accident, filed claim petition in terms of Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") for grant of compensation. Thus, the claim petition was maintainable. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 4:

11. It is apt to record herein that the respondents have not led any evidence to discharge the onus to prove issue No. 4. The appellant-insurer has failed to prove that the offending vehicle was being driven in violation of the terms and conditions of Insurance policy and without effective driving licence. Accordingly, the findings returned by the Tribunal on issue No. 4 are also upheld.

Issue No. 2:

12. Learned senior counsel for the appellant-insurer argued that the amount awarded is excessive. The argument is devoid of any force for the following reason:

13. A meager amount of Rs.2,10,000/- has been awarded in favour of the claimants. How can it be said to be excessive? The claimants-parents have lost their budding son, who was the source of their old age, hope and help.

14. There is specific averment contained in the claim petition that the deceased was a student and was also earning more than Rs. 5,000/- from agricultural and horticultural vocations. This has also been proved by the claimants, but the Tribunal has assessed his income as Rs.2,500/- per month. On what basis such assessment has been made, is not forthcoming.

15. Even, a labourer is earning Rs.200/- per day and if, at all, he would have been a labourer, he would have earned not less than Rs.4,500/- per month; was a bachelor, thus, it can be safely held that the claimants have lost their source of dependency to the tune of Rs.3,000/- per month.

16. Learned senior counsel for the appellant-insurer argued that the multiplier of '7' was applicable. The argument advanced is not correct. The Tribunal has rightly applied the multiplier of '10' while keeping in view the age of the deceased and the claimants.

17. Having said so, the appellant-insurer has failed to carve out a case for interference. Accordingly, the appeal is dismissed and the impugned award is upheld.

18. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque.

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

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

Smt. Poonam ... Petitioner/Respondent
Vs.
Sh. Virender Chauhan ..... Respondent/Petitioner

CMPMO No. 162 of 2014.
Reserved on: 14.11.2014
Date of decision: 21.11.2014

Hindu Marriage Act, 1955- Section 24- Petitioner claimed that she is pursuing her studies of Ph.D. and is residing in girl's hostel of Kurukshetra, University- she had no source of income- Court awarded maintenance @ Rs. 2,500/- per month and Rs. 5,000/- as litigation expenses- held, that the husband is bound to maintain his wife - husband had not declared his income and had not denied the averments of the wife that his income was Rs. 35,000/- per month- As per the pay scale uploaded on the official website of the school, the TGT was getting Rs. 35,000/- as salary- teachers and administrative staff are entitled to free food and accommodation, therefore, in these circumstances, the maintenance of Rs. 2,500/- per month and litigation expenses of Rs. 5,000/- cannot be said to be excessive, rather, wife held entitled for maintenance @ Rs.10,000/- per month. (Para-10 to 18)

For the petitioner : Mr. B.S. Attri with Mr. Ashish Verma, Advocates.
For the respondent : Ms. Shikha Chauhan and Mr. Jasbir Singh, Advocates.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge :

This petition, under Article 227 of the Constitution of India, for enhancement of the amount of maintenance pendente-lite and litigation expenses, is directed against the order passed by the learned District Judge (Forest), Shimla on 19.5.2014 whereby the application under Section 24 of the Hindu Marriage Act (for short 'Act') filed by the petitioner-wife for grant of maintenance pendente-lite and litigation expenses has been allowed thereby awarding the amount of maintenance pendente-lite to the tune of Rs.2,500/- per month from the date of filing of the application and Rs.5,000/- as litigation expenses.

2. The facts, in brief, are that the respondent herein, filed a petition under Section 13 of the Act for grant of decree of divorce against the petitioner-wife, which is pending before the Court below. The petitioner-wife is presently residing in Kurukshetra University in Girls'Hostel for pursuing her studies of Ph.D. The petitioner has submitted that she has no source of income and her mother is providing necessary financial assistance for pursuing her studies and in order to defend the divorce petition she needs maintenance pendente-lite at the rate of Rs.20,000/- per month and a sum of Rs. 35,000/- as litigation expenses. She also submitted that the respondent-husband is having sufficient means for providing maintenance allowance and litigation expenses to her.

3. The respondent-husband resisted and contested the application by filing reply in which he has submitted that the instant application is not maintainable and the petitioner-wife is also estopped to file this application on account of her acts, conduct, deeds etc. He has denied that the petitioner-wife needs maintenance allowance and litigation expenses as claimed by her. He also

denied that he is having sufficient means to provide her maintenance allowance and litigation expenses. According to him, he arranged for job and rented accommodation at Kurukshetra at the instance of the petitioner-wife, who wanted to pursue her studies at Kurukshetra, but he was compelled to resign his job as the petitioner-wife did not accompany him nor she lived with him. He further submitted that he has also no source of income because of the compelling circumstances created by the petitioner-wife. The respondent-husband has stated that the petitioner-wife has been provided financial assistance by the UGC to the extent of Rs.40,000/- which fact she had suppressed from the Court below and he prayed for dismissal of the application.

4. The learned Court below vide order dated 19.5.2014 allowed the application filed by the petitioner for grant of maintenance pendente-lite and litigation expenses, which is impugned in this petition.

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

6. According to petitioner, the amount of Rs.2,500/- awarded by the Court below towards maintenance and likewise Rs.5,000/- awarded towards litigation expenses is too meager taking into consideration the present day cost of living, price index and also taking into account the status of the parties.

7. Petitioner was awarded maintenance by the Court below on the pretext that she did not possess any independent source of income and has been pursuing her Ph.D studies in Kurukshetra University and staying in Girl's Hostel. Whereas, before this Court, the respondent moved an application, being CMP No. 11042 of 2014, for bringing on record the details of financial assistance received by the petitioner from the University Grants Commission. On the strength of these details, it was claimed that the very basis of awarding compensation was bad since the petitioner had already received by way of financial assistance a sum of Rs. 5,31,182/-.

8. Petitioner filed reply to this application and did not deny the receipt of this amount. However, it was stated that she had joined URS in March, 2008 in Kurukshetra University and in October, 2010, UGC had granted JRF for two years. Thereafter, in October, 2012, the UGC had granted SRF till March, 2013. The petitioner would then contend that this amount received towards financial assistance could not in any manner be termed to be an income, particularly when this financial assistance had come to an end on 31.3.2013.

9. According to petitioner, the respondent is working as TGT (Science) in Pine Grove School, Kuthar Road, Subathu and is earning well since it is a reputed school. In support of her claim, the petitioner has annexed a profile of the respondent uploaded by the school on its website. Based upon the contents of the profile, it is alleged that prior to this school, the respondent was working as a teacher in Senior School at Subathu till 2011. In rejoinder to this application, the respondent has not specifically denied these averments.

10. The obligation for Hindu male to maintain his wife is not a modern day concept but it existed even under the Shastric Hindu Law. According to the old Shastric Hindu Law, marriage between two Hindus is a sacrament - a religious ceremony which results in a sacred and a wholly union of man and wife by virtue of which the wife becomes a part and parcel of the body of the husband. She is, therefore, called Ardhangani. It is on account of this status of a Hindu wife, under the Shastric Hindu law, that a husband was held to be under a personal obligation to maintain his wife and where he dies, possessed of properties, then his widow was entitled, as of right, to be maintained out of those properties.

Mulla in his classic work on "Hindu Law," 14the Edn., dealing with the characteristic of the right of maintenance of a Hindu wife observes:

> *"A wife is entitled to be maintained by her husband, whether he possesses property or not. When a man with his eyes open marries a girl accustomed to a certain style of living, he undertakes the obligation of maintaining her in that style. The maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relationship, and quite independent of the possession by the husband of any property, ancestral or self-acquired."*

Mayne in his Treatise on "Hindu Law and Usage" 11th Edn., while trancing the history and origin of the right of maintenance of a Hindu wife says:-

> *"The maintenance of a wife by her husband is, of course, a matter of personal obligation, which attaches from the moment of marriage."*

11. Section 24 of the Act makes a provision in favour of a spouse having no independent income sufficient for her or his support and the necessary expenses of the proceedings for maintenance pendente-lite and expenses of proceedings in the following terms:

> "**S.24. Maintenance pendente-lite and expenses of proceedings.-** *Where in any proceeding under this Act it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly, during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable.*
>
> *[Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be]."*

12. The right of a wife for maintenance is an incident of the status or estate of matrimony. It is, therefore, the bounden duty of the husband to defray the wife's costs of any proceeding under the Act and also to provide for her maintenance and support pending the disposal of such proceeding. Any decision on the subject of alimony must necessarily depend on the circumstance of each case and no fix rule can be expected on the question.

13. The respondent has withheld his actual income from the Court. While on the other hand, it is proved on record that the petitioner currently has no independent income. Though, the learned counsel for respondent would contend that since the petitioner is not only well educated but is better educated than the respondent, therefore, she can support herself. I am afraid this cannot be the answer to the claim of the maintenance raised by the wife. The maintenance under this section is dependent upon, amongst other factors, the sufficiency of independent income. Therefore, when a claimant spouse has, at the time of claiming under this section, no independent or sufficient income, capable of supporting herself, it would be no answer to such a claim, based on the preponderance of probability, that she was qualified and could support herself.

14. As noticed earlier, respondent himself has not chosen to disclose his income. In para 3(d) of the petition, the specific averment has been made to the effect that the respondent is working in Pine Grove School, Subathu and is drawing salary of Rs. 35,000/- per month and besides this, he has sufficient

immoveable property at his native place which is coparcenary and joint family property and is also having building in the urban area of Chhota Shimla.

15. In reply to this para, it has been averred that the respondent-husband is neither regular employee of Pine Grove School nor is there any contract of employment with the management as the respondent-husband is only temporarily giving his services as a substitute teacher till the regular employee joins back. As regards the income of Rs.35,000/-, it is alleged that the same is exaggerated and is far from truth. It is also submitted that the respondent is living in a joint family and, therefore, he has no exclusive ownership or possession of any property.In view of the specific averment made by the petitioner, it was incumbent upon the respondent to have annexed his salary slip so as to ascertain the nature of his employment as also the total income received therefrom. In absence of such a certificate, an adverse inference is drawn against the respondent and the income stated by the petitioner will have to be taken as correct .

16. Even otherwise in terms of the profile uploaded on the official website of the school, the respondent is working as TGT (Science) and as per the pay scales uploaded on the official website of the school, the TGT is being paid initial basic of Rs.10,230/-, Grade Pay Rs.4,200/-, D.A. 80%, H.R.A. 7%, P.F. Rs. 750/- and Special Pay Rs.5000/-. This pay works out to be roughly Rs.35,000/- per month. That apart, all teachers and other administrative staff in addition to salary are entitled to free food and accommodation in the school as per the information available on the official website of the school.

17. Now, in case the total income of the respondent is taken as Rs.35,000/- per month, then the petitioner would be entitled to atleast 1/3rd of the income which works out to Rs.11,666/- and if rounded off, the same would be Rs.12,000/- per month.

18. In this factual backdrop, the award of maintenance at the rate of Rs.2,500/- per month cannot be sustained and is too meager and, therefore, the petitioner is held entitled to monthly maintenance of Rs. 12,000/- per month from the date of filing of the application till the disposal of the main petition. Likewise, the amount of Rs. 5,000/- awarded towards litigation expenses is also far too meager and in the given facts and circumstances, the ends of justice would be met in case the same is enhanced to Rs.10,000/-. Ordered accordingly.

19. Resultantly, the petition succeeds and is disposed of in the aforesaid terms, so also the pending application(s), if any.

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

Smt.Rubi Sood and another .....Appellants/Non applicants.

Versus

Major (Retd.)Shri Vijay Kumar Sood and others .....Respondents/Applicants.

CMP No.15975 of 2014 in RSA No.436 of 2000.
Reserved on: 14.11.2014.
Date of decision:21st November, 2014.

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff claimed that the history and background of the title of the plaintiffs were not given in the plaint, though evidence was led and this is a technical defect - held, that application was filed when the respondents were confronted during the course of hearing of appeal with the fact that evidence was not in

accordance with pleading- amendment has been filed with an intention to fit the pleadings with the evidence already adduced, which is not permissible- the opposite party cannot be placed in the same position as if the pleadings had been correct- therefore, application is liable to be dismissed. (Para-13 to 15)

Code of Civil Procedure, 1908- Order 23 Rule 1- Application filed to withdraw the suit with liberty to file a fresh suit on the same cause of action on the ground that pleadings are not in accordance with the evidence which has been led- held, that suit can be allowed to be withdrawn due to a formal defect which does not affect the merit of the case- permission cannot be granted mechanically when the suit is originally weak- a statement by the plaintiff that there is a formal defect is not sufficient and the plaintiff is required to satisfy the Court that defect is a formal defect - since, no such defect was shown, hence, application is dismissed. (Para- 18 to 21)

Cases referred:

Mahendra Meheta and others v. Amaresh Sarkar, AIR 1991 Orissa 1

Khali v. Sadhaba Bewa, AIR 1967 Orissa 58 ((1967) 33 Cut LT 65)

Nrisingh Prasad Paul v. Steel Products Ltd., AIR 1953 Cal 15: (1952) 89 Cal LJ 140)

Beni Pershad Bhargava v. Narayan Glass Works, Makhanpur, AIR 1949 Ajmer 19

Jhara Dasiani v. Magata Das 1971(2) C.W.R 1004,

Bhagavatula Gopalakrishnamurthi v. Dhulipalla Sreedhara Rao AIR 1950 Mad 32: ((1949) 2 MLJ 421),

Siddik Mahomed Shah v. Mt. Saran AIR 1930 PC 57 (1): (58 MLJ 7)

Hindustan Commercial Corporation, Cuttack v. Bank of Baroda, Cuttack, (1983) 55 Cut LT 219.

Debashis Singha Roy & Ors. vs. Tarapada Roy & Ors. 2001 (2) CCC 30 (Cal.)

Ramrao Bhagwantrao Inamdar and another vs. Babu Appanna Samage and others AIR 1940 Bombay 121 (FB)

K.S. Bhoopathy and others vs. Kokila and others (2000) 5 SCC 458

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 Vashisht, Advocate, for applicants/ respondents No.5, 7 to 9.
		Mr.Bhupender Gupta, Senior Advocate with Mr.Neeraj Gupta, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge .

This application has been preferred by the applicants/ respondents under Order 6 Rule 17 read with Sections 151 and 153 CPC or in the alternative under Order 23 Rule 1 CPC with the prayer that the applicants-plaintiffs be allowed to amend the plaint or in the alternative the plaintiffs be allowed to withdraw the suit with permission to file fresh on the same cause of action.

2. It is averred by the applicants-plaintiffs that they are owners of 1/4th undivided share in Shop No.72, Lower Bazar, Shimla standing built upon land comprised in Khasra No. 313, Bazar Ward, Barra Shimla and during the

course of arguments in the case, it was found that due to an oversight and inadvertent mistake, history and background of the title of the plaintiffs was not been given in the plaint, though evidence was led in this behalf which is a technical defect in the pleadings of the plaintiffs. It is further averred that the plaintiffs are owners of 1/4th share in the shop in question through their predecessors-in-interest late Shri Kedar Nath Sood and Shri Sansar Chand Sood. During the pendency of the case, the original plaintiff No.2 and 3 have died and their legal representatives have been brought on record. Similarly, original defendant No.1 and 2 have also died and name of defendant No.2 has been deleted from the array of the defendants and legal heir of original defendant No.1 has been brought on record as appellant No.1.

3. The plaintiffs have averred that with a view to overcome the technical defect in the pleadings, lest the plaintiffs are non-suited on this count, they want to amend the plaint by adding Para No.2A to the plaint to the following effect:-

> "2A. That the said 1/4th share in the suit property and adjoining shop No.72/1 originally belonged to Shri Tikhu Mal s/o Shri Mukadi Mal and Shri Khusi Lal, s/o Shri Hira Lal Sood who vide sale deed dated 15th February, 1926 duly registered in the Office of the Sub Registrar, Shimla, sold their undivided ¼ share in the said properties 72 and 72/1 in favour of Shri Mukand Lal s/o Shri Bhandari Mal and Shri Sansar Chand s/o Shri Shiv Dayal. Shri Mukand Lal aforesaid sold his 1/8th share in shop No.72 and 72/1 to Shri Kedar Nath, s/o Shri Shiv Dayal vide sale deed dated 15.2.1926 duly registered with the Sub Registrar, Shimla. In the original sale deed of 1926 shop No.72 by mistake and drafting error has wrongly been mentioned as shop No.72/2 and the said mistake has also been repeated in the subsequent sale deed of Shri Mukand Lal. The said inadvertent mistake was also carried forward in the Municipal records for some time but later on rectified when mistake was discovered. In fact on Khasra No.313, Bazar Ward, Barra Shimla there are only two shops, that is shop No.72 and 72/1. Shop No.72/2 has never been in existence at all and reference to shop No.72/2 in the sale deed is a drafting error/defect. In the sale deeds of 1926 and subsequent sale deed of December, 1977 executed by Dr.Mukand Lal in favour of Shri Kedar Nath, said two shops are properly identified by permanent boundaries which fact is also mentioned in the sale certificate of Shri 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 and dimensions of the properties are on the east 21 feet, on the west 25 feet, on the south 29 feet, on the north 28 feet, total being 644 square feet. Even as on the date the boundaries of property No.72 and 72/1 are the same and the dimensions of shop No.72 and 72/1 on the spot are also the same as also in the revenue record right from 1907 onward till date. The said two properties are encompassed in the said dimensions in the papers as also in the record. Thus reference of shop No.72/2 in sale Deeds was an error/defect. In fact, reference to 72/2 is reference to shop No.72."

4. It is also averred that due to subsequent developments in the wake of death of parties, the plaintiffs want to make consequential amendments in Para 1 of the plaint to bring the pleadings in consonance with latest memo of parties by deleting the last two lines of Para 1 of the plaint and substitute it with following lines:-

> "deceased defendant No.1 late Shri Ajay Kumar and grandmother of Plaintiff No.1 and 3 to 7"

Similarly, to bring the pleadings in consonance with amended memo of parties, Para 2 of the plaint would require formal amendments by adding the word

"original" a in line No.4 after the word i.e. and in line No.6 after the word inherited by and before the word plaintiff by and in last line of Para 2 before the word defendant No.1.

5. The plaintiffs have averred that the said amendments are necessary to determine the real matter in controversy between the parties. The plaintiffs do not want to lead any further evidence in the case after amendment as they have already led evidence in the case to the effect that shop No.72/2 was never in existence. No prejudice will be caused to the defendants in case the amendment is allowed. It is further averred that the amendment so sought is only clarificatory in nature giving the history and background of the property which was omitted in the original plaint, though oral and documentary evidence about the history and background of the property has been led by the plaintiffs. Smt.Udhi Devi was owner of 3/4th share in shop No.72, Lower Bazar, Shimla and the only question involved is as to who is owner of remaining 1/4th share and to determine this point, the amendment is all the more necessary. It is averred that the suit is likely to fail for the said technical and formal defect in the pleadings, though evidence has come that on the spot there are only two shops i.e. shop No.72 and 72/1. Lastly, it is averred that in these circumstances there are sufficient grounds for allowing the plaintiffs to withdraw the suit and institute fresh suit, if necessary, for the subject matter of the suit or part of claim thereof with permission to file the same on the same cause of action, hence this application.

6. The non-applicants/appellants filed reply to this application and stated that a joint application under Order 6 Rule 17 and under Order 23 Rule 1 CPC is not competent and maintainable and the present application is liable to be dismissed on this score alone as the applicants have failed to make out a case for granting permission to them for filing fresh suit on the same cause of action. There is no technical or formal defect in the plaint upon which the suit of the applicants may fail and the same is likely to be dismissed on merits.

7. It is averred by the non-applicants/appellants that the application under Order 6 Rule 17 CPC is not competent and maintainable at this belated stage after a period of 25 years of filing of the original suit without explaining as to why the said amendment was not applied for at the earlier stage. The grounds stated in the application are not sufficient grounds for allowing the applicants to amend the plaint by changing the entire complexion of the suit. In case the amendment so sought is allowed, it would totally displace the non-applicants and set up a new case in favour of the applicants. The case was finally heard by the trial Court where also a similar plea was raised on behalf of the non-applicants, however, the applicants have been insisting upon what they had stated in the plaint. After the judgment was passed by the trial Court, the matter was again argued on behalf of the non-applicants before the appellate Court where no such plea was raised by the applicants and got a judgment from the appellate Court. It is after the present appeal which was filed in the year 2000, in which the applicants had filed a caveat petition and no such pleas were raised and it is only after the matter was partly heard by the Hon'ble Court that the present application has been moved. Right from the year 1926, the applicants and their predecessors-in-interest had been accepting what was written in the sale deeds and even mutations were attested in favour of the predecessors-in-interest of the applicants and after the death of predecessor-in-interest of the applicants, the mutation of inheritance was further attested in the presence of the applicants where also no such plea was raised. The original owners of the property never raised an objection that shop No.72/2 was wrongly mentioned in the sale deeds and the sale deeds were never challenged by them and even in the plaint, said sale deeds have not been challenged by the applicants.

8. It is also averred that the present application is also not maintainable in view of the fact that the original plaint has been signed and

verified by Shri Vijay Kumar Sood, whereas, the present application has been sighed and supported by an affidavit of Shri Ashwani Kumar Sood, who appeared as PW-1 and nowhere stated that in place of property No.72, 72/2 had been mentioned. In his statement on oath, he has stated that 72/2 has been mentioned by mistake in place of 72/1 in the sale deed dated 15.2.1926. There is no technical or formal defect in the pleading as mentioned by the applicants and the application is also not maintainable in view of the fact that the proposed amended plaint has not been filed along with the application. The application is also not maintainable in view of the fact that Shri Deepak Sood, respondent No.6, is being represented by separate counsel, who has not signed the application and as such some of the applicants cannot be allowed to amend the plaint.

9. On merits, it is admitted that the plaintiffs are owners of 1/4th undivided share in shop No.72, Lower Bazar,Shimla, however, it is specifically denied that during the course of arguments, it was found that due to oversight and inadvertent mistake, history of the title of the plaintiffs has not been given in the plaint, though the evidence has been led in this behalf. It is denied that the said omission on the part of the plaintiffs is a technical or formal defect in the pleadings of the plaintiffs and further denied that the plaintiffs have been maintaining that they are owners of 1/4th share in the shop in question through their predecessor-in-interest late Shri Kedar Nath Sood and Shri Sansar Chand Sood and purchased 1/8th share of Shri Mukand Lal in shop No.72/2 and 72/1 in the year 1971 vide registered sale deed which was never challenged and the mutation was also attested on the basis of sale deeds of the year 1926 and 1971.

10. The non-applicants have further averred that there is neither technical defect in the pleadings nor is any amendment required in the same and the applicants by way of amendment cannot be allowed to set up a new case after lapse of 25 years, especially the matter having been decided by two Courts and the applicants had ample time to seek amendment. Tikhumal and Hira Lal Sood had transferred 1/4th share in shop No.72/2 and 72/1 in favour of Mukand Lal, son of Shri Bhandari Mal and Shri Sansar Chand son of Shri Shiv Dayal. Mukand Lal further sold what he had purchased from Tikhumal and Hira Lal through sale deed executed in the year 1971. Tikhumal and Hira Lal Sood had never been the owners of Shop No.72 to the extent of any share and as such they had no right to transfer 1/4th share in shop No.72, Lower Bazar, Shimla. It is specifically denied that it was by mistake and drafting error that the shop No.72/2 was mentioned in place of 72 in the two sale deeds and subsequent mutations and revenue records. The original owners as well as their successor-in-interest never challenged the sale deeds or laid claim before any authority with respect to the same. It is denied that there were only two shops in the year 1926.

11. It is further claimed that as per the plan submitted by the applicants, there were three shops on the spot which fact is also confirmed in the sale deed executed by Himat Singh in favour of Smt.Udhi Devi and the boundaries mentioned in the sale deed executed by Shri Mukand Lal also do not tally with the sale deed executed in favour of Smt. Udhi Devi nor any dimension given in the sale deed. It is also denied that the reference to shop No.72/2 is in fact reference to shop No.72 and the non-applicants reserve their rights to file a complete reply to the para sought to be added by the amendment in case the amendment is ultimately allowed.

12. The non-applicants have denied that the amendment sought is necessary to determine the real controversy between the parties, rather applicants by way of amendment want to set a new cause of action which is not permissible under the law and even otherwise the amendment cannot be allowed to make it in consonance with the evidence. The evidence is to be in consonance with the pleadings. The present application is an abuse of process of law and in

case the application is allowed, the non-applicants will be greatly prejudiced. No copy of the proposed amended plaint has been supplied to the non-applicants. It is denied that the amendment is clarificatory in nature. The amendment is likely to change the entire complexion of the suit. It is denied that Udhi Devi was owner of 3/4th share in the shop, however, even if it is presumed that she was owner of 3/4th share in the shop, it will not lead to any inference that remaining 1/4th share is owner by the applicants. The fact regarding 1/4th share in the property can be decided on the basis of pleading and evidence led by the parties. It is also denied that in the evidence it has come on record that there are only two shops. There are no grounds for allowing the plaintiffs to withdraw the suit with permission to file a fresh suit on the same and similar cause of action with respect to the property which is the subject matter of the suit and in case the applicants want to withdraw the suit unconditionally, the non applicants have no objection for the same. The non-applicants accordingly prayed for dismissal of the application with costs.

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

13. The learned counsel for the applicants-respondents has argued that there is a technical defect in the pleadings and the proposed amendment is necessary to adjudicate the real matter in controversy between the parties and the applicants-respondents also do not want to lead any further evidence in case the amendment is allowed as the evidence in tune with the proposed amendment is already on record. To my mind, it is not so simple a proposition as has been argued by the learned counsel for the applicants-respondents. The case has been heard at length on 28.08.2014 and 29.08.2014 and when during the course of hearing the respondents were confronted with their evidence being not in tune with the pleadings, they sought time for seeking amendment of the plaint.

14. A perusal of the proposed amendment would show that the same has been preferred only with the intention to fit the pleadings with the evidence already adduced which is not permissible in law. (***Refer: AIR 1991 Orissa 1 Mahendra Meheta and others*** *v.* ***Amaresh Sarkar, AIR 1967 Orissa 58 ((1967) 33 Cut LT 65) (Khali v. Sadhaba Bewa), AIR 1953 Cal 15: ((1952) 89 Cal LJ 140) (Nrisingh Prasad Paul v. Steel Products Ltd.), AIR 1949 Ajmer 19 (Beni Pershad Bhargava v. Narayan Glass Works, Makhanpur), 1971(2) C.W.R 1004 (Jhara Dasiani v. Magata Das), AIR 1950 Mad 32: ((1949) 2 MLJ 421), (Bhagavatula Gopalakrishnamurthi v. Dhulipalla Sreedhara Rao), AIR 1930 PC 57 (1): (58 MLJ 7) (Siddik Mahomed Shah v. Mt. Saran) and (1983) 55 Cut LT 219 (Hindustan Commercial Corporation, Cuttack v. Bank of Baroda, Cuttack).***

15. It is well settled that if the evidence is not in consonance with the pleadings, it may be thrown out and, at this stage, the plaintiffs-respondents cannot be permitted to file this application as the same is not bonafide and it is intended to fill-up lacunas in the case. In case the amendment is allowed, the other party cannot be placed in the same position as if the pleadings had been originally correct. The injury now caused to the defendants would be such that the same cannot be compensated in any terms much less in monetary terms.

16. Insofar as the question of permitting the plaintiffs to withdraw the suit, at this stage, with liberty to file the same on the same cause of action is concerned, this prayer also cannot be granted to them.

17. Order 23 Rule 1 CPC reads as under:-

> *"[**1.Withdrawal of suit or abandonment of part of claim**.- (1) At any time after, the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:*

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject- matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.]"

18. The only kind of defect which attracts the applicability of Order 23, Rule 1(3) CPC is formal defect. The formal defect is a defect of form described by a rule or procedure. The formal defect connotes defects of various kinds not affecting the merits of the case. In ***Debashis Singha Roy & Ors.*** *vs.* ***Tarapada Roy & Ors. 2001 (2) CCC 30 (Cal.),*** the Calcutta High Court has held that non-joinder of parties and non-description of suit land is not a formal defect.

19. A suit cannot be allowed to be withdrawn for a defect of substance. (*See*: ***Ramrao Bhagwantrao Inamdar and another*** *vs.* ***Babu Appanna Samage and others AIR 1940 Bombay 121 (FB*)**. The court cannot be oblivious to the fact that no litigant can be allowed to file suit one after another on the same cause of action only for the purpose of keeping alive the dispute between the parties to be reopened at the discretion of the plaintiff. This would not only causes harassment to the parties against whom it is filed, but it is unnecessary impart on the public exchequer and unnecessary load on the court time. The grant of leave envisaged in sub-rule (3) of rule -1 of Order 23 CPC is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection because this provision is founded on public policy.

20. It is settled law that permission to withdraw the suit with liberty to file a fresh suit cannot be granted mechanically and the court is duty bound to satisfy itself that there exist proper grounds for granting such permission. Such permission cannot be resorted to when the claim set out in the original suit is weak. The Hon'ble Supreme Court in ***K.S. Bhoopathy and others*** *vs.* ***Kokila and others (2000) 5 SCC 458*** has held as follows:-

"13. The provision in Order XXIII, Rule 1, C.P.C. is an exception to the common law principle of non-suit. Therefore on principle an application by

a plaintiff under sub-rule (3) cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule (1). In the former it is actually a prayer for concession from the Court after satisfying the Court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided, (1) where the Court is satisfied that a suit must fail by reason of some formal defect, and the other where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule (1) is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or Courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate Court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII, Rule 1(3), C.P.C. for exercise of the discretionary power in permitting the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower Courts and inordinate delay in disposal of the cases.

17. From the above it appears that the approach of the High Court was that the plaintiff should have prayed for declaration of title which they had omitted to include in the plaint. It was for the plaintiffs to frame their suit in any form as advised. If they felt that there was a cause of action for declaration of their title to the suit property they could have made a prayer in that regard. If they felt that a declaration of their right to exclusive user of the pathway was necessary they should have framed the suit accordingly. On the other hand the plaintiffs merely sought a decree of injunction permanently restraining the defendants from disturbing their right of user of the property. From the facts and circumstances of the case as emanating from the judgments of the trial Court and the first appellate Court it is clear that the plaintiffs realised the weakness in the claim of exclusive right of user over the property and in order to get over the findings against them by the first appellate Court they took recourse of Order XXIII, Rule 1(3), C.P.C. and filed the application for withdrawal of the suit with leave to file fresh suit. The High Court does not appear to have considered the relevant aspects of the matter. Its approach appears to have been that since the interest of the defendants can be safeguarded by giving them permission for user of the pathway till adjudication of the controversy in the fresh suit to be filed, permission for withdrawal of the suit as prayed for can be granted. Such an approach is clearly erroneous. It is the duty of the Court to feel satisfied that there exist proper grounds/reasons for

granting permission for withdrawal of the suit with leave to file fresh suit by the plaintiffs and in such a matter the statutory mandate is not complied by merely stating that grant of permission will not prejudice the defendants. In case such permission is granted at appellate or second appellate stage prejudice to defendant is writ large as he loses the benefit of the decision in his favour in the lower Court."

21. A mere statement by the plaintiff that there is a formal defect in the plaint and form in the suit is not enough. As already observed earlier, a formal defect is a defect of form unrelated to the case of the plaintiff on merits and is required to be spelt out specifically in the application seeking permission to withdraw the suit.

22. Accordingly, there is no merit in the application and the same is dismissed with no order as to costs.

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

United India Insurance Co. Nangal .....Appellant
Versus
Sh. Gaurav Sharma and others ...Respondents

FAO (MVA) No. 350 of 2007
Date of decision: 21st November, 2014.

Motor Vehicle Act, 1988- Section 166- Insurer claimed that accident was result of contributory negligence – however, no evidence was led by the insurer to prove this fact- evidence of the claimants showed that driver was driving the vehicle in a rash and negligent manner- driver had not questioned this finding, hence, plea of the insurer was not acceptable. (Para- 7 and 8)

For the appellant: Mr. Sanjeev Kuthiala, Advocate.
For the respondents: Mr. Ashok Sood, Advocate, for respondents No. 1 to 3.
Mr. S.D. Gill, Advocate, for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The Insurance Company has made a futile exercise by filing appeal, in terms of Section 173 of the Motor Vehicles Act, for short "the Act", questioning the impugned award dated 25.6.2007, made by the Motor Accident Claims, Tribunal, Shimla in MACC No.21-S/2 of 2003, tilted *Sh. Gaurav Sharma and others vs. Smt. Swaran Kaur and others,* hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The claimants had filed a claim petition before the Tribunal for the grant of compensation to the tune of Rs.8 lacs, as per the break-ups given in the claim petition.

3. The respondents in the claim petition, resisted and contested the claim petition and following issues, on the pleadings of the parties, came to the framed:

(i) Whether the death of Kewal Krishan took place due to rash and negligent driving of truck NO.HP-20A-2423 by the respondent, Sukhdev? OPP

(ii) In case the issue No.1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP

(iii) Whether the petition is not maintainable? OPR

(iv) Whether the petitioner himself was negligent and responsible for causing the accident? OPR

(v) Whether this Tribunal has no jurisdiction to entertain the petition? OPR

(vi) Whether the petition is barred by limitation? OPR

(vii) Whether the vehicle in question was being driven in violation of the terms and conditions of the insurance policy? OPR

(viii) Whether the driver of the vehicle in question was not having a valid and effective driving license? OPR

(ix) Whether the petition is bad for non-joinder of parties? OPR

(x) Relief.

4. The claimants, driver and owner have examined the witnesses but the insurer has not led any evidence.

5. The Tribunal, after scanning the evidence held that the claimants became victims of a vehicular accident, which was caused by driver, namely, Sukhdev, while driving offending truck bearing registration No.HP-20A-2423, rashly and negligently on 13.8.2002, at 10.05 a.m. at place Stag Hotel, Parontha More near Kandaghat. The Tribunal also held that the claimants are entitled to compensation to the tune of Rs.1,90,780/- and saddled the insurer with the liability with right of recovery, on the ground that the owner has committed willful breach, in terms of Section149 of the Act, read with the Insurance Policy.

6. The claimants, driver and insured have not questioned the impugned award on any aground, thus, it has attained finality, so far it relates to them.

7. The insurer has questioned the impugned award on the ground that the accident was outcome of the contributory negligence. The insurer has not led any evidence, thus the evidence led by the claimants has remained un-rebutted.

8. I have gone through the record. The claimants have proved that driver Sukhdev had driven the offending vehicle rashly and negligently. He has not questioned it, has attained finality. The findings recorded on issue No. 1 are upheld accordingly.

9. The impugned award is not excessive in any way and the same is upheld.

10. The Tribunal has rightly recorded the finding that the owner has committed willful breach, which was not questioned by the owner/insured, has attained the finality against the insured.

11. Having said so, the appeal merits to be dismissed, accordingly it is dismissed and the impugned award is upheld.

12. The Registry is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award. The insurer is at liberty to lay motion before the Tribunal for effecting recovery from the owner.

13. Accordingly, the appeal stands disposed of alongwith pending applications, if any. Send down the record forthwith.

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

United India Insurance Company Ltd. ...Appellant.
Versus
Sh. Mohan Lal & others ...Respondents.

FAO No. 529 of 2008
Decided on: 21.11.2014

Motor Vehicle Act, 1988- Section 149- A cover note was issued which was valid from 16.9.2005 till 15.9.2005- insurer pleaded that cover note was issued without the payment of premium and the cover note was cancelled – held, that there is no evidence that cancellation of the policy was conveyed to the insured in absence of which the Insurance Company will be liable to satisfy the award.(Para-9 to 18)

Cases referred:

New India Assurance Co. Ltd. versus Rula and others, reported in AIR 2000 Supreme Court 1082

Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd., reported in 2007 AIR SCW 7948

United India Insurance Co. Ltd. versus Laxmamma & Ors., reported in 2012 AIR SCW 2657

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Ms. Poonam Gehlot, Advocate, vice Ms. Anu Tuli, for respondent No. 1.
Mr. Romesh Verma, Advocate, for respondent No. 2.
Nemo for respondent No. 3.
Mr. Lalit K. Sharma, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Appellant-insurer has invoked the jurisdiction of this Court by the medium of this appeal in terms of Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") and has called in question the award, dated 30th June, 2008, made by the Motor Accident Claims Tribunal-II, Solan, District Solan, H.P. (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 1-S/02 of 2006, titled as Mohan Lal versus Kishan Lal and others, whereby compensation to the tune of Rs.7,14,000/- came to be awarded in favour of the claimant and the appellant-insurer was saddled with liability (hereinafter referred to as "the impugned award"), on the grounds taken in the memo of appeal.

2. The claimant and the drivers-cum-owners and the insurer of the scooter have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

Brief facts:

3. The claimant had claimed compensation to the tune of Rs.10,00,000/-, as per the break-ups given in the claim petition, on the ground

that he became the victim of motor vehicular accident, which was caused by the driver, namely Shri Kishan Lal, while driving the car, bearing registration No. HP-01 A-0722, rashly and negligently on 23rd October, 2005, near Bye Pass Solan.

4. The respondents resisted the claim petition on the grounds taken in the respective memo of objections.

5. Following issues came to be framed by the Tribunal on 5th April, 2007:

"1. Whether the petitioner sustained injuries as a result of an accident involving vehicle bearing No. HP-01 A-0722 and scooter bearing No. HR-12 D-2329 due to rash and negligent driving of the offending vehicles by respondents No. 1 & 4? ...OPP

2. If issue No. 1 is proved in affirmative, whether the petitioner is entitled for compensation, if so, to what amount? ...OPP

3. Whether the petition is not maintainable? ...OPR-1-2 & 4-5

4. Whether the petitioner is estopped by his own acts, deeds and conduct from filing the present petition? ...OPR-1&2

5. Whether the accident took place due to rash and negligent driving of the Car by respondent No. 1, as alleged? ...OPR-4&5

6. Whether the Car No. HP-01 A-0722 was not insured with the respondent No.3? ...OPR-3

7. Whether the petitioner has no cause of action against the respondents No. 4 & 5? ...OPR-4&5

8. Whether the driver of the Car was not holding valid & effective driving licence at the time of accident? ...OPR-3

9. Whether the registration certificate, fitness certificate and permit papers of the Car were not valid nor effective? ...OPR-3

10. Whether the scooter was not insured with respondent No. 6? ...OPR-6

11. Whether the driver of the scooter was not holding valid and effective driving licence at the time of accident? ...OPR-6

12. Whether the scooter was not validly registered, if so, its effect? ...OPR-6

13. Whether the petitioner was pillion rider on the scooter and the respondent No. 6 is not liable to pay compensation to the petitioner? ...OPR-6

14. Relief."

Issue No. 1:

6. After scanning the evidence, oral as well as documentary, the Tribunal held that the claimant has proved that the driver, Shri Kishan Lal, had driven the offending vehicle, i.e. car, bearing registration No. HP-01 A-0722, rashly and negligently on 23rd October, 2005 and hit the scooter, bearing registration No. HR-12D-2329, and the claimant sustained injuries. Accordingly, issue No. 1 was decided in favour of the claimant and against driver of the car, namely Shri Kishan Lal. The findings returned on this issue are not in dispute, are upheld.

Issues No. 3 to 13:

7. The findings returned on issues No. 3 to 13 are also not in dispute for the reason that the claimant, owners-cum-drivers and the insurer of the scooter have not questioned the impugned award on any count. Thus, the findings returned by the Tribunal on issues No. 3 to 13 are also upheld.

Issue No. 2:

8. The only dispute in this appeal is - whether the owner-cum-driver of the car is to satisfy the award for the reason that the insurer is not liable to pay?

9. Learned counsel for the appellant-insurer argued that the cover note, which was proved by the insurer, is on record as Ext. RW-1, was issued without depositing the premium amount, was cancelled, thus, the appellant-insurer is not liable.

10. The Tribunal, after scanning the evidence and the documents on the file, held that the risk was covered in view of the fact that insurance cover, Ext. RW-1, was subsisting on the date of accident, i.e. 23rd October, 2005.

11. I have gone through Ext. RW-1. It contains details of the entire insurance policy. According to Ext. RW-1, the insurance policy was effective from 16th September, 2005, to 15th September, 2006, and one of the conditions contained is "The Period of Validity of this cover note will expire on 15/9/06". Thus, the validity of the cover note was till 15th September, 2006.

12. The appellant-insurer has not proved that the factum of cancellation of the cover note was conveyed to the insured.

13. According to the learned counsel for the appellant-insurer, it is a case of fraud. He was asked to show whether any action was drawn against the alleged erring official. He was unable to answer.

14. The Apex Court in a case titled as **New India Assurance Co. Ltd. versus Rula and others,** reported in **AIR 2000 Supreme Court 1082,** has held that the insurer has to mandatorily intimate the owner by way of notice about the cancellation of insurance policy and if the accident occurs between the period till the cancellation is conveyed, it is the insurer, who is liable. It is apt to reproduce para 11 of the judgment herein:

> *"11. This decision, which is a 3-Judge Bench decision, squarely covers the present case also. The subsequent cancellation of the Insurance Policy in the instant case on the ground that the cheque through which premium was paid was dishonoured, would not affect the rights of the third party which had accrued on the issuance of the Policy on the date on which the accident took place. If, on the date of accident, there was a Policy of Insurance in respect of the vehicle in question, the third party would have a claim against the Insurance Company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of Insurance Policy on the ground of non-payment of premium would not affect the rights already accrued in favour of the third party."*

15. The matter again came up for consideration before the Apex Court in **Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd.,** reported in **2007 AIR SCW 7948,** and the same principle has been laid down. It is apt to reproduce paras 26 to 28 of the judgment herein:

> *"26. We are not oblivious of the distinction between the statutory liability of the Insurance Company vis-a-vis a third party in the context of Sections 147 and 149 of the Act and its liabilities in other*

cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim.

27. A beneficial legislation as is well known should not be construed in such a manner so as to bring within its ambit a benefit which was not contemplated by the legislature to be given to the party. In Regional Director, Employees' State Insurance Corporation, Trichur v. Ramanuja Match Industries [AIR 1985 SC 278], this Court held :

> *"We do not doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but where such beneficial .legislation has a scheme of its own there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme."*

We, therefore, agree with the opinion of the High Court.

28. However, as the appellant hails from the lowest strata of society, we are of the opinion that in a case of this nature, we should, in exercise of our extra-ordinary jurisdiction under Article 142 of the Constitution of India, direct the Respondent No.1 to pay the amount of claim to the appellants herein and recover the same from the owner of the vehicle viz., Respondent No.2, particularly in view of the fact that no appeal was preferred by him. We direct accordingly."

16. In the case titled as **United India Insurance Co. Ltd. versus Laxmamma & Ors.,** reported in **2012 AIR SCW 2657,** the Apex Court has discussed the law developed on the issue and ultimately held that if cancellation order is not made or if the accident occurs till the cancellation is made and conveyed, the insurer is liable. It is profitable to reproduce para 19 of the judgment herein:

> *"19. In our view, the legal position is this : where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof."*

17. I have laid down the same principle in cases tilted as **M/s New Prem Bus Service versus Laxman Singh & another**, being **FAO No. 316 of 2008,** decided on 23rd May, 2014 and **FAO No. 35 of 2009,** titled as **National Insurance Company Ltd. versus Smt. Anjana Sharma & others,** being the lead case,

decided on 4th July, 2014. It is apt to reproduce paras 15 and 16 of the judgment rendered in **Anjana Sharma's case (supra)** herein:

> *"15. Admittedly, the cover note was issued alongwith the insurance policy. The cover note and the insurance policy are Ext. RW-2/B & Ext. RW-2/A in M.A.C.P. No. 38-G/2004 and Ext. RW-3/B and Ext. RW-3/A in MACP RBT No. 68-G/2010/2004, respectively. While going through the insurance policy and the cover note, one comes to an inescapable conclusion that it was issued on 28th April, 2003 and was valid up to 27th April, 2004. But, were cancelled on 29th April, 2003, without mentioning any reason. It is nowhere mentioned in the cover note that the premium amount was not received. Further, there is no evidence on the file in support of the fact that the amount was not deposited.*
>
> *16. Learned counsel for the appellant(s) was asked to show whether there is any evidence on the file to the effect that notice was given to the owner-insured about the cancellation of the insurance policy and the cover on 29th April, 2003, he failed to reply the same."*

18. Viewed thus, the Tribunal has rightly returned findings on this issue at page No. 11. Accordingly, the findings returned by the Tribunal on issue No. 2 are upheld.

19. Having said so, I am of the considered view that the Tribunal has rightly saddled the appellant-insurer with liability and this appeal merits to be dismissed; is dismissed and the impugned award is upheld accordingly.

20. Registry is directed to release the awarded amount in favour of the claimant strictly as per the terms and conditions contained in the impugned award.

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

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