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THE
INDIAN LAW REPORTS
HIMACHAL SERIES, 2014

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

October, 2014

Vol. LXIV (X)

Pages: HC 301 to 406

Mode of Citation : I L R 2014 (X) HP 1

Containing cases decided by the High Court of

Himachal Pradesh and by the Supreme Court of India

And
Acts, Rules and Notifications.

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

INDIAN LAW REPORTS

HIMACHAL SERIES

(October, 2014)

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SUBJECT INDEX

he is not entitled for the concession of bail- held, that the repeated and successive indulgence of the applicant in criminal activities and the fact that criminal cases were pending against him is necessary factor to be kept in mind while granting or refusing the bail- however, the Court can impose strict conditions to ensure that the applicant will not flee from justice and will not indulge in criminal activities- Bail granted with the appropriate condition.

Title: Madan Lal Vs. State of H.P. Page- 373

Constitution of India, 1950- Article 226- Case of the petitioner is covered by the judgment in case titled as ***Ms. Nisha Devi versus State of Himachal Pradesh and others, decided on 23.08.2007*** delivered by Himachal Pradesh Administrative Tribunal, Camp at Dharamshala- hence, respondents are directed to consider the case of the petitioners in accordance with the judgment and to pass the appropriate order within 6 weeks and liberty was granted to the petitioners to challange the order in case, same goes against the petitioners.

Title: Nigma Devi Vs. State of H.P. and another Page-301

Constitution of India, 1950 - Article 226- Himachal Pradesh Administrative Service Rules, 1973 read with the Himachal Pradesh Public Service Commission (Procedure & Transaction of Business and Procedure for the Conduct of Examinations, Screening Tests & Interviews Etc.) Rules, 2007- Himachal Pradesh Public Service Commission conducted the preliminary test for selecting the candidates for Himachal Pradesh Administrative Service, Class-I (Gazetted)- the answer key was displayed on the website and seven days' time was given for raising objections- some candidates raised objections- matter was referred to the Committee of Expert- result was prepared after taking note of the expert's opinion- held, that Court can interfere where the Key on the face of it appears to be wrong and the Commission fails to take note of the same- however, Public Service Commission had rectified the mistakes on the basis of the opinion of the Expert- therefore, there was no need for interference.

Title: Arvind Kumar Vs. H.P. Public Service Commission Page-303

Constitution of India, 1950- Article 226- Petitioner filed a Writ for quashing the order passed by Himachal Pradesh State Electricity Board demanding levy/charges-held, that the petitioner had not questioned the order passed by the Zonal Level Dispute Settlement Committee or the order passed by, Forum for Redressal of Grievances of Consumers of HPSEB or the order passed by Himachal Pradesh Electricity Ombudsman- authorities had exercised the powers and jurisdiction vested in terms of applicable law- Further, the dispute regarding tariff to be levied and demand to be made, are the disputed question of fact which cannot be decided in a Writ Petition.

Title: M/s. Delux Enterprises Vs. H.P.S.E.B. Page-368

Constitution of India, 1950- Article 226- Petitioner was appointed as a daily wage driver- his services were terminated on 22.12.2012 on the charges of misconduct- he approached Industrial Tribunal, which allowed the complaint- however, his joining report was not accepted by the respondent- explanation of the Officer was called by Labour Commissioner, after which joining report was accepted- however, services of the petitioner were not regularized- Department contended that the petitioner had not worked for 240 days in each calendar year and he is not entitled for regularization- held, that a person can be regularized only, if he is appointed by the Competent Authority on the recommendation of Selection Committee- petitioner had not placed any material on record to show that his appointment was made after the recommendation of the Selection Committee- further, no material was placed on record to show that any vacancy was lying vacant upon which petitioner could be regularized-hence the petitioner cannot be regularized.

Title: Bansi Ram Vs. State of H.P. Page-378

Constitution of India, 1950- Article 226- Petitioner was appointed as lecturer college cadre on contract basis- petitioner contended that she was entitled to be appointed on regular basis- respondent contended that the Government had sent a requisition for filling up 742 posts of lecturers in which 92 posts were reserved for persons with disability- however, Government withdrew the requisition except for the post reserved for disabled person- Government again sent a requisition for filling up 633 posts of lecturers on contract basis- Public Service Commission had recommended the names of 6 persons with disability, if recruitment appointment was given to handicapped persons they would become senior to the regular employee- held, that Commission had invited applications for the posts reserved for the persons with disability- the name of the petitioner was recommended by the Commission on regular basis- Department was not competent to appoint the petitioner on contract basis contrary to the recommendation of Public Service Commission- respondent directed to give appointment to the petitioner on regular basis.

Title: Ruchy Sharma Vs. State of H.P. and another Page-389

Constitution of India, 1950- Article 226- Petitioner was engaged as Gardner after completing the training- he was not regularized- according to the petitioner, respondents were taking the work of the clerk from the petitioner- respondent contended that petitioner was initially engaged for seasonal work subject to the availability of work- petitioner had not completed 180 days- it was further denied that respondent had taken work of the clerk from the petitioner- held, that the service of the petitioner can be regularized as per Recruitment and Promotion Rules after the appointment was made by the selection committee - further, regularization is dependent upon the existence of the vacant post- petitioner had not placed any record to show that there was regular vacancy in the department or that his appointment was made by a duly constituted Selection Committee- further, petitioner was engaged for a particular work which work came into end on

the completion of the season, therefore, petitioner was not entitled to be regularized or granted status of work charge employee.

Title: Chain Singh Vs. State of H.P. and others. Page-364

Constitution of India, 1950- Article 226- Petitioners were appointed on daily wages in the Department in the year 1988- work charge status was granted to them after completion of 10 years- their services were regularized in the year 2007 and they worked till 2010- however, pension was not granted to them - held, that the services rendered by petitioners as work charge employees has to be counted towards qualifying service for pension.

Title: Shri Ram Vs. State of H.P. Page-374

Constitution of India, 1950 - Article 226- Petitioners who had not filed the objections to the answer key have lost their right and cannot file the Writ Petition.

Title: Arvind Kumar Vs. H.P. Public Service Commission Page-303

Constitution of India, 1950- Article 226- Power of Judicial Review- Court are not expert and they have to honour the opinion of the expert- they cannot substitute their opinion.

Title: Arvind Kumar Vs. H.P. Public Service Commission Page-303

Hindu Marriage Act, 1955- Section 24 - An application was filed by wife seeking maintenance on the ground that she had insufficient means to support herself or to meet her necessary expenses- husband contended that income of the wife was more than Rs. 40,000/- per month and that she was also taking tuitions- salary statement of the petitioner showed that she was getting gross salary of Rs. 47,991/- and net salary of Rs. 40,605/-- respondent was getting gross salary of Rs. 46,658/- and net salary of Rs. 42,038/-- held, that the mere fact that wife is working is not sufficient ground to refuse maintenance to her- however, when the wife claims that she is unable to maintain herself, it is for her to prove such inability- when husband was earning almost equal salary as the wife and this fact was concealed by the wife, she is not entitled for maintenance.

Title: Sushil Kumar Vs. Deepika Page-320

Indian Evidence Act, 1872- Section 65- An application filed for leading secondary evidence by filing typed copy of the judgment stated to be delivered by Learned Sub Judge 2nd Class, Mandi- report of the Copying Agency stating that the file was not treacable and the certified copy could not be supplied was also filed in support of the application- held, that the secondary evidence can be led when the original is lost or destroyed- there was no evidence to establish that the original existed and that the original

was lost or destroyed- no copy of the register was filed to prove this fact, therefore, the typed copy could not have been produced in evidence.

Title: Mohinder Kumar Goel Vs. Kusum Kapoor and others Page- 356

Indian Evidence Act, 1872- Sections 91 and 92- Independent witness had turned hostile, however, he had admitted his signature on the memo- held, that in view of the fact that independent witness had admitted his signature on the memo, he is estopped from deposing in variance with the contents of the memo, in view of Bar contained in Sections 91 and 92 of Indian Evidence Act his testimony cannot be used for discarding the prosecution version.

Title: Satpal Vs. State of H.P. Page-335

Indian Penal Code, 1860- Section 376- As per prosecution case, accused cousin of the prosecutrix, had raped her, however, no injuries were found on her person- hymen was found intact- Medical Officer was not sure, whether sexual intercourse had taken place or not- held, that in these circumstances accused is entitled to benefit of doubt.

Title**:** Manga Singh Vs. State of H.P. and others Page-381

Indian Penal Code, 1860- Sections 342, 376 and 506- As per the prosecution case, accused forcibly entered into the house of the prosecutrix and raped her- the prosecutrix had litigation with the family of the accused- she had earlier filed case against her sister-in-law which was cancelled- house of the prosecutrix was surrounded by the other houses, however, prosecutrix had not raised any alarm to connect the inhabitants of those houses- no injury was found on the person of the prosecutrix nor her clothes were torn- matter was reported to the police on the next day - no blood or semen was found on the underwear of the prosecutrix- held, that in these circumstances, acquittal of the accused was justified.

Title: State of H.P. Vs. Hardev Singh Page-342

Industrial Disputes Act, 1947- Section 25-G & H- dispute between the workman-employee and employer was raised before the Industrial Tribunal-cum-Labour Court- award was passed by the Labour Court- Writ Petition was preferred against the award which was dismissed- held, that the petitioner had failed to prove that workman had abandoned his job at any point of time- no notice was served upon workman- workman is entitled to protection in terms of Sections 25-G & 25-H- Appeal dismissed.

Title: The Executive Engineer HPPWD and anr. Vs. Attar Singh Page-377

Malicious Prosecution- plaintiff was working as Ex. En.- defendant was a class-D contractor- FIR was registered by the defendant against the plaintiff with the allegation that plaintiff had demanded bribe of Rs. 1,000/- from the defendant- however, plaintiff was acquitted by the Trial Court- plaintiff filed a suit for claiming damages for malicious prosecution- held, that plaintiff has to prove independently that the defendant had launched the prosecution

maliciously- no finding was recorded by the Trial Court that plaintiff had not accepted the money- on the other hand, it was stated in the notice served by the defendant upon the plaintiff that he had confessed to the recovery of Rs. 1,000/- in the presence of the witnesses- no reply was filed to the notice which shows that the plaintiff had accepted the averments of the notice, therefore, the plea of the defendant that plaintiff had accepted a sum of Rs. 1,000/- from the defendant is to be accepted as probable and the prosecution could not be said to be launched without reasonable and probable cause.

Title: D.D.Gautam Vs. Vimal Kishore Page-349

N.D.P.S. Act, 1985- Section 20- Accused 'M' had kept one black coloured bag on his lap and one attachi by his side- On their search, 10.500 kilograms of charas and Rs. 45,000/- were recovered - independent witnesses had turned hostile- however, they had admitted their signatures on the recovery memo- held, that once the witness had admitted his signature on the memo, he is estopped from deposing in variance with the contents of the memo, in view of bar contained in Sections 91 and 92 of Indian Evidence Act, hence, their testimonies cannot be used for discarding the prosecution version.

Title: Mukesh Kumar Vs. State of H.P. Page-331

N.D.P.S. Act, 1985- Section 20- As per prosecution case, accused 'S' was found in possession of 5 k.g of cannabis- held, that minor contradiction was discrepancy in the testimony of the official witnesses do not affect the prosecution version, when the prosecution witnesses had deposed substantially in accordance with the prosecution case.

Title: Satpal Vs. State of H.P. Page-335

N.D.P.S. Act, 1985- Section 20- Police had not associated any independent witness at the time of the recovery and the seizure of the contraband despite the fact that houses were situated at the distance of 500 meters at the place of the incident- police official was sent to bring scale and weight but the shopkeeper was not associated- the person who carried the ruqqa to the police station was also not examined- held, that in view of these infirmities, acquittal of the accused was justified.

Title: State of H.P Vs. Kuldeep Singh and others Page-345

N.D.P.S. Act, 1985- Section 20- Trial Court had awarded sentence of rigorous imprisonment of four years and fine of Rs. 40,000/- - an appeal was preferred by the State contending that the sentence was inadequate- another appeal was preferred by the convict on the ground that accused was wrongly convicted- held, that percentage of resin contents in stuff would not be a determinative factor of quantity- Moreover, as per notification issued by Government dated 18.11.2009- entire quantity would be a determining factor- accused was found in possession of 1 kg 200 grams charas which is a

commercial quantity- minimum punishment of 10 years and minimum fine of Rs. 10 lacs has been provided for the same- accused sentenced to undergo imprisonment for a period of 10 years and to pay a fine of Rs. 1 lac.

Title: State of H.P. Vs. Ganesh Kumar Page-394

N.D.P.S. Act, 1985 - Section 29- As per prosecution, accused 'M' was found 10 kg and 500 grams charas- accused 'L' was sitting beside him- held, that prosecution had not led any evidence to prove that accused L shared mens rea to carry charas by accused M-thus, acquittal of M was justified.

Title: Mukesh Kumar Vs. State of H.P. Page-331

N.D.P.S. Act- Section 29- Police had recovered 5 kg of charas of 'S'- charge-sheet was filed against 'R' on the ground that he was occupying the sheet adjacent to accused 'S'- held, that there was no evidence to connect accused 'R' with 'S'- hence, acquittal of the 'R' was justified.

Title: Satpal Vs. State of H.P. Page-335

N.D.P.S. Act, 1985- Section 42- Police had conducted the search of the Bus during which recovery of 5 kg. charas was effected- ruqqa and FIR were immediately sent to the police station- held, that there was substantial compliance of Section 42 of N.D.P.S. Act.

Title: Satpal Vs. State of H.P. Page-335

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit for declaration with the allegations that the parties are joint owners in possession to the extent of ½ share in the suit land, the defendants had manipulated the reduction of the share of the plaintiff from ½ share to ¼ share and the defendants had got land partitioned on the basis of wrong entries- defendants contended that plaintiffs were in possession of ¼ share- They relied upon the copy of the jamabandi and the order passed by Learned A.C. 1st Grade, Ghumarwin- Statement was made by predecessor-in-interest of the plaintiffs, and predecessor-in-interest of defendants No. 3 and 4 admitting that predecessor-in-interest of plaintiffs had ½ share in the suit property- However, there was no evidence to show that defendant No. 2 had authorized them to make statement- statement would not be binding upon the defendant No. 2- defendant No. 2 was also not summoned by a Compensation Officer- therefore, order passed by him was in violation of the principles of natural justice, which could not be relied upon- Appeal dismissed.

Title: Ram Dai & Ors. Vs. Kalan and Ors. Page-359

TABLE OF CASES CITED

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'B'

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Bhagwati Prasad vs. Delhi State Mineral Development Corporation, (1990)1 SCC 361

Bhuvnesh Kumar Dwivedi versus M/s Hindalco Industries Ltd., 2014 AIR SCW 3157

'H'

Hamidbhai Azambhai Malik versus State of Gujarat, AIR 2009 SC 1378

Himachal Pradesh Public Service Commission versus Mukesh Thakur and another, (2010) 6 Supreme Court Cases 759

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Kanpur University, through Vice-Chancellor and others versus Samir Gupta and others, (1983) 4 Supreme Court Cases 309

Karnail Singh versus State of Haryana, (2009) 8 SCC 539

'L'

Laxmi Sharma vs. Dr. Akash Deep 2012 (1) Shim. L.C. 74

'M'

Manish Ujwal & Ors. versus Maharishi Dayanand Saraswati University & Ors., 2006 AIR SCW 4703

Marwari Kumar and others vs. Bhagwanpuri Guru Ganeshpuri and another *AIR 2000 SC 2629*

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Mukesh Thakur and another versus Himachal Pradesh Public Service Commission, 2006 (1) Shim. LC 134

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'R'

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'S'

Showkat Ahmad Dar & Ors. versus State & Anr., 2012 (4) JKJ 141 [HC]

'T'

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The Secretary, West Bengal Council of Higher Secondary Education versus Ayan Das & Ors., 2007 AIR SCW 5976

'U'

Upinder Singh Lamba versus Raminder Singh, AIR 2012 Punjab & Haryana, 92

'V'

Vikas Pratap Singh and Ors. versus State of Chattisgarh and Ors., 2013 AIR SCW 4826

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

LPA No. 84 of 2011 a/w
LPA No. 277 of 2010 & LPA No.453 of 2011
Decided on : 15.10.2014

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1. **LPA No. 84 of 2011**

Ms. Nigma Devi ..Appellant
Versus
State of Himachal Pradesh & another ..Respondents

2. **LPA No. 277 of 2010**

Smt. Kamla Devi ..Appellant
Versus
State of Himachal Pradesh & another ..Respondents

3. **LPA No. 453 of 2011**

Smt. Raksha Sharma ..Appellant
Versus
State of Himachal Pradesh & others ..Respondents

Constitution of India, 1950- Article 226- Case of the petitioner is covered by the judgment in case titled as ***Ms. Nisha Devi versus State of Himachal Pradesh and others, decided on 23.08.2007*** delivered by Himachal Pradesh Administrative Tribunal, Camp at Dharamshala- hence, respondents are directed to consider the case of the petitioners in accordance with the judgment and to pass the appropriate order within 6 weeks and liberty was granted to the petitioners to challange the order in case, same goes against the petitioners. (Para-5 & 6)

LPA No. 84 of 2011

For the Appellant : Mr. Onkar Jairath, Advocate.
For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr. V.S. Chauhan, Additional Advocate Generals, Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals.

LPA No. 277 of 2010

For the Appellant : Mr. Vijay Verma, Advocate.
For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr. V.S. Chauhan, Additional Advocate Generals, Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals.

LPA No. 453 of 2011

For the Appellant : Mr. Vijay Verma, Advocate.

For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Mr. V.S. Chauhan, Additional Advocate Generals, Mr. J.K. Verma and Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 1 & 2.
Mr. Ashok Sharma, Assistant Solicitor General of India, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

LPA No. 84 of 2011

This Letters Patent Appeal is directed against the judgment dated 16th November, 2010, made by the learned Single Judge in CWP (T) No. 2594 of 2008 (OA No. 1733 of 1999), whereby writ petition came to be dismissed, in terms of the judgment dated 6th August, 2010, passed by this Court in CWP (T) No. 4595 of 2008, hereinafter referred to as " impugned judgment-I".

LPA No. 277 of 2010

2. By the medium of this Letters Patent Appeal, the appellant has questioned the judgment dated 4th January, 2010, passed by the Writ Court in CWP (T) No. 2173 of 2008, whereby the writ petition came to be dismissed, hereinafter referred to as "impugned judgment-II".

LPA No. 453 of 2011

3. Challenge in this Letters Patent Appeal is to the judgment dated 14th June, 2011, passed by the Writ Court in CWP (T) No. 14090 of 2008, whereby the writ petition came to be dismissed, in terms of the judgment dated 2nd June, 2011, passed by this Court in CWP (T) No. 8409 of 2008, hereinafter referred to as "impugned judgment-III".

4. The writ petitioners in all the writ petitions had sought reliefs to appoint them as Language Teacher(s). The dispute in all these Letters Patent Appeals is-whether the Degree of Parangat from Kendriya Hindi Shikshan Mandal, Agra is recognized with Himachal Pradesh Government?

5. Learned Counsel for the appellants argued that the issue is squarely covered by the judgment rendered by the Himachal Pradesh Administrative Tribunal, Camp at Dharamshala, in O.A. No. 498 of 1998, titled as Ms. Nisha Devi versus State of Himachal Pradesh and others, decided on 23.08.2007 and the same has attained finality.

6. In view of the judgment, *supra,* we deem it proper to direct the respondents to examine the case(s) of the appellant-writ petitioners, in the light of the judgment, *supra,* and pass appropriate order, within six weeks

from today. The judgment, referred to above, shall form part of this judgment.

7. It goes without saying that in case the consideration orders goes against the appellants-writ petitioners, they are at liberty to challenge the same.

8. Accordingly, all the impugned judgments are modified, as indicated above.

9. The appeals are disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, CJ. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, JUDGE

CWP No. 6812 of 2014 a/w
CWPs No. 6938, 7018, 7095, 7105,
7280, 7298 and 7336 of 2014
Reserved on : 09.10.2014
Decided on: 16.10.2014

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1. CWP No. 6812 of 2014

Arvind Kumar & others ...Petitioners.

Versus

Himachal Pradesh Public Service Commission ...Respondent.

2. CWP No. 6938 of 2014

Kiran Gupta & others ...Petitioners.

Versus

State of Himachal Pradesh & another ...Respondents.

3. CWP No. 7018 of 2014

Sudershana Rana ...Petitioner.

Versus

Himachal Pradesh Public Service Commission ...Respondent.

4. CWP No. 7095 of 2014

Vipin Kumar ...Petitioner.

Versus

Himachal Pradesh Public Service Commission ...Respondent.

5. CWP No. 7105 of 2014

Sh. Vinod Sharma & others ...Petitioners.

Versus

State of Himachal Pradesh & another ...Respondents.

6. CWP No. 7280 of 2014

Sh. Anil Kumar & others ...Petitioners.

Versus

Himachal Pradesh Public Service Commission ...Respondent

7. CWP No. 7298 of 2014

Brahamu Ram ...Petitioner

Versus

State of Himachal Pradesh & another ...Respondents.

8. CWP No. 7336 of 2014

Naveen Kumar ...Petitioner.

Versus

State of Himachal Pradesh & another ...Respondents.

Constitution of India, 1950 - Article 226- Himachal Pradesh Administrative Service Rules, 1973 read with the Himachal Pradesh Public Service Commission (Procedure & Transaction of Business and Procedure for the Conduct of Examinations, Screening Tests & Interviews Etc.) Rules, 2007- Himachal Pradesh Public Service Commission conducted the preliminary test for selecting the candidates for Himachal Pradesh Administrative Service, Class-I (Gazetted)- the answer key was displayed on the website and seven days' time was given for raising objections- some candidates raised objections- matter was referred to the Committee of Expert- result was prepared after taking note of the expert's opinion- held, that Court can interfere where the Key on the face of it appears to be wrong and the Commission fails to take note of the same- however, Public Service Commission had rectified the mistakes on the basis of the opinion of the Expert- therefore, there was no need for interference. (Para- 10 to 18)

Constitution of India, 1950 - Article 226- Petitioners who had not filed the objections to the answer key have lost their right and cannot file the Writ Petition. (Para- 20)

Constitution of India, 1950- Article 226- Power of Judicial Review- Court are not expert and they have to honour the opinion of the expert- they cannot substitute their opinion. (Para-21)

Cases referred:

Pankaj Sharma versus State of Jammu and Kashmir and others, (2008) 4 Supreme Court Cases 273

Kanpur University, through Vice-Chancellor and others versus Samir Gupta and others, (1983) 4 Supreme Court Cases 309

Abhijit Sen and others versus State of U.P. and others, (1984) 2 Supreme Court Cases 319

Showkat Ahmad Dar & Ors. versus State & Anr., 2012 (4) JKJ 141 [HC]

The Secretary, West Bengal Council of Higher Secondary Education versus Ayan Das & Ors., 2007 AIR SCW 5976

Mukesh Thakur and another versus Himachal Pradesh Public Service Commission, 2006 (1) Shim. LC 134

Himachal Pradesh Public Service Commission versus Mukesh Thakur and another, (2010) 6 Supreme Court Cases 759

Vikas Pratap Singh and Ors. versus State of Chattisgarh and Ors., 2013 AIR SCW 4826

Manish Ujwal & Ors. versus Maharishi Dayanand Saraswati University & Ors., 2006 AIR SCW 4703

Rajesh Kumar and others etc. versus State of Bihar and others etc., 2013 AIR SCW 4309

For the petitioners: M/s. Bipin C. Negi, Surinder Prakash Sharma, Sat Prakash, D.N. Sharma, Mukul Sood, Tara Singh Chauhan, and Varun Chandel, Advocates, for the respective petitioners.

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, for respondent-State.

Mr. D.K. Khanna, Advocate, for respondent-H. P. Public Service Commission.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

All these writ petitions are disposed of by a common judgment as common questions of law and facts are involved.

2. The respondent-H.P. Public Service Commission (hereinafter referred to as "the Commission") issued advertisement notice No. IV/2013, dated 1st January, 2014 (Annexure P-1), for filling up seven vacancies of Himachal Pradesh Administrative Service, Class-I (Gazetted). The desirous candidates applied and the preliminary examination was conducted on 15th June, 2014, in terms of the Himachal Pradesh Administrative Service Rules, 1973 (hereinafter referred to as the "Rules of 1973") read with the Himachal Pradesh Public Service Commission (Procedure & Transaction of Business and Procedure for the conduct of Examinations, Screening Tests & Interviews Etc.) Rules, 2007 (hereinafter referred to as the "Rules of 2007"). The answer key was displayed on the website on 19th June, 2014, and seven days' time was given for raising objections.

3. It appears that thereafter, some of the candidates filed their objections, were considered by the respondent-Commission by referring the matter to the Expert Committee, the result was prepared by the Examiners

after taking note of the Expert's opinion and result was declared by the Commission on 9th September, 2014.

4. The petitioners have questioned the same on the grounds taken in the memo of respective writ petitions.

5. The respondent-Commission has filed replies in CWPs No. 6812, 6938, 7018, 7095 & 7105 of 2014 and stated that reply filed in CWP No. 6812 of 2014 be treated as reply in CWPs No. 7280, 7298 & 7336 of 20149169 of 2013 also.

6. The respondents have taken a specific stand that the preliminary examination is no examination, it is just a screening and sort of filtration, the petitioners have no right to question the same and the Rules of 1973 & Rules of 2007 no where provide for having revaluation or rechecking. Further, though the Rules do not provide for the same, however, in terms of Clause 7 (B) (i) of Chapter V of the Rules of 2007, before examining the question papers and declaring the result, objections were invited from the candidates within seven days from the date when the answer key was displayed on the website; some of the candidates, including few petitioners, have filed objections, were considered and referred to Experts, after examining the objections, the Experts submitted their opinion, some mistakes were found in the key and after noticing the Expert opinion, the Examiners examined the papers and the result was declared.

7. It would be profitable to reproduce the relevant portions of the replies filed by the respondent-Commission in the respective petitions:

CWP No. 6812 of 2014:

"Paras 3 to 9: According to the prevailing instructions of the Commission, the Answer Key(s) were displayed on the Official Website after conclusion of the Examination on 19-06-2014 and the objections were invited from the candidates for wrong Answer, if any by 25-06-2014. The Commission received some of the objections to the Answer key, which were placed before the Expert Committee for taking their opinion. According to the opinion rendered by the Expert Committee, the result of the Himachal Pradesh Administrative Combined Competitive (Preliminary) Examination-2013 was declared on 09-09-2014. The question paper-II of Aptitude Test has been prepared strictly in accordance with the prescribed syllabus which is evident from the Advertisement No. 4/2013 annexed by the Petitioners as Annexure P-1 at Page-27 of the CWP under item No. 6 "SCHEME OF EXAMINATION" Clause-B i.e. Syllabus of Paper-II "Interpersonal skills including communication skills". Some of the candidates also objected that the question Nos. 36 to 55 of Booklet series 'D' (Questions No. 16 to 35 of Booklet Series 'A') are from expert field of psychology subject. The similar objection of the candidates were also placed before the Expert

Committee, who opined that these questions are under graduate standards and are of general nature. The questions are based on the standard books of psychology at under graduate level". As such the plea taken by the Petitioners is baseless and has no weight."

CWP No. 6938 of 2014:

"Paras 5 to 12: That according to the prevailing instructions of the Commission, the Answer Key(s) were displayed on the Official Website after conclusion of the Examination on 19-06-2014 and the objections were invited from the candidates for wrong Answer, if any by 25-06-2014. The Commission received some of the objections to the Answer key, which were placed before the Expert Committee for taking their opinion. According to the opinion rendered by the Expert Committee, the result of the Himachal Pradesh Administrative Combined Competitive (Preliminary) Examination-2013 was declared on 09-09-2014. Both the question papers-I & II i.e. General Studies & Aptitude Test have been prepared strictly in accordance with the prescribed syllabus which is evident from the Advertisement No. 4/2013 annexed by the Petitioners as Annexure P-1 at Page-17 of the CWP under item No. 6 "SCHEME OF EXAMINATION" Clause-B i.e. Syllabus of Paper-I & II. The objections of the candidates were placed before the Expert Committee, who opined that these questions are all under graduate standards and are of general nature. The questions are based on the standard books of psychology at under graduate level". As such the plea taken by the Petitioners is baseless and has no weight. It is further submitted that the Replying Respondent Commission had taken all questions objected by the candidates to correct the key answers before evaluating OMR answers sheets as submitted herein above in preliminary submissions. Since 4 questions in each paper were scrapped by the Key-Committees, it was decided by the Commission to count the total marks for each paper as 192 instead of 200. This exercise had caused no prejudice to any one as the same pattern has been applied uniformly to all the appearing candidates. According to the opinion rendered by the Expert Committee, the result of the Himachal Pradesh Administrative Combined Competitive (Preliminary) Examination-2013 was declared on 09-09-2014 on the basis of revised answer key which is annexed as R-II."

CWP No. 7018 of 2014:

"Paras 5 to 9: According to the prevailing instructions of the Commission, the Answer Key(s) were displayed on the

Official Website after conclusion of the Examination on 19-06-2014 and the objections were invited from the candidates for wrong Answer, if any by 25-06-2014. The Commission received some of the objections to the Answer key, which were placed before the Expert Committee for taking their opinion. According to the opinion rendered by the Expert Committee, the result of the Himachal Pradesh Administrative Combined Competitive (Preliminary) Examination-2013 was declared on 09-09-2014. The question paper-II of Aptitude Test has been prepared strictly in accordance with the prescribed syllabus which is evident from the Advertisement No. 4/2013 annexed by the Petitioner as Annexure P-1 at Page-14 of the CWP under item No. 6 "SCHEME OF EXAMINATION" Clause-B i.e. Syllabus of Paper-II "Interpersonal skills including communication skills". Some of the candidates also objected that the question Nos. 51 to 70 of Booklet series 'C' (Questions No. 16 to 35 of Booklet Series 'A') are from expert field of psychology subject. The similar objections of the candidates were also placed before the Expert Committee, who opined that these questions are all under graduate standards and are of general nature. The questions are based on the standard books of psychology at under graduate level". As such the plea taken by the Petitioners is baseless and has no weight."

CWP No. 7095 of 2014:

"Paras 4 to 9: According to the prevailing instructions of the Commission, the Answer Key(s) were displayed on the Official Website after conclusion of the Examination on 19-06-2014 and the objections were invited from the candidates for wrong Answer, if any by 25-06-2014. The Commission received some of the objections to the Answer key, which were placed before the Expert Committee for taking their opinion. According to the opinion rendered by the Expert Committee, the result of the Himachal Pradesh Administrative Combined Competitive (Preliminary) Examination-2013 was declared on 09-09-2014. The question paper-II of Aptitude Test has been prepared strictly in accordance with the prescribed syllabus which is evident from the Advertisement No. 4/2013 annexed by the Petitioner as Annexure P-1 at Page-20 of the CWP under item No. 6 "SCHEME OF EXAMINATION" Clause-B i.e. Syllabus of Paper-II "Interpersonal skills including communication skills". Some of the candidates also objected that the question Nos. 36 to 55 of Booklet series 'D' (Questions No. 16 to 35 of Booklet Series 'A') and Booklet series 'C' (Questions No. 51 to 70) are from expert field of psychology subject. The similar objection of the candidates were also placed before the Expert Committee,

who opined that these questions are under graduate standards and are of general nature. The questions are based on the standard books of psychology at under graduate level". As such the plea taken by the Petitioners is baseless and has no weight.

Para-10: That the Replying Respondent Commission had taken all questions objected by the candidates to correct the key answers before evaluating OMR answers sheets as submitted herein above in the preliminary submissions. Since 4 questions in each paper were scrapped by the Key-Committees, it was decided by the Commission to count the total marks for each paper as 192 instead of 200. This exercise had caused no prejudice to any one as the same pattern has been applied uniformly to all the appearing candidates. According to the opinion rendered by the Expert Committee, the result of the Himachal Pradesh Administrative Combined Competitive (Preliminary) Examination-2013 was declared on 09-09-2014 on the basis of revised answer key which is annexed as R-II.

Para-11 to 12: .....

Para-13 to 15: Denied. The respondent Commission has associated different Experts from different fields of the subjects concerned and asked them to examine thoroughly the disputed questions objected by the candidates. The two key committees constituted for paper-I and paper-II were asked to furnish the correct key answers to the respondent Commission and then the answer sheets were evaluated on the basis of revised key answers. In case, if there were more than one probable answers to any question, the Replying Respondent considered both the answers for such questions. It is also submitted that the Respondent Commission has taken utmost care and caution at every steps of selection including setting up of question papers, re-checking of key answers by Experts and proper evaluation of OMR answer sheets of all the candidates."

CWP No. 7105 of 2014:

"Paras 9 to 21 (I to IX): According to the prevailing instructions of the Commission, the Answer Key(s) were displayed on the Official Website after conclusion of the Examination on 19-06-2014 and the objections were invited from the candidates for wrong Answer, if any by 25-06-2014. The Commission received some of the objections to the Answer key, which were placed before the Expert Committee for taking their opinion. According to the opinion rendered by the Expert Committee, the result of the Himachal Pradesh Administrative Combined

Competitive (Preliminary) Examination-2013 was declared on 09-09-2014. The question paper-II of Aptitude Test has been prepared strictly in accordance with the prescribed syllabus which is evident from the Advertisement No. 4/2013 annexed

by the Petitioner as Annexure P-1 at Page-30 of the CWP under item No. 6 "SCHEME OF EXAMINATION" Clause-B i.e. Syllabus of Paper-II "Interpersonal skills including communication skills". Some of the candidates also objected that the question Nos. 36 to 55 of Booklet series 'D' (Questions No. 16 to 35 of Booklet Series 'A') and Booklet series 'C' (Question No. 51 to 70) are from expert field of psychology subject. The similar objection of the candidates were also placed before the Expert Committee, who opined that these questions are under graduate standards and are of general nature. The questions are based on the standard books of psychology at under graduate level". As such the plea taken by the Petitioners is baseless and has no weight. The Replying Respondent Commission had taken all questions objected by the candidates to correct the key answers before evaluating OMR answers sheets as submitted herein above in preliminary submissions. Since 4 questions in each paper were scrapped by the Key-Committees, it was decided by the Commission to cunt the total marks for each paper as 192 instead of 200. This exercise had caused no prejudice to any one as the same pattern has been applied uniformly to all the appearing candidates. According to the opinion rendered by the Expert Committee, the result of the Himachal Pradesh Administrative Combined Competitive (Preliminary) Examination-2013 was declared on 09-09-2014. The Eminent Professors/Experts are being engaged to prepare the question papers under prescribed syllabi, therefore, there is no question putting ambiguous questions in the question papers."

8. Mr. D.K. Khanna, learned counsel for the respondent-Commission, has stated at the Bar that reply filed in CWP No. 6812 of 2014 be treated as reply in CWPs No. 7280, 7298 and 7336 of 2014.

9. The other grounds raised by the respondent-Commission are that the writ petitions are premature, the Rules do not provide for re-checking and judicial review is not permissible in law, particularly, in terms of Rules of 1973 and Rules of 2007.

10. It is a fact that the Rules of 1973 and Rules of 2007 no where provide for rechecking and revaluation; preliminary examination is just a screening and not a part of examination and the candidates cannot question

the same. At the same time, it cannot be lost sight of that in extreme cases, where the key, on the face of it, appears to be wrong and in response, the Commission fails to take note of the same, we are of the considered view that Court may interfere.

11. The Apex Court in a case titled as **Pankaj Sharma versus State of Jammu and Kashmir and others,** reported in **(2008) 4 Supreme Court Cases 273,** has held that the decision of the Public Service Commission in deleting the defective/wrong questions and to allot those marks on pro-rata basis and to call the persons for interview if a candidate gets in after getting additional marks on pro-rata basis was legal one. It is apt to reproduce para 50 of the judgment herein:

> *"50. But there is an additional factor also which supports this view. It is clear from the fact that after the receipt of the complaints, the Commission had issued Press Note on 6-7-2005 and assured the candidates that the Commission would look into the matter and no injustice would be caused to them. The Commission also obtained expert advice and thereafter suo motu decided to delete certain questions by allotting those marks pro-rata to remaining questions. It is, therefore, clear that even according to the Commission, some action was necessary, after the examination was over."*

12. The Apex Court in other cases titled as **Kanpur University, through Vice-Chancellor and others versus Samir Gupta and others,** reported in **(1983) 4 Supreme Court Cases 309** and **Abhijit Sen and others versus State of U.P. and others,** reported in **(1984) 2 Supreme Court Cases 319,** has held that the Courts can pass appropriate directions in appropriate cases in order to avoid the delay and to avoid recurrence of such lapses.

13. The same view was taken by one of us (Mansoor Ahmad Mir, Chief Justice) while sitting in Single Bench as a Judge of the High Court of Jammu and Kashmir, in a case titled as **Showkat Ahmad Dar & Ors. versus State & Anr.,** reported in **2012 (4) JKJ 141 [HC].**

14. It would also be profitable to reproduce paras 6 to 9 of the judgment rendered by the Apex Court in a case titled as **The Secretary, West Bengal Council of Higher Secondary Education versus Ayan Das & Ors.,** reported in **2007 AIR SCW 5976,** herein:

> *"6. The permissibility of re-assessment in the absence of statutory provision has been dealt with by this Court in several cases. The first of such cases is Maharashtra State Board of Secondary and Higher Secondary Education & Anr. v. Paritosh Bhupeshkumar Sheth & Ors. reported in (1984 (4) SCC 27). It was observed in the said case that finality has to be the result of public examination and, in the absence of statutory provision,*

Court cannot direct re-assessment/re-examination of answer scripts.

7. The courts normally should not direct the production of answer scripts to be inspected by the writ petitioners unless a case is made out to show that either some question has not been evaluated or that the evaluation has been done contrary to the norms fixed by the examining body. For example, in certain cases examining body can provide model answers to the questions. In such cases the examinees satisfy the court that model answer is different from what has been adopted by the Board. Then only the court can ask the production of answer scripts to allow inspection of the answer scripts by the examinee. In Kanpur University and Ors. v. Samir Gupta and Ors. (AIR 1983 SC 1230) it was held as follows:-

> *"16. Shri Kacker, who appears on behalf of the University, contended that no challenge should be allowed to be made to the correctness of a key answer unless, on the face of it, it is wrong. We agree that the key answer should be assumed to be correct unless it is proved to be wrong and that it would not be held to be wrong by an inferential process of reasoning or by a process of rationalization. It must be clearly demonstrated to be wrong, that is to say, it must be such as no reasonable body of men well versed in the particular subject would regard as correct. The contention of the University is falsified in this case by a large number of acknowledged text-books, which are commonly read by students in U.P. Those text books leave no room for doubt that the answer given by the students is correct and the key answer is incorrect.*
>
> *17. Students who have passed their Intermediate Board Examination are eligible to appear for the entrance Test for admission to the Medical Colleges in U.P. Certain books are prescribed for the Intermediate Board Examination and such knowledge of the subjects as the students have is derived from what is contained in those text-books. Those text books support the case of the students fully. If this were a case of doubt, we would have unquestionably preferred the key answer. But if the matter is beyond the realm of doubt, it would be unfair to penalize the students for not giving an answer which accords with the*

key answer, that is to say, with an answer which is demonstrated to be wrong".

8. Same would be a rarity and it can only be done in exceptional cases. The principles set out in Maharashtra Board' case (supra) has been followed subsequently in Pramod Kumar Srivastava v. Chairman Bihar Public Service Commission, Patna & Ors. (2004 (6) SCC 714), Board of Secondary Education v. Pravas Ranjan Panda & Anr. (2004 (13) 714) and President, Board of Secondary Education, Orissa and Anr. v. D. Suvankar and Anr. (2007 (1) SCC 603).

9. In view of the settled position in law, the orders of learned Single Judge and the Division Bench cannot be sustained and stand quashed."

15. This Court in a case titled as **Mukesh Thakur and another versus Himachal Pradesh Public Service Commission,** reported in **2006 (1) Shim. LC 134,** interfered and quashed the result made by the Commission, was subject matter of Civil Appeals No. 907 and 897 of 2006 before the Apex Court, titled as **Himachal Pradesh Public Service Commission versus Mukesh Thakur and another,** reported in **(2010) 6 Supreme Court Cases 759.** It is apt to reproduce paras 23 to 26 of the judgment herein:

"23. The situation will be entirely different where the court deals with the issue of admission in mid-academic session. This Court has time and again said that it is not permissible for the courts to issue direction for admission in mid-academic session. The reason for it has been that admission to a student at a belated stage disturbs other students, who have already been pursuing the course and such a student would not be able to complete the required attendance in theory as well as in practical classes. Quality of education cannot be compromised. The students taking admission at a belated stage may not be able to complete the courses in the limited period. In this connection reference may be made to the decisions of this Court in *Pramod Kumar Joshi (Dr.) v. Medical Council of India, (1991) 2 SCC 179; State of U.P. v. Dr. Anupam Gupta, 1993 Supp (1) SCC 594 : AIR 1992 SC 932; State of Punjab v. Renuka Singla, (1994) 1 SCC 175 : AIR 1994 SC 932, Medical Council of India v. Madhu Singh, (2002) 7 SCC 258; and Mridul Dhar v. Union of India, (2005) 2 SCC 65.*

24. The issue of revaluation of answer book is no more *res integra.* This issue was considered at length by this Court in *Maharashtra State Board of Secondary and*

Higher Secondary Education v. Paritosh Bhupeshkurmar Sheth, (1984) 4 SCC 27 : AIR 1984 SC 1543, wherein this Court rejected the contention that in the absence of the provision for revaluation, a direction to this effect can be issued by the Court. The Court further held that even the policy decision incorporated in the Rules/ Regulations not providing for rechecking/ verification/revaluation cannot be challenged unless there are grounds to show that the policy itself is in violation of some statutory provision. The Court held as under: (SCC pp. 39-40 & 42, paras 14 & 16)

> "14. .....It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provisions of the Statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act...
>
> * * *
>
> 16. .....The Court cannot sit in judgment over the wisdom of the policy evolved by the legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that, in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act."

25. This view has been approved and relied upon and re-iterated by this Court in *Pramod Kumar Srivastava v. Bihar Public Service Commission, (2004) 6 SCC 714,* observing as under: (SCC pp. 717-18, para 7)

> "7. ... Under the relevant rules of the Commission, there is no provision wherein a candidate may be entitled to ask for revaluation of his answer book. There is a provision for scrutiny only wherein the answer books are seen for the purpose of checking whether all the answers given by a candidate have been examined and whether there has

> been any mistake in the totalling of marks of each question and noting them correctly on the first cover page of the answer book. There is no dispute that after scrutiny no mistake was found in the marks awarded to the appellant in the General Science paper. *In the absence of any provision for revaluation of answer books in the relevant rules, no candidate in an examination has got any right whatsoever to claim or ask for revaluation of his marks."* (emphasis added)
>
> A similar view has been reiterated in *Muneeb-Ul-Rehman Haroon (Dr.) v. Govt. of J&K State , (1984) 4 SCC 24 : AIR 1984 SC 1585; Board of Secondary Education v. Pravas Ranjan Panda, (2004) 13 SCC 383; Board of Secondary Education v. D. Suvankar, (2007) 1 SCC 603; W.B. Council of Higher Secondary Education v. Ayan Das, (2007) 8 SCC 242 : AIR 2007 SC 3098; and Sahiti v. Dr. N.T.R. University of Health Sciences, (2009) 1 SCC 599.*
>
> 26. Thus, the law on the subject emerges to the effect that in the absence of any provision under the statute or statutory rules/regulations, the Court should not generally direct revaluation."

16. The Apex Court, after discussing the authorities, which were governing the field till the date of the decision in the case, has used the words : *".....the Court should not generally direct revaluation"*. Meaning thereby, it suggests that if there is some mistake apparent on the face of it, the Court may interfere and may direct for revaluation.

17. In the instant case, the Rules do prescribe for inviting objections before the Examiner examines the papers and before declaring the result, if the candidates files objections within seven days from displaying the key on the website. It appears that the purpose is just to examine those objections before declaring the result.

18. Applying the test to the instant case, it is specifically averred by the respondent-Commission, as discussed hereinabove, that they have invited the objections, asked the Experts to examine the objections, objections were examined, some mistakes were found, were rectified, the Examiners were asked to examine the papers in light of the Expert's opinion and thereafter, the result was declared. Thus, there is no case for interference. Had the Commission not invited the objections or had failed to take into account the said objections and the Expert's opinion, in that eventuality, the judicial review was permissible. Thus, on this count, these writ petitions are not maintainable.

19. The respondent-Commission has specifically pleaded that some of the petitioners have filed objections, but some have not filed the same.

20. It is beaten law of land that the Courts are not Experts, have to honour the opinion of the Experts and cannot substitute the same. In the instant cases, the Experts have examined the questions and given their opinion.

21. We are of the considered view that the writ petitioners, who have not filed objections, have lost their right, are bound by the decision of the Commission and cannot now file writ petitions. Further, the objections raised by the candidates, i.e. other writ petitioners, have been considered. The judicial review is not permissible. Viewed thus, the writ petitions are not maintainable.

22. The Apex Court in **Vikas Pratap Singh and Ors. versus State of Chattisgarh and Ors.,** reported in **2013 AIR SCW 4826,** held that even if the Rules are not providing for revaluation, but if the Board decides for revaluation of incorrect questions, is a wise decision, is permissible and any candidate, who gets ouster, cannot claim prejudice. Though, the judgment is not directly applicable to the facts of this case, but principle is laid down that revaluation is permissible if the questions are incorrect or the answers given in the key are wrong.

23. In **Manish Ujwal & Ors. versus Maharishi Dayanand Saraswati University & Ors.,** reported in **2006 AIR SCW 4703,** and **Rajesh Kumar and others etc. versus State of Bihar and others etc.,** reported in **2013 AIR SCW 4309,** the Apex Court has held that relief of revaluation is better than holding of fresh examination in case of wrong answer keys.

24. The advertisement notice was issued on 1st January, 2014, which contained the conditions including clause 7, i.e. other conditions. The candidates, after noticing the said advertisement notice and after going through all the conditions, applied, participated in the preliminary examination, cannot now make u-turn and challenge the decision/result of the said process in view of the conditions, more particularly sub-clause 17 of clause 7 of the advertisement notice. It is apt to reproduce sub-clause 17 of clause 7 of the said advertisement notice herein:

> ***"7. OTHER CONDITIONS:-***
>
> .....
>
> *17. Re-checking / Re-evaluation for the preliminary as well as for the main written examination shall not be allowed in any case."*

25. Having glance of the said fact, the writ petitioners are precluded to assail the result of the preliminary examination in the given circumstances.

26. The case of the writ petitioners is squarely covered by the judgment rendered by this Court on 17th July, 2014, in a bunch of writ petitions, **CWP No. 9169 of 2013,** titled as **Vivek Kaushal & others versus Himachal Pradesh Public Service Commission.**

27. Keeping in view the observations made hereinabove, the writ petitions merit to be dismissed, are dismissed alongwith all pending applications.

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

Ravi Rai. ...Petitioner.

Versus

J.B.S. Bawa and others. ...Respondents.

CMPMO No. 14 of 2014
Reserved on: 13.10.2014
Decided on: 16.10. 2014

Code of Civil Procedure, 1908- Sections 47 and 151 read with Order 21 Rule 97 - Order of eviction was passed by the Rent Controller on the ground of arrears of rent- warrant of possession was issued but could not be executed as the house was found locked- objection petition was filed by one 'R' which was disposed of on merit- warrant of possession was again issued after which present petition was filed- objection petition was dismissed on the ground that he was in settled possession of the accommodation, he was inducted as tenant by one 'H' and Decree Holder was neither owner nor landlord of the premises- held, that the Will settled by 'H' was declared null and void by the Civil Court- an appeal preferred against the judgment and decree was dismissed by Additional District Judge- 'H' was held to be tenant in the premises- there was no evidence that 'H' was the owner of the premises- rent receipts were obtained subsequent to the passing of the order by the Rent Controller- In these circumstances, the objector had failed to prove the case set up by him, hence, objections were ordered to be dismissed with costs. (Para-8 to 10)

For the Petitioner: Mr. Ajay Kumar, Sr. Advocate with
Mr. Dheeraj K. Vashishta, Advocate.
For the Respondents: Mr. Pankaj Chauhan, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This petition is instituted against the judgment dated 31.8.2013 rendered by the District Judge, Shimla in Civil Misc. Appeal No.RBT No.47-S/13 of 2011.

2. "Key facts" necessary for the adjudication of this petition are that respondent No.1 had filed petition against respondents No.2 and 3 under section 14 of the Himachal Pradesh Urban Rent Control Act on the ground of arrears of rent. The eviction of respondent No.2 was also sought on the ground that he has built and acquired vacant possession of residential premises within the urban area of Shimla, which are sufficient for his residence. The Rent Controller allowed the petition on 1.9.2003. Respondent No.1 was held entitled to recover the rent from respondents No.2 and 3 w.e.f. 1.6.1993 till 31.8.2003 @ Rs.135/- per month with interest @ 9% per annum. Order dated 1.9.2003 has become final against the respondents on the ground of arrears of rent.

3. Warrant of possession was issued vide order dated 8.4.2005. However, the same could not be executed as the premises were found locked. Objection petition under order 21 rule 97 read with sections 47 and 151 of the Code of Civil Procedure was filed by Rattan Lal. The same was disposed of on merits on 11.12.2008. The objections raised by Rattan Lal were dismissed with costs quantified at Rs. 3,000/-. The warrant of possession in respect of demised premises was again issued on 11.12.2008. The same were returned unexecuted. Thereafter, the present petitioner filed petition under order 21 rule 97 read with section 47 and 151 of the Code of Civil Procedure before the Civil Judge (Senior Division), Court No.1, Shimla on the ground that he was in settled possession of the Set situated in Bawa Market. He was inducted as a tenant by Sh. Harbans Lal. According to him, decree holder was neither owner nor landlord of the premises. He was running a tour and travel agency under the name and style of M/s. New Ruchika Travel Agency. According to him, the order was collusive. The decree holder filed the reply. He has denied the case of the objector that he has been inducted as a tenant by Harbans Lal and he has been in settled possession thereof. Learned Civil Judge (Senior Division) framed issues on 29.5.2009. He dismissed the objections on 27.7.2010. Petitioner filed an appeal before the learned District Judge, Shimla bearing Civil Appeal RBT No. 47-S/13 of 2011. Learned District Judge dismissed the same on 31.8.2013. Hence, the present petition.

4. I have heard the learned counsel for the parties and have gone through the orders passed by the courts below.

5. OW-1 Ravi Rai has deposed that he was residing in premises for the last eight years. He was running tour and travel agency. He was paying rent @ Rs.10,000/- annually. According to him, Harbans Lal Sethi was owner of the premises. He has denied the suggestion that Harbans Lal was not legally competent to receive the rent.

6. OW-2 Rattan Lal has deposed that he was residing in Set No.2, Bawa Building, Shimla since 1990. Ravi Rai was running agency of tour and travel for the last 7-8 years. Harbans Lal Sethi was owner of premises in which objector was tenant. Ravi Rai was paying rent to Harbans Lal Sethi. He did not know that the "will" executed in favour of Harbans Lal was challenged before the Civil Court by Jung Bahadur and the same was declared null and void by the Civil Court on 24.4.2000. He did not know that appeal filed by Harbans Lal was also dismissed.

7. According to Jung Bahadur, he was also administrator of new Bawa building Male Rose Building Bawa Estate w.e.f. 3.6.1989. He has obtained letter of probate from District Judge, Shimla vide copy Ex.DSW-1. Harbans Lal Sethi has no concern with the building. He was legally entitled to induct tenant and to receive the rent. He has filed civil suit against Harbans Lal Sethi qua the "will" executed by his mother Manorma. Civil Suit No.355/1 of 199/94 was decreed on 24.4.2000 in his favour. He has proved copy of decree sheet Ex.DHW/2 and copy of judgment mark 'X'. The appeal was also filed by Harbans Lal Sethi, which was dismissed vide mark 'Y'. He has denied the suggestion that objector was residing in premises for the last 8-10 years.

8. What emerges from the facts enumerated hereinabove is that order was passed by the Rent Controller (1), Shimla in case No.28/20 of 2000 on 1.9.2003. Respondent No.2 Rattan Lal has filed objections under order 21 rule 97 read with sections 47 and 151 of the Code of Civil Procedure. These were dismissed on 11.12.2008. Respondent Nos. 2 and 3 have been resisting the execution of the order passed by the Rent Controller. Petitioner has miserably failed to prove that he was ever inducted as a tenant by Harbans Lal.

9. Now, as far as Harbans Lal is concerned, he has relied upon "will" executed by the mother of respondent No.1. Respondent No.1 had filed a civil suit challenging the "will". It was decreed on 20.4.2000. The "will" was declared null and void. The appeal filed against the judgment and decree dated 20.4.2000 was also dismissed by the learned Additional District Judge, Fast Track Court, Shimla vide mark 'Y' dated 27.8.2004. Respondent No.1 was appointed as Administrator vide order dated 30.6.1989 by the learned District Judge, Shimla on the basis of "will" dated 30.12.1987. Harbans Lal has been held to be tenant in the premises belonging to respondent No.1 vide order of Rent Controller dated 16.3.2010. He was held to be in arrears of rent of Rs. 2,07,232/-. Respondent No.1 has led tangible evidence that Harbans Lal was never owner of the estate of Baba Market. OW-2 Rattan while deposing earlier in support of his objection on 8.4.2008 has deposed that he was in possession of premises. However, while deposing subsequently in support of objector he has tried to show that objector was residing in the premises for the last 7-8 years. It cannot be said that the petitioner was not aware of the proceedings pending before the Rent Controller. The entire exercise has been undertaken by the petitioner by filing objections to delay the execution of the order passed by the Rent Controller.

10. Mr. Ajay Kumar, learned Senior Advocate, has referred to the receipt allegedly issued by Harbans Lal Sethi. Rent receipts have been obtained pertaining to the period after the passing of order by the Rent Controller on 1.9.2003. Electricity bill does not prove that the petitioner was in possession of suit premises.

11. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed. Learned Executing Court is directed to ensure the execution of order within a period of eight weeks from today and, if necessary, by seeking police assistance. Pending application(s), if any, also stands disposed of. No costs.

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

Sushil Kumar . ...Petitioner
Versus
Smt. Deepika .....Respondent.

CMPMO No. 199 of 2014.
Date of decision : 16.10.2014

Hindu Marriage Act, 1955- Section 24 - An application was filed by wife seeking maintenance on the ground that she had insufficient means to support herself or to meet her necessary expenses- husband contended that income of the wife was more than Rs. 40,000/- per month and that she was also taking tuitions- salary statement of the petitioner showed that she was getting gross salary of Rs. 47,991/- and net salary of Rs. 40,605/-- respondent was getting gross salary of Rs. 46,658/- and net salary of Rs. 42,038/-- held, that the mere fact that wife is working is not sufficient ground to refuse maintenance to her- however, when the wife claims that she is unable to maintain herself, it is for her to prove such inability- when husband was earning almost equal salary as the wife and this fact was concealed by the wife, she is not entitled for maintenance. (Para-7 to 12)

Cases referred:
Laxmi Sharma vs. Dr. Akash Deep 2012 (1) Shim. L.C. 74
Radhika Negi vs. T.G. Negi, 2012 (2) SLC 844

For the Petitioner : Mr. Suneel Awasthi, Advocate.
For the Respondent : Mr. Gaurav Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This petition under Article 227 of the Constitution of India has been preferred against the order dated 31.5.2014 passed by learned Additional District Judge (II),Shimla in Application No. 59-S/6 of 2014 whereby he granted interim maintenance of Rs.1500/- and Rs. 5,000/- as litigation expenses to the respondent.

2. The respondent had filed a petition under Section 13 of the Hindu Marriage Act (for short 'Act') for dissolution of marriage on the ground of desertion and cruelty. During the pendency of the petition, an application under Section 24 of the Act claiming maintenance pendente-lite and expenses of proceedings was preferred on the ground that she was working as a teacher at Abohar (Punjab) and did not have much income and was not in a position to maintain herself in a proper manner and was not in a position to bear the day to day expenses. It was alleged that though the respondent had income of her own but the same was not sufficient to

support her or even to meet her necessary expenses. The petitioner on the other hand was stated to be earning about more than Rs.1,00,000/- per month as he was working as Lecturer at Jawahar Navodaya Vidyalaya, Mouli, District Panchkula and belonged to a rich family, who own a house in Shimla and huge land holdings at Pathankot. On such basis, the respondent lay claim of maintenance of Rs.15,000/- and a sum of Rs.10,000/- as travelling allowance and Rs.20,000/- as litigation expenses.

3. The petitioner filed reply wherein it was stated that as per his knowledge, the respondent was getting Rs.40,000/- as monthly salary and apart therefrom was earning out of tuition she was taking at home.

4. The learned Court below granted maintenance and litigation expenses to the respondent by according the following reasons:

> *"10. I do not find a considerable force to the submissions raised before me from the side of the husband. The court must bear in mind while granting interim maintenance, the standard of living to be enjoyed by wife at her matrimonial home. It is settled law that an arithmetical equality or inequality is not intended while granting any maintenance. The wife is supposed to meet all her requirements during the pendency of the final disposal of the petition. It is no answer to claim of maintenance, that the claimant could support herself and she acquired a good financial position. It is settled that where divorce claim raised by the parties, some conjectures and guess work by the court are impermissible. It is equally settled that court would not be in a position to judge the merits of the rival contention of the parties when deciding an application for interim alimony and would not allow its discretion to be fettered by the allegations made by them and would not examine by the merits of the case. In a case of working wife, our own High Court granted maintenance pendente -lite to wife. I am supported by the decision appeared in case Laxmi Sharma vs. Dr. Akash 2012(1) SLC 74, Radhika Negi vs. T.G. Negi (2012) 2 SLC 844.*
>
> *11. Keeping in view the facts and circumstances, I hereby allow the present application by directing the petitioner to pay Rs.1500/- as maintenance to the applicant from the date of application and Rs.5000/- as litigation expenses."*

It is this order which has been challenged before this Court on the ground that the same is highly unjust, illegal, arbitrary and contrary to the facts and law.

5. I have heard learned counsel for the parties and have also gone through the records carefully.

6. At the initial stage this Court made an endeavour to settle the matter by appointing a Mediator but such proceedings failed. Thereafter, vide order dated 18.9.2014 both the parties were directed to file their latest salary slips before this Court. Vide order dated 18.9.2014 the case was ordered to be taken up for hearing today and the parties have filed their respective salary statements.

7. A perusal of the salary statement of the petitioner issued by his employer shows that the petitioner is receiving a gross payment of Rs. 47,991/- upon which deduction on account of CPF, GSLIS, Income Tax etc. to the extent of Rs.7386/- are being applied and the net payment to the petitioner works out to Rs.40,605/-.

8. On the other hand, the salary statement of the respondent shows that the respondent is getting gross salary of Rs.46,658/- upon which deductions of Rs. 4620/- on account of GPF, GIS and Income Tax are being made and thereafter a net payable income works out Rs.42,038/-. Now, when the respective salary statements are compared, in no event can it be said that the respondent is a destitute or does not have an income sufficient enough to support her and meet her necessary expenses. Therefore, the averments made by her in the application claiming maintenance are prima-facie false and belied from her salary slip which shows that she is earning as much if not more than the petitioner.

9. The mere fact that the wife is working can not be a ground to refuse the grant of maintenance but when the wife is earning more than or equal to the husband, can maintenance still be awarded to her is a moot question? The learned Court below in support of its conclusion that even when the wife is earning she is still entitled to claim maintenance has relied upon the judgment of this Court in ***Laxmi Sharma vs. Dr. Akash Deep 2012 (1) Shim. L.C. 74.*** The facts of the case there were that the wife was working in a school and was being paid a sum of Rs.11,000/- per month and was bringing up her two children, while the respondent therein was Class-I Officer and was getting more than Rs.35,000/- per month. This Court thereafter taking into consideration these facts, had enhanced the compensation in favour of the wife from Rs.5,000/- to Rs.15,000/- per month, which amount included the maintenance of the wife and her two children and the litigation expenses were also enhanced to Rs.10,000/-.

10. For the aforesaid proposition it has further relied upon the judgment of this Court in ***Radhika Negi vs. T.G. Negi, 2012 (2) SLC 844.*** A perusal thereof would show that there is not even a whisper regarding the wife being gainfully employed much less any details of her income being available on the record, therefore, this decision is not at all applicable to the facts of the present case.

11. Sh. Gaurav Sharma, learned counsel for the respondent would contend that the petitioner owes a moral duty to maintain the wife and the token amount of Rs.1500/- towards maintenance and Rs. 5000/- as litigation expenses in no event can be said to be excessive. No doubt, it is not only a moral obligation but is also a legal duty cast upon the husband to maintain his wife since the maintenance is a right which accrues to a wife against her husband the minute the former gets married to the latter. However, when the wife approaches a Court claiming maintenance by filing application on the ground that she is not able to maintain herself, it is for her to prove such inability and in case when the Court ultimately decides after conducting the inquiry that she is entitled to maintenance, the said decision must necessarily based upon the material showing that the wife was unable to maintain herself when she filed an application.

12. From the records, it is established that not only the respondent is earning equivalent to that of the husband but it is proved on record that the income is more than sufficient to not only support but meet her necessary expenses. The contrary averments made in the application are required to be viewed seriously as the respondent has tried to mislead the Court by making false averments. It is well settled that a litigant who approaches the Court of law with unclean hands, suppresses material facts and makes false averments in the petition and/or tries to mislead or hoodwink, the judicial forum is not entitled to any relief either on equity or law.

13. In view of the aforesaid discussion, there is merit in this petition and the same is allowed and the order passed by the learned Court below is, therefore, set-aside, leaving the parties to bear their own costs.

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

Mahesh Puri ....Petitioner.
Versus
State of Himachal Pradesh ....Respondents.

Cr.MMO No.120 of 2014.
Date of Decision: 17th October, 2014.

Code of Criminal Procedure, 1973- Section 311- Prosecution filed an application under Section 311 Cr.P.C for placing on record certain documents- held, that Section 311 of Cr.P.C does not permit placing of the documents on record- however, documents can be produced by the Investigating Agency under Section 173(8) by filing a supplementary challan- application under Section 311 Cr.P.C dismissed with liberty to the prosecution to file documents under Section 173(8).

(Para-11, 12 and 14)

Cases referred:
Rajendra Prasad v. Narcotic Cell, AIR 1999 SC 2292

For the petitioner : Mr. J.S. Bhogal, Senior Advocate with Mr. Satyen Vaidya, Advocate.
For the respondent : Mr. D.S. Nainta and Mr. Virender Verma, Additional Advocates General.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (Oral).

Complaint is that learned trial Court vide order Annexure P-9 under challenge in this petition, has erroneously allowed the prosecution to produce in evidence Annexure-1, Annexure B-1, Annexure C-1, Annexure-D, Annexure-E and Annexure-F to the report Ext.PW-10/B, being not the part of the investigation conducted nor taken into possession by the Investigating Officer during the course of investigation.

2. The petitioner is accused in Corruption Case No.8-S/7 of 2009 and is being tried for the commission of offence punishable under Sections 465, 468, 420, 109, 471, 120-B of the Indian Penal Code and Section 13(1)(d) of Prevention of Corruption Act, 1988. The report Ext.PW-10/B has been relied upon against him. The same as per version of the prosecution is incomplete as its Annexures referred to hereinabove could not be taken into possession by the Investigating Officer during the course of investigation.

3. The prosecution initially filed an application under Section 311 of the Code of Criminal Procedure in the trial Court for permission to produce the Annexures to report Ext.PW-10/B in evidence by examining Shri Anil Gupta, Executive Engineer (PW-10). The said application was allowed by learned trial Court vide order dated July 19, 2013. In a petition registered as CRMMO No.4043 of 2013 preferred in this Court against the said order, the same was quashed with liberty reserved to the respondent-State to file fresh application vide judgment dated November 26, 2013. Relevant portion thereof reads as follows:

> "Having gone through the record and also taking into consideration the rival submissions it transpired that in the application under Section 311 Cr.P.C., Annexure P-4 to this petition no details qua the nature and contents of the annexure to the report Ex.PW-10/B, sought to be produced in evidence find mention. Not only this, but its copy was neither annexed to the application nor made available to the accused-petitioners to enable them to contest the same more effectively, particularly whether the so called annexure, sought to be produced in evidence, is part and parcel of the report Ex.PW-10/B or not and taken into possession during the investigation of the case therewith. The present, therefore, is a case where the accused petitioners have been condemned unheard and, as such, the impugned order being legally unsustainable deserves to be quashed, of course, with liberty reserved to the respondent-State to file fresh application highlighting therein all details qua the contents and nature of the 'annexure' to report Ex.PW-10/B, now sought to be produced in evidence, the relevancy thereof vis-a-vis the investigation conducted and the evidence collected."

4. Consequent upon the order ibid, the respondent-State (prosecution) preferred fresh application Annexure P-7. The detail of the documents, i.e., Annexures to Ext.PW-10-/B has been furnished in para 4 of the application.

5. The accused-petitioner contested the application on the ground that neither the Annexures sought to be produced are on record nor any witness while in the witness box has stated about the existence of the same and as such sought the same to be dismissed. Learned Special Judge has, however, accepted the application and allowed the respondent-State to produce the documents in question by recalling PW-10 for further examination. The relevant portion of the order passed by learned Special Judge reads as follows:

> "….The report Ext.PW-10/B is based upon annexures sought to be produced. Moreover, the annexures are to be produced from public record by the prosecution to falsely implicate the accused persons. Simply because the prosecution or the I.O. has not placed on record these documents, which may be due to various reasons also, is no ground for dismissal of this application. The annexures are part of the report and are necessary for just decision of the case. The defence shall have opportunity to cross-examine PW-10 when this witness will prove these annexures. Ergo no serious prejudice shall be caused to the case of the defence in case the prosecution is allowed to produce on record annexures of report Ext.PW-10/B which is already proved on record."

6. Mr. J.S. Bhogal, learned Senior Advocate, has mainly emphasized that the documents sought to be produced being not on record nor relied upon, cannot be produced in evidence under Section 311 of the Code of Criminal Procedure, as according to Mr. Bhogal the jurisdiction vested in the Court under the Section ibid is only to the extent of recalling a witness for further examination or to examine any other person if his evidence appears to be essential for the just decision of the case.

7. Learned Additional Advocate General has come forward with the version that report Ext.PW-10/B is a material piece of evidence in this case. The same is incomplete without annexures thereto now sought to be produced in evidence. It has, therefore, been urged that these documents are essentially required for just decision of the case and that no prejudice is likely to be caused to the accused, who will have an opportunity to cross-examine PW-10.

8. On analyzing the submissions made on both sides and taking into consideration the provisions contained under Section 311 of the Code, it is crystal clear that the Court seized of a criminal case may recall a witness for further examination or examine any person in attendance even

if not summoned as a witness or recall and re-examine any person, if his evidence is essentially required for just decision of the case. The provisions thus postulate a situation where examination of any person or re-examination of a witness is required for further clarification or elaboration of the evidence available on record and the prosecution omitted to produce the same at the time when such person was in the witness box or could not be cited as a witness.

9. In the case in hand, the documents sought to be produced in evidence under Section 311 of the Code admittedly are not part of the record being not taken into possession by the Investigating Officer during the course of investigation nor relied upon in the report filed under Section 173 of the Code.

10. The explanation as set out that inadvertently the Investigating Officer omitted to take these documents on record during the course of investigation seems to be plausible, as *prima facie*, the documents which are in the form of cross-section prepared on the basis of measurement conducted by the Committee constitute to find out the irregularities committed by the accused during the course of construction of Sohal-Drabala road, form part of the report Ext.PW-10/B submitted by the Investigating Officer. The Investigating Officer for the reasons best known to him, has omitted to take the same into possession during the course of investigation. The documents on the face of it *prima facie* form the part of the report Ext.PW-10/B and coming from the official record, i.e., office of Executive Engineer, HP PWD, Kumarsain Division. True it is that the accused may have an opportunity to cross-examine the witness, however, the mode resorted to in producing the documents in evidence perhaps is not legally admissible because as noted supra under Section 311 of the Code a witness can be recalled to explain the evidence already on record and omitted to be proved when he was in the witness box or to be proved by a witness who could not be cited as a witness during the course of the trial.

11. The documents which are sought to be taken on record, cannot be allowed to be produced in the exercise of jurisdiction vested under Section 311 of the Code. Learned Counsel representing the accused-petitioner has very fairly submitted that the respondent-State (prosecution) in case intends to produce these documents in evidence, should have resorted to the provisions contained under Section 173 (8) of the Code, of course subject to just exceptions and rightly so because the provisions ibid empower the investigating agency to collect further evidence at any stage even after filing Challan and in case any evidence collected during the course of further investigation to place the same on record by way of filing supplementary Challan. The prosecution, therefore, is at liberty to resort to the provisions ibid in case the documents form the part of the record of this case or could not be taken into possession during the course of investigation already conducted.

12. Be it stated that learned trial Judge has passed a detailed order after taking into consideration the law laid down by the Apex Court, however, in the order emphasis is laid only with respect to the power of the

Court under Section 311 of the Code in the matter of summoning any person as a witness for examination and also circumstances under which the power under Section 311 of the Code can be exercised.

13. The reference in ***Rajendra Prasad*** v. ***Narcotic Cell, AIR 1999 SC 2292*** that if proper evidence could not be adduced or a relevant material not brought on record due to inadvertence the Court seized of the matter should permit such mistake to be rectified, is in the context of the evidence though collected during the course of investigation, however, inadvertently or due to unavoidable circumstances could not be produced during the course of trial.

14. For the above reasons, the impugned order is not legally sustainable. The same, therefore, is quashed and set aside, of course with liberty to the respondent-State (prosecution) to resort to appropriate remedy in accordance with law and in the light of observations made hereinabove, if so advised.

15. The parties to appear in the trial Court on **November 14, 2014**. Record be returned immediately so as to reach in the trial Court well before the date fixed.

The petition stands disposed of.

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

Sanjeev Kumar .....Petitioner.

Versus

State of Himachal Pradesh .....Respondent.

Cr.MMO No. 173 of 2014.
Reserved on: 10th October, 2014.
Date of Decision : 17th October, 2014.

Code of Criminal Procedure, 1973- Section 397- FIR was registered against the petitioner- petitioner alleged that a sum of Rs. 15,000/- was demanded by Investigating Officer for obtaining a favourable opinion from RFSL, Dharamshala- a complaint was made and a raiding party was formed to nab the investigating officer red handed, however, Investigating Officer refused to accept the bribe amount- FIR was registered against the petitioner for the commission of offence punishable under Section 12 of Prevention of Corruption Act- held, that immunity granted by Section 24 will only be attracted when the bribe is accepted by the public servant- since the amount was not accepted, therefore petitioner cannot claim the benefit of section 24- charge was rightly framed against the petitioner for the commission of offence punishable under Section 12 of Prevention of Corruption Act. (Para-3)

For the Petitioner: Mr. N.K. Thakur, Senior Advocate with Mr. Rahul Verma, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

An FIR bearing No.98 of 2011 of 18.4.2011, under Sections 420, 468 and 471 of the Indian Penal Code comprised in Annexure P-1, was lodged in Police Station, Sadar Una, District Una, against the petitioner. Sub Inspector Yashpal Gautam carried out the investigation into the offences constituted by the FIR aforesaid.

2. The petitioner avers that during the course of the aforesaid investigation carried out by Sub Inspector Yashpal Gautam, a sum of Rs.15,000/- was demanded by the latter as illegal gratification for obtaining a favourable opinion from RFSL, Dharmshala. A complaint comprising the aforesaid demand by SI Yashpal Gautam for illegal gratification was made by the petitioner before the Anti Corruption Bureau, Hamirpur. The said complaint is comprised in Annexure P-2 annexed with the petition. A raiding party was formed to nab red handed SI Yashpal Gautam. However, a perusal of Annexure P-3, divulges that though the bribe amount was offered to Sub Inspector Yashpal Gautam yet it was refused to be accepted by him.

3. On the contrary, the petitioner has averred in the petition that the said refusal on the part of Sub Inspector Yashpal Gautam to accept the bribe amount from him when offered to him by the former while his forming a part of the raiding party as a decoy, is pretextual, as Sub Inspector Yashpal Gautam had rather than accepting the bribe amount from the petitioner in his hands had directed him to put it in a hole of the wall in his room. On strength thereof, it is contended by the learned counsel appearing for the petitioner that the proceedings launched against him in consequence of lodging of FIR No. 219 of 4.9.2011 (Annexure P-3) with an enunciation in it of the petitioner having offered a sum of Rs.15,000/- as illegal gratification to SI Yashpal Gautam for its onward transmission to Mr. Arun Sharma, Dy. Director, RFSL, Dharamshala, for obtaining a favourable opinion in FIR No. 98 of 2011 (Annexure P-1), lodged against the petitioner for his having committed offences under Sections 420, 468 and 471 of the I.P.C., as such, constituting an offence punishable under Section 12 of the Prevention of Corruption Act, are both untruthful as well as arise from a prevaricated and slanted investigation of a partisan Sub Inspector Yashpal Gautam. Besides he contends that its lodging is a sheer handiwork of or a manipulation at the instance of SI Yashpal Gautam. Consequently, he urges that the order framing charge against him by the learned trial Court for his having allegedly committed offence under Section 12 of the Prevention of Corruption Act in furtherance of FIR No. 215 of 4.9.2011 be quashed and set aside. The learned counsel appearing for the petitioner with force has contended that the order framing charge for his having committed an offence under Section 12 of the Prevention of Corruption Act as constituted by FIR No. 215 of 2011 (Annexure P-3) is generated by sheer non application of mind. However, the learned counsel for the petitioner is amiss,

in making the said contention projected by him before this Court as he has failed to place on record any material demonstrating, that in the learned trial Court proceeding to frame the charge against the petitioner in pursuance to FIR No. 215 of 2011 of 4.9.2011 had excluded from consideration apposite and germane material and had taken into consideration excludable material. Besides per se the reading of the material as available on record rather personifies the factum of Sub Inspector Yashpal Gautam, a public servant, who allegedly demanded illegal gratification and for whose nabbing a raiding party was formed comprising the petitioner handling a sum of Rs.15,000/- demanded as illegal gratification by him from the petitioner, had refused to accept the said amount from the petitioner. Only in the event of the aforesaid Sub Inspector Yashpal Gautam having accepted the bribe amount would the provisions of Section 24 of the Prevention of Corruption Act provide an immunity to the bribe giver or its applicability is invoked only in case he displays his willingness to pay the illegal gratification to a public servant through/under the aegis of the police agency for trapping a public servant. However, the said immunity would not come to be attracted, in case the petitioner proceeds to independently or voluntarily dehors his eliciting the collaboration of the police agency offers or attempt to offer illegal gratification for obtaining a prohibited gain or advantage from a public servant. Provisions of Section 24 of the Prevention of Corruption Act reads as under:-

> "24. Statement by bribe-giver not to subject him to prosecution. Notwithstanding anything contained in any law for the time being in force, a statement made by person in any proceeding against a public servant for an offence under Section 7 to 11 or under Sections 13 or Section 15, that the offender agreed to offer any gratification (other than legal remuneration) or any valuable thing to the public servant shall not subject such person to a prosecution under Section 12."

For testing whether the immunity with which the petitioner was clothed by Section 24 of the Prevention of Corruption Act, it is necessary to bear in the mind that Annexure P-3, divulges the factum of a refusal of the Investigating Officer to accept the demand of illegal gratification from the petitioner with his comprising a decoy witness and handling a sum of Rs.15, 000/-. With a perusal of Annexures R-I, R-II and R-III on 3.9.2011, prepared a day preceding to the lodging of FIR, Annexure P-2, marking the fact of RFSL, Dharmshala having rendered an opinion on the specimen and disputed signatures of the petitioner sent to it for comparison gives leverage to the inference that, hence, when the work for which the demand for purported illegal gratification was made had then concluded or had terminated, of which the petitioner appears to be unaware, renders concocted the version as spelt out by the petitioner in his complaint, Annexure P-2. Moreso, when the offer of illegal gratification made by the petitioner to the Investigation Officer, comprised in Annexure P-3 is not demonstrated by any cogent evidence existing on record to have been made in collaboration with or under the aegis of the Police Agency, as corollary then it is, hence, bereft of the mantle of immunity vested in the petitioner by the provisions of Section

24 of the Prevention of Corruption Act. As a concomitant then the revelations by Annexures R-I, R-II & R-III, all cumulatively and unanimously divulge the fact of the petitioner rather taking to attempt to offer illegal gratification for obtaining an illegitimate favour from the Investigating Officer in case FIR No.98 of 2011, Annexure P-1 lodged against the petitioner in Police Station Sadar Una. The complaint, comprised in Annexure P-2 is then obviously construable to be a sequel to the unleashing of a backlash by the petitioner against the Investigating Officer arising from the latter refusing to comply with the untenable desire of the petitioner. In sequel to the above findings, it appears that the order framing the charge when, hence, has not been demonstrated to be arising from sheer non application of mind by the learned trial Judge to the entire material on record inasmuch as in the learned trial Courtin rendering it had excluded apposite and germane material and had taken into consideration excludable material, it does not suffer from any material illegality or legal impropriety.

4. Before parting, it is deemed fit and appropriate to clarify that the contentions as urged before this Court by the learned counsel for petitioner may be urged by the petitioner in defence during the course of his trial for his having committed an offence punishable under Section 12 of the Prevention of Corruption Act for which he has come to be charged. However, at this stage prima facie on a perusal of the material on record, it appears that the learned trial Judge in framing the charge has traversed through the entire material on record. Even otherwise, the contentions as raised before this Court by the learned counsel for the petitioner for ingraining the order framing charge with the vice of infirmity or its suffering from vitiation, cannot be come to be countenanced for the reasons as already submitted hereinabove.

5. In view of the above, there is no merit in this petition which is dismissed accordingly. However, even if this Court has at this stage prima facie rendered an opinion qua the tenability of the order framing charge against the petitioner nonetheless any expression made by this Court qua the legality of the order framing charge by the learned trial Judge against the petitioner/accused be not construed as a decision on merits nor would it preclude the petitioner to agitate his defence before the learned trial Judge. No costs.

6. All the pending applications also stand disposed of.

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

Cr.Appeal No.493 of 2012 with Cr. Aa No. 143 of 2013
Reserved on:09/10/2014.
Date of Decision :**18.10. 2014.**

1. Criminal Appeal No.493 of 2012:
Mukesh Kumar ...Appellant.
Versus
State of H.P. ...Respondent.
2. Criminal Appeal No.143 of 2013:
State of H.P. .....Appellant.
Versus
Lalita Devi ...Respondent.

N.D.P.S. Act, 1985- Section 20- Accused 'M' had kept one black coloured bag on his lap and one attachi by his side- On their search, 10.500 kilograms of charas and Rs. 45,000/- were recovered - independent witnesses had turned hostile- however, they had admitted their signatures on the recovery memo- held, that once the witness had admitted his signature on the memo, he is estopped from deposing in variance with the contents of the memo, in view of bar contained in Sections 91 and 92 of Indian Evidence Act, hence, their testimonies cannot be used for discarding the prosecution version. (Para-10)

N.D.P.S. Act, 1985 - Section 29- As per prosecution, accused 'M' was found 10 kg and 500 grams charas- accused 'L' was sitting beside him- held, that prosecution had not led any evidence to prove that accused L shared mens rea to carry charas by accused M-thus, acquittal of M was justified.
(Para-11)

1. Criminal Appeal No.493 of 2012:
For the Appellant: Mr.Lakshay Thakur, Advocate.
For the respondent: Mr.Ashok Chaudhary, Additional Advocate General.

2. Criminal Appeal No.143 of 2013:
For the Appellant: Mr.Ashok Chaudhary, Additional Advocate General.
For the respondent: Mr.Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

1. Both these appeals are being disposed of by a common judgment as they arise out of the common judgment. Cr.Appeal No.493 of 2012 has been preferred by the appellant/accused Mukesh Kumar, against the judgment rendered on 24.11.2012, by the learned Special Court(II) (Additional Sessions Judge), Sirmaur District at Nahan, H.P., in Sessions trial No.8-N/7 of 2012, whereby he has been convicted and sentenced to ten years rigorous imprisonment and to pay a fine of Rs.1,00,000/- for his having committed offence punishable under Section 20(ii)(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein-after referred to as 'NDPS Act'). In default of payment of fine, he has been sentenced to further

undergo simple imprisonment for one year. Cr.Appeal No.143 of 2013 has been preferred by the State of H.P. against the recording of findings of acquittal qua accused Lalita Devi in the impugned judgment.

2. The prosecution story, in brief, is that on 17.11.2011 at about 4:45 a.m., Head Constable Ranjeet Singh, along with PSI Dinesh Kumar and HHC Jeet Singh, was on VVIP duty at Kala Amb. They were checking the vehicles from security point of view as VVIP had to come. In the meantime, one Volvo bus bearing registration No.UK-07PA-1235 of Uttrakhand Roadways had entered the Himachal area and in presence of Rakesh, Peon of Excise Tax Barrier and Rohtash employee of the Toll Barrier, bus was checked. At seats No.3 and 4 accused Mukesh and Lalita Devi were found sitting and accused Mukesh had kept one black coloured bag on his lap above the legs and one attachi case by his side. On checking of the bag, the gents clothes i.e. shirt, jacket, underwear and vest were recovered. Beneath it, substance of black round shape sticks, on which cello tape was affixed found. In the attachi case, one pant jacket, shirt etc. were found and in that currency notes of denomination of 100 x 100 (5 bundles) were recovered. In the bag charas like substance was recovered. Accused persons could not produce the licence of the recovered charas and on inquiry, they disclosed their name as such. The scale for weighing the charas was brought from Raj Kumar along with weights of 4 KG, 2 Kg, 400 grams, 200 grams, 100 grams and 50 grams. Total weight of charas recovered was 10 kg and 500 grams. On counting the currency notes, total amount of Rs.45,000/- from the attachi were found. Charas was put in same bag with shirt, jacket, underwear and vest and put in parcel and sealed with seal 'T' at 12 places. Rs.45,000/- were put in attachi and then in cloth parcel and seal 'T' was affixed at 12 places. Rs.45,000/- were put in attachi and then in cloth parcel and seal 'T' was affixed on parcel at 12 places. Sample of seals were separate drawn. The NCB forms were filled in. Charas weighing 10.5 Kgs, bag, shirt, jacket, underwear and vest were taken into possession in presence of witnesses Rakesh and Rohtash vide recover memo prepared on the spot. Lady police official was not present and was called later on and she carried out search of accused Lalita Devi. From her personal search, one traveling coupon dated 16.11.2011 issued in the name of accused Mukesh from Jammu to Haridwar of bus No.1235, seat Nos. 7-8 along with currency notes worth Rs.1175/-x 2, total Rs.2350/-, one voter card of accused Mukesh, Pan Card, artificial ear rings, Mangal Sutra, one golden chain, one pair pajeb silver, on ladies watch, two mobile phones were recovered. These were taken into possession in presence of the witnesses Rajesh Kumar and Rohtash vide seizure memo prepared on the spot. Later on, on the same day i.e. 17.11.2011 per mandate of law the said parcels were produced before ASI Daulat Ram, the then Officer In Charge of Police Station, Nahan, who had resealed the parcels with his seal 'A' and to this effect had issued the certificate. NCB forms were filled on the spot and the case property was deposited with MHC, Police Station, Nahan in the Malkhana. After recovery of contraband intimation was sent to the Superintendent of Police, Sirmaur District at Nahan. Site plan of the spot was prepared. The parcels were safely sent to State Forensic Science Laboratory, Junga and as per the report of FSL, Junga it was found charas containing 26.49% resin in it.

3. On completion of the investigation, into the offences, allegedly committed by the accused, report under Section 173 Cr.P.C. was prepared and filed in the Court.

4. Accused Mukesh Kumar and Lalita Devi were charged for theirs having committed offence punishable under Section 20(ii)(c) 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 as many as 16 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C. were recorded in which they pleaded innocence. On closure of proceedings under Section 313 Cr.P.C., the accused were given an opportunity to adduce evidence, however, they chose not to adduce any evidence in defence.

6. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against accused Mukesh Kumar, whereas it acquitted accused Lalita Devi.

7. The appellant/accused Mukesh Kumar is aggrieved by the judgment of conviction recorded against him by the learned trial Court, whereas, the State of H.P. is aggrieved by the findings of acquittal recorded in favour of accused Lalita Devi by the learned trial Court. The learned counsel appearing for accused/appellant Mukesh Kumar has concertedly and vigorously contended that the findings of conviction recorded by the learned trial Court are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of conviction be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

8. On the other hand, the learned Additional Advocate General, appearing for the respondent/State, has, with considerable force and vigour, contended that the findings of conviction, recorded against accused Mukesh Kumar by the Court below, are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication. However, the findings of acquittal, recorded in favour of accused/respondent Lalita Devi, are contended to be not based on a proper appreciation of the evidence on record, rather, they are contended to be sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal recorded in favour of accused/respondent Lalita Devi by the learned trial Court be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction.

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. Independent witnesses PW-1 (Rohtash) and PW-2 (Rajesh Kumar), have been contended by the counsel for the accused/appellant to have in their respective testimonies repulsed as well as denuded the effect

of the projection by the prosecution voiced through the testimonies of the official witnesses, of the contraband having been recovered from the exclusive and conscious possession of accused Mukesh Kumar from his black coloured bag while it was kept on his lap above the legs. With both PW-1 and PW-2 have deposed that no luggage from inside the bus was found in their presence, hence appear to have discounted as well as belied the prosecution version communicated through the testimonies of the official witnesses of recovery of contraband having been effected in the manner as deposed in tandem by them. For reiteration, with the imminent fact of both PW-1 and PW-2 having in their respective oral depositions overwhelmed the effect and efficacy of the depositions of the official witnesses qua the manner recovery of contraband from the conscious and exclusive possession of the accused, boosts the learned counsel for the accused/appellant, to contend that it hence, strips the prosecution version of its vigour and vitality. However, even though both PW-1 and PW-2 have turned hostile and have reneged/resiled from their previous statements recorded in writing, however, the preponderant and pre-eminent factum of theirs having admitted their signatures on memos Exts.PW-1/A to D renders insignificant as well as inconsequential the effect of their turning hostile as well as theirs having reneged from their previous statements recorded in writing. Rather, in the face of the embargo contemplated/envisaged by Sections 91 and 92 of the Indian Evidence Act against their deposing in variance to the recorded recitals in memos Exts.PW-1/A to D admitted by both to be bearing their signatures, renders their oral depositions in variance to the recorded recitals in memos aforesaid, to be having no effect so as to overwhelm the import and effect of the recorded recitals which, rather, convey proof qua the prosecution case, as deposed unanimously by each of the official witnesses of recovery of contraband having been recovered in the manner as deposed by them. With a wholesome reading of the depositions of the official witnesses portraying their testimonies being bereft of any inter-se or intra-se contradictions, hence, their testimonies acquire the virtue of credibility. In aftermath, when the effect of the turning hostile of the independent witnesses aforesaid has been for the reasons afforded herein-above construed to be gathering no momentum. Consequently, the depositions of the official witnesses while, hence being credible lead to the apt conclusion as appropriately drawn by the learned trial Court, that hence, the prosecution has been able to prove the factum of the accused Mukesh Kumar having committed an offence under Section 20(ii)(c) of the Act.

11. Even though, co-accused Lalita Devi was occupying the seat adjoining to the seat occupied by co-accused Mukesh Kumar, yet when this Court has imputed credibility to the prosecution case of Charas having been recovered from the conscious and exclusive possession of the co-accused Mukesh Kumar while his carrying it in a black coloured bag kept on his lap above the legs, as such, when he alone has been found to be in conscious and exclusive possession thereof, unless co-accused Lalita Devi was portrayed by substantial and weighty evidence to be sharing a *mens rea* so as to garner the conclusion of hers hence sharing a vicarious criminal liability along with co-accused Mukesh Kumar, which evidence,

however, is amiss. Consequently, the findings of acquittal, hence, recorded by the learned trial Court, qua accused Lalita Devi, merit no interference, rather are vindicable.

12. The learned trial Court has appreciated the evidence in a mature and balanced manner and its findings, hence, do not necessitate interference. Both the appeals being Criminal Appeal No.493 of 2012, preferred by accused Mukesh Kumar against his conviction and Criminal Appeal No.143 of 2013, preferred by the State against the acquittal of Lalita Devi, are dismissed being devoid of any merit and the findings, rendered by the learned trial Court, are affirmed and maintained. Records of the learned trial Court be sent down forthwith.

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

Cr.Appeal No.176 of 2011 with
Cr.Appeal No.222 of 2011.
Reserved on:09/10/2014.
Date of Decision :**18.10. 2014.**

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1. <u>Criminal Appeal No.176 of 2011</u>:
Sat Pal …Appellant.
Versus
State of H.P. …Respondent.

2. <u>Criminal Appeal No.222 of 2011</u>:
State of H.P. …..Appellant.
Versus
Rahul ...Respondent.

N.D.P.S. Act, 1985- Section 20- As per prosecution case, accused 'S' was found in possession of 5 k.g of cannabis- held, that minor contradiction was discrepancy in the testimony of the official witnesses do not affect the prosecution version, when the prosecution witnesses had deposed substantially in accordance with the prosecution case. (Para-13)

Indian Evidence Act, 1872- Sections 91 and 92- Independent witness had turned hostile, however, he had admitted his signature on the memo- held, that in view of the fact that independent witness had admitted his signature on the memo, he is estopped from deposing in variance with the contents of the memo, in view of Bar contained in Sections 91 and 92 of Indian Evidence Act his testimony cannot be used for discarding the prosecution version. (Para-12)

N.D.P.S. Act, 1985- Section 42- Police had conducted the search of the Bus during which recovery of 5 kg. charas was effected- ruqqa and FIR were immediately sent to the police station- held, that there was substantial compliance of Section 42 of N.D.P.S. Act. (Para-13)

N.D.P.S. Act, 1985 - Section 29- Police had recovered 5 kg of charas of 'S'- charge-sheet was filed against 'R' on the ground that he was occupying the sheet adjacent to accused 'S'- held, that there was no evidence to connect accused 'R' with 'S'- hence, acquittal of the 'R' was justified. (Para- 15)

Cases referred:
Babubhai Odhavji Patel & Ors. versus State of Gujarat, (2005) 8 SCC 725
Hamidbhai Azambhai Malik versus State of Gujarat, AIR 2009 SC 1378
Karnail Singh versus State of Haryana, (2009) 8 SCC 539

1. Criminal Appeal No.176 of 2011:

For the Appellant: Mr.N.K.Tomar, Advocate.
For the respondent: Mr.Ramesh Thakur, Assistant Advocate General.

2. Criminal Appeal No.222 of 2011:
For the Appellant: Mr.Ramesh Thakur, Assistant Advocate General.
For the respondent: Mr.N.K.Tomar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Both these appeals are being disposed of by a common judgment as they arise out of the common judgment. Cr.Appeal No.176 of 2011 has been preferred by the appellant-accused Sat Pal, against the judgment rendered on 11.4.2011, by the learned Special Judge, Mandi, District Mandi, H.P., in Sessions trial No.23 of 2010, whereby he has been convicted and sentenced to twelve years rigorous imprisonment and to pay a fine of Rs.1,20,000/- for his having committed offence punishable under Section 20(b)(ii)(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein-after referred to as 'NDPS Act'). In default of payment of fine, he has been sentenced to further undergo simple imprisonment for two years. Cr.Appeal No.222 of 2011 has been preferred by the State of H.P. against the recording of findings of acquittal qua accused Rahul in the impugned judgment.

2. The prosecution story, in brief, is that on 10.01.2010, ASI Ram Lal, along with ASI Mohan Lal, Constable Inder Singh, LHC Narpat Ram, Constable Suresh Kumar, Constable Kashmir Singh and Constable Dhameshwar Singh, was present at Suki Bai and laid a Naka there. At about 3.40 p.m., a private bus Bharati bearing registration No.HP-66-1146 came from Manali towards Mandi. It was signaled to stop. Police party

boarded the bus and started checking the passengers. Accused Sat Pal and Rahul were occupying seats No.15 and 16 respectively. On seeing the police, they became fidgety. Police party became suspicious about their possessing some stolen articles. Driver Ajay Singh, H.C. Inder Singh and Conductor Gopal, PW-2, were associated as witnesses. Police party gave its search to the accused in the presence of witnesses. No contraband was found in their possession. Memo Ex.PW1/A was prepared which was signed by all members of the police party and by the accused. Accused Sat Pal was occupying seat No.15 and accused Rahul was occupying seat No.16. Accused Sat Pal had a backpack (Ex.P-2) in his lap. Search of the backpack was conducted. One bag (Ex.P-3) was found inside the backpack which was bearing the words the dress up Shoppee. When the backpack (Ex.P-3) was checked, it was found to be containing black coloured stick like and pancake like substance wrapped in polythene. Cannabis was weighed and its weight was found 5 kg. Substance was put in the bag and bag was put into backpack from which it was recovered. Backpack was wrapped in a piece of cloth and parcel was sealed with 16 impressions of seal 'R'. NCB-I form Ex.PW1/A was filed in triplicate and seal impression was taken on NCB-I form. Sample seals were taken separately on separate pieces of cloths Ex.PW1/D. Seal was handed over to Inder Singh after its use. Parcel was seized vide seizure memo Ex.PW1/C. Signatures of the witnesses Ajay Singh, Gopal Singh and H.C. Inder Singh were obtained on the memo. Copy of seizure memo was supplied to the accused and their signatures were obtained on the memo. Accused Rahul had knowledge about transportation of cannabis by accused Sat Pal as he was sitting with accused Sat Pal. Rahul and Sat Pal belonged to the same village and ticket fare of Rahul was paid by Sat Pal. Ruqua Ex.PW7/A was prepared and sent to Police Station through LHC Narpat Ram. LHC Narpat Ram handed over the ruqua to Inspector Hari Pal, who recorded the FIR and sent it to the spot through LHC Narpat. Investigation was conducted by ASI Ram Lal, who prepared site plan and recorded the statements of the witnesses as per their versions. Accused were arrested and memo of their arrest Ex.PW1/F and Ex.PW1/G were prepared. The case property, NCB form in triplicate, sample seal and accused were produced before SHO Hari Pal. SHO Hari Pal re-sealed the parcels with nine impressions of seal 'S'. He filled the columns of NCB form. Sample impression was taken separately on separate pieces of cloth and one such impression is Ex.PW12/B. Inspector Hari Pal handed over the parcels, NCB-1 form and the sample seal to MHC Anil Kumar. He prepared memo of re-sealing Ex.PW1/E. Anil Kumar made an entry in the Malkhana register at serial No.959 and deposited the articles in the Malkhana. He handed over all the articles deposited with him to Krishan Lal (PW-9) with the direction to carry these to FLS, Junga vide R.C. No. 254/2010. Krishan Lal deposited all the articles at FSL, Junga in safe condition and handed over the receipt to MHC on his return. Special report, Ex.PW6/A was sent to Additional S.P., Mandi through HHC Dharam Pal. HHC Dharam Pal handed over the special report to ASP Abhishek Dullar on 11.1.2010 at 3.50 p.m. ASP Abhishek Dullar made the endorsement on the special report and handed it over to his Reader H.C. Sant Ram at about 4.00 p.m. H.C. Sant Ram made an entry at serial No.12 in his register and filed it on record. Accused made the statement that

they could show the place and person, from where the Charas was purchased and also the person from whom the Charas was purchased. They took police to village Lihayani where they identified the house of Hem Singh alias Raju. Memo Ex.PW4/A was prepared regarding identification. Site plan Ex.PW11/F was prepared. Hem Singh was interrogated and arrested. Memo of arrest Ex.PW4/E was prepared. As per the report of Chemical analysis, the samples were found to be containing 30.20 % resin in it.

3. On completion of the investigation, into the offences, allegedly committed by the accused, report under Section 173 Cr.P.C. was prepared and filed in the Court.

4. Accused Sat Pal was charged for his having committed offence punishable under Section 20(b)(ii)(c) of the NDPS Act and accused Rahul was charged for his having committed offence punishable under Section 29 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 as many as 12 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C. were recorded in which they pleaded innocence. On closure of proceedings under Section 313 Cr.P.C., the accused were given an opportunity to adduce evidence, however, they chose not to adduce any evidence in defence.

6. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against accused Sat Pal, whereas it acquitted accused Rahul and Hem Singh.

7. The appellant/accused Sat Pal is aggrieved by the judgment of conviction recorded against him by the learned trial Court, whereas, the State of H.P. is aggrieved by the findings of acquittal recorded in favour of accused Rahul by the learned trial Court. The learned counsel appearing for accused/appellant Sat Pal has concertedly and vigorously contended that the findings of conviction recorded by the learned trial Court are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of conviction be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

8. On the other hand, the learned Assistant Advocate General, appearing for the respondent/State, has, with considerable force and vigour, contended that the findings of conviction, recorded against accused Sat Pal by the Court below, are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication. However, the findings of acquittal, recorded in favour of accused/respondent Rahul, are contended to be not based on a proper appreciation of the evidence on record, rather, they are contended to be sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal recorded in favour of accused/respondent Rahul by the learned trial Court be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of conviction.

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

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

12. Nonetheless, it is urged before this Court by the learned counsel appearing for accused Sat Pal that the learned trial Court in omitting to discard the fact of PW-2 (Gopal), an independent witness, having turned hostile ingrains the impugned judgment of conviction rendered against him with the vice of infirmity. He contends that when the independent witness aforesaid did not lend support to the prosecution case, the genesis of the prosecution version propounded by the official witnesses has been erroneously construed to be credible. The contention of the learned counsel for the accused/appellant Sat Pal is anvilled and anchored upon the factum of his having turned hostile, hence, not supporting the prosecution case and as such the prosecution version getting capsized or suffering erosion, even in the face of significance having been untenably imputed by the learned trial Court to the factum of his having admitted his signatures on memos Exts.PW-1/A to G. However, obviously, in the face of his admitting his signatures on memos Exts.PW-1/A to G, he is barred as well as estopped, as envisaged/contemplated by Sections 91 and 92 of the Indian Evidence Act, to depose orally, in variance to the recorded contents of Exts.PW-1/A to G. Consequently, for reiteration, in the face of the bar, envisaged under Sections 91 and 92 of the Indian Evidence Act against the receipt of oral evidence in variance to or in contradiction to the recorded recitals of memos Exts.PW-1/A to G which memos stand admitted to be signed by independent witness PW-2 (Gopal), hence, dilutes and dwindles the effect of his having reneged from the recorded recitals of memos Exts.PW-1/A to G. As a corollary then, the entire trend of his oral deposition in denial to the prosecution case does not garner or muster any strength so as to, as aptly concluded by the learned trial Court, jettison the prosecution version as propounded by the official witnesses. Even though, the independent witness PW-2 (Gopal) has deposed that his signatures were obtained on a blank piece of paper, on strength whereof, it is canvassed by the learned counsel appearing for accused/convict Sat Pal that hence the independent witness, aforesaid, being unaware or unacquainted with the recitals on memos Exts.PW-1/A to G signatured by him as blank, as such, the bar or interdiction envisaged by Sections 91 and 92 of the Indian Evidence Act against his deposing in variance to or in contradiction to the

recorded recitals in the memos, aforesaid, gets waned as well as diluted or the embargo, envisaged therein, does not prohibit him from orally deposing in variance thereto nor interdicts his oral deposition being discardable. However, the above contention, too, loses its force in the face of it emanating on a reading of his testimony of his having studied up to 9th standard, which belies the factum of his having signatured it blank, besides, in case his signatures on memos were obtained blank in the face of his having not protested at the earliest to the superior officials in the higher echelons of the police hierarchy now estop him from orally espousing in his deposition that its recorded recitals are not binding against him, his having signatured memo Exts.PW-1/A to G, when they were blank. Consequently, the view, as adopted by the learned trial Court in overwhelming the effect of PW-2 turning hostile or reneging from the contents of memos, is a vindicable view and does not necessitate any interference.

13. That apart, besides the reasoning, as adopted by the learned trial Court in over-looking as well as construing discardable the minor contradictions or discrepancies in the testimonies of the official witnesses does not suffer from any perversity or absurdity, especially when it has been tenably reasoned by the learned trial Court that such trivial discrepancies or trifling contradictions occurring in the testimonies of the prosecution witnesses do not erode or detract from the substratum of the prosecution case. For reiteration, when on a wholesome and harmonious reading of the testimonies of the official witnesses and theirs portraying lack of any vital, potent and overwhelming contradictions either inter-se or intra-se severely pronouncing and impeaching upon their credibility, the effect of minor contradictions inter-se or intra-se in their testimonies when have been for a tenable and good reason over-looked by the learned trial Court, the said affording of tenable and sound reasoning by the learned trial Court in over-looking as well as discarding minor contradictions inter-se or intra-se in their respective testimonies, forestalls this Court to reverse the findings of conviction arrived against accused Sat Pal by the learned trial Court. Besides when on a wholesome and omnibus reading of the testimonies of the official witnesses do not unravel theirs having blatantly digressed or detracted from the genesis of the prosecution story, absence thereof renders the trivial discrepancies to hold no sway or command in boosting an inference that they erode the substratum of the genesis of the prosecution case. Even the reason attributed by the learned trial Court in concluding that the legally enjoined substantial compliance was begotten by the Investigating Officer with the provisions of Section 42 of the NDPS Act comprised in the factum of the Investigating Officer having promptly sent the Ruqua and FIR to the superior officer, too, is a weighty and plausible reason afforded by the learned trial Court, in ousting the contention of the learned counsel appearing for the accused/convict Sat Pal that the mandate of Section 42 of the NDPS Act mandating the forthwith transmission of information to the immediate superior officer as well as his being enjoined to record reasons in writing before proceeding to search the public conveyance in which the accused/convict was traveling while consciously and exclusively carrying the contraband as recovered from his alleged possession, rather being mandatory in nature as well as necessitating strict

compliance remained un-complied, inasmuch, as both Ruqua and F.I.R. did not constitute the enjoined reasons constraining the Investigating Officer to carry out between sunset and sunrise, the search of public conveyance in which the accused was traveling. The factum of enjoined substantial compliance having been tenably begotten by the Investigating Officer is comprised in his hence transmitting forthwith the copy of Ruqua and F.I.R. which both do impliedly comprise the inherent reasons which drove the Investigating Officer to between sunset and sunrise proceed to search the public conveyance in which the accused was traveling is supported by the judgments reported in **Babubhai Odhavji Patel & Ors. versus State of Gujarat, (**2005) 8 SCC 725, **Hamidbhai Azambhai Malik versus State of Gujarat,** AIR 2009 SC 1378 and **Karnail Singh versus State of Haryana, (**2009) 8 SCC 539, which judgments while portraying a commensurate apposite factual matrix to the instant case inasmuch as when the learned trial Court while applying the mandate envisaged in the judgments, referred to herein-above, while theirs envisaging substantial compliance, rather, than strict compliance with the mandate of Section 42 of the NDPS Act, which substantial compliance was begotten by the Investigating Officer in his dispatching with promptitude to his superior officers, both copy of Ruqua and the FIR, pronounces upon the factum of hence no infringement or transgression of the mandate of Section 42 of the NDPS Act having come to be begotten, at his instance.

14. The fact of the report of FSL comprised in Ext. PW11/H divulging that the seals on sample parcels received by it for rendition of an opinion were found intact or un-tampered belies the factum of the seals on sample parcels having been either tampered with or doctored at the time of theirs sealing/resealing/deposit in the Malkhana, till their transmission to the FSL for rendition of opinion on it. Consequently, when the seals on sample parcels have been divulged in Ext.PW11/H which comprises the report of the FSL to be intact or un-tampered, the effect of delay, if any, which has occurred in the dispatch of the sample parcel to the FSL for rendition of the opinion thereon by the latter, gets eroded as well as overcome.

15. Insofar as the reasons, as afforded by the learned trial Court in recording findings of acquittal in favour of accused Rahul, are concerned, they are anvilled upon his merely occupying the seat adjacent to accused Sat Pal, who was carrying and possessing a bag, from which the recovery was effected, yet, accused Rahul not having been proved by the prosecution by sufficient and adequate evidence to be carrying a *mens rea* with accused/convict Sat Pal so as to make him vicariously liable for the commission of offence for which the accused/convict Sat Pal was found to be guilty, is a sound and tenable reason, when has not been portrayed to be either displaceable or dislodgeable by any invincible or potent proof on record. Consequently, the findings of acquittal, recorded by the learned trial Court, do not deserve to be either reversed or set aside.

16. The learned trial Court has appreciated the evidence in a mature and balanced manner and its findings, hence, do not necessitate interference. Both the appeals being Criminal Appeal No.176 of 2011, preferred by accused Sat Pal against his conviction and Criminal Appeal No.222 of 2011, preferred by the State against the acquittal of Rahul, are

dismissed being devoid of any merit and the findings, rendered by the learned trial Court, are affirmed and maintained. Records of the learned trial Court be sent down forthwith.

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

State of Himachal Pradesh. …Appellant.
Versus
Hardev Singh. …Respondent.

Criminal Appeal No. 335/2008
Reserved on : 17.10.2014
Decided on: 18.10. 2014

Indian Penal Code, 1860- Sections 342, 376 and 506- As per the prosecution case, accused forcibly entered into the house of the prosecutrix and raped her- the prosecutrix had litigation with the family of the accused- she had earlier filed case against her sister-in-law which was cancelled- house of the prosecutrix was surrounded by the other houses, however, prosecutrix had not raised any alarm to connect the inhabitants of those houses- no injury was found on the person of the prosecutrix nor her clothes were torn- matter was reported to the police on the next day - no blood or semen was found on the underwear of the prosecutrix- held, that in these circumstances, acquittal of the accused was justified.
(Para-14)

For the Appellant: Mr. Ashok Chaudhary, Addl. A.G.
For the Respondent: Mr. Ravinder Thakur, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 24.1.2008 rendered by the Sessions Judge, Solan in Sessions Trial No.1-S/7 of 2007, whereby the accused-respondent (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offence punishable under sections 342, 376 and 506 of the Indian Penal Code, has been acquitted.

2. Case of the prosecution, in a nutshell, is that PW-1 prosecutrix was resident of Kabakalan. She has one son and one daughter. Daughter was married. Age of son was 18 years, who was unmarried. On 3.1.2007 at about 3.00 P.M. when she was alone in the house, accused forcibly entered her house and bolted the door from inside. He forcibly committed sexual intercourse with her. He was drunk. Since her left arm

was not working for the last 3-4 months, therefore, she could not put much resistance to avoid the rape. Accused raped her against her wishes. Accused confined her in the room for about two hours. He threatened her while leaving. She could not report the matter immediately. The matter was reported to the police on 4.1.2007, on the basis of which FIR was registered. Prosecutrix was examined by PW-2 Dr. Jyoti Kapil, Medical Officer. Accused was examined by PW-3 Dr. Vinod Kapil, Medical Officer. PW-4 Baldev Singh was independent witness. The matter was investigated by PW-5 K.D. Khan. The MLC of the prosecutrix is Ex.PW-2/B and that of accused is Ex.PW-4/B. Spot map is Ex.PW-5/A. The report of Chemical Examiner is Ex.PW-5/C. Copy of compromise dated 2.4.1997 is Ex.DA. Police investigated the case and after completion of investigation, the challan was put up in the court.

3. Prosecution examined as many as 5 witnesses in all to prove its case against the accused. Statement of the accused under section 313 of the Code of Criminal Procedure was also recorded. He has denied that he had entered the room of prosecutrix and forcibly committed rape upon her.

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

5. Mr. Ravinder Thakur has supported the judgment of the Trial Court.

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

7. Statement of PW-1 prosecutrix was recorded in camera. According to her, on 3.1.2007 at 3.00 P.M. she was present in her house. She was alone. Accused came to her house. He bolted the door of the room from inside and committed rape upon her. He was drunk. Her hand was not working for the last four months. Thus, she could not put any resistance. He committed rape upon her 2-3 times. He remained in the room for about two hours. Thereafter, he opened the door. While leaving, he threatened. She could not go to the Police Station since it was at a distance of 7 KMs. She went to the Police Station on 4.1.2007 and lodged the FIR Ex.PW-1/A. Under wear of the accused was lying on the bed. It was taken into possession by the police. Baldev Singh and Chatter Singh were present at that time. Underwear was taken into possession vide recovery memo Ex.PW-1/B. Kameez Ex.P-1, Salwar Ex.P-2, underwear Ex.P-3 and bra Ex.P-4 were taken into possession by the police. In her cross-examination, she has admitted that accused is son of her Devrani. Their house was joint. Their land was also joint. She married to Gulab Singh 20 years back. She had litigation with her Devrani. She had filed cases three years back. The case was of similar nature but at that time rape was not committed. Case was found to be false by the police and the same was cancelled. Cases filed against Devrani were also found to be false and the same were cancelled. Her house was surrounded by other houses. She has also admitted that these houses were occupied by the families.

Her son was 18 years old and daughter was 21 years old. She sustained injuries on her back. Accused torn her clothes. However, she has further deposed that Salwar was not torn from anywhere. The string was not broken. The shirt was also not torn. She had cried 3-4 times. However, accused had gagged her mouth. The mouth was gagged with her Dupatta. She had taken the Dupatta with her to the Police Station. Police did not say anything about the Dupatta. Doctor also did not inquire about the same.

8. PW-2 Dr. Jyoti Kapil has examined the prosecutrix. She has issued MLC Ex.PW-2/B. No semen was reported on the specimen. There were no injury marks present over chest, breast and back region. According to her opinion, the prosecutrix was habitual of sexual intercourse. The possibility of sexual activity could not be ruled out.

9. PW-3 Dr. Vinod Kapil has examined the accused and issued MLC Ex.PW-3/B.

10. PW-4 Baldev Singh has not supported the case of prosecution. According to him, one underwear was kept in the courtyard. In his presence underwear was sealed by the police. He could not say from where the underwear was recovered. He was cross-examined by the learned Public Prosecutor. He has denied the suggestion that the underwear was recovered by the police from the cot in the room of prosecutrix. He has denied the suggestion that accused told the police that it was his underwear. He was also cross-examined by the learned defence counsel. He has admitted that many persons used to visit the prosecutrix. The family of accused had been raising objection to the same. He has admitted that prosecutrix lodged false cases many times against many persons. He has also admitted that son of prosecutrix Ramesh used to remain in the house. He has not seen Ramesh working with Bal Krishan. He has also admitted that adjoining to the house of prosecutrix, there is house of her Devrani where she resides. The windows open towards the house of other persons.

11. PW-5 K.D. Khan has deposed that on 4.1.2007 at about 5.00 P.M. prosecutrix came to the Police Station. She lodged FIR Ex.PW-1/A. The prosecutrix and accused were got medically examined. He also prepared spot map Ex.PW-5/A. He has also taken photographs of the site. One under wear stated to be of the accused lying on the cot in the room of the prosecutrix was also taken into possession in presence of witnesses Chatter Singh and Baldev Singh.

12. Accused has also examined DW-1 Soma Devi and DW-2 Sanjay Kumar. Statements of both the DWs are not material.

13. What emerges from the statement of the prosecutrix is that the accused is closely related to her. She has litigation with the family of accused. She had filed earlier cases against her Devrani. These were cancelled. It has come in the statement of PW-4 Baldev Singh that prosecutrix was habitual of filing false cases. Her house was surrounded by other houses. In case the accused had entered in her house forcibly she

would have raised alarm. The version of the prosecutrix that her mouth was gagged with Dupatta cannot be believed. The Dupatta was never recovered by the Police. No injury was found on the body of the prosecutrix. In her cross-examination, she has admitted that her clothes were not torn from anywhere. The alleged incident has taken place on 3.1.2007 at 3.00 P.M. However, the FIR has been lodged by the prosecutrix with the police on 4.1.2007 at 5.00 P.M. Police has visited the spot on 5.1.2007. The FIR ought to have been lodged immediately. Normally, she should have narrated this incident to her son. According to the prosecution, the underwear was recovered from the cot in the room. However, PW-4 Baldev Singh has deposed that it was recovered from the courtyard. According to C.F.L. report Ex.PW-5/C, no semen was spotted on the trousers of the accused. Neither blood nor semen was found on the underwear of the prosecutrix. In her cross-examination, she has deposed that she has received injuries. However, as per opinion of the doctor, there was no injury on the person of prosecutrix relatable to rape.

14. Accordingly, in view of analysis and discussion made hereinabove, the prosecution has failed to prove its case beyond reasonable doubt. There is no ground to interfere with the well reasoned judgment of the trial court.

15. Consequently, the appeal 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.

Versus

Kuldeep Singh and others. ...Respondents.

Cr.A.No. 195 of 2003
Reserved on : 16.10.2104
Decided on: 18.10. 2014

N.D.P.S. Act, 1985- Section 20- Police had not associated any independent witness at the time of the recovery and the seizure of the contraband despite the fact that houses were situated at the distance of 500 meters at the place of the incident- police official was sent to bring scale and weight but the shopkeeper was not associated- the person who carried the ruqqa to the police station was also not examined- held, that in view of these infirmities, acquittal of the accused was justified. (Para-14)

For the Appellant: Mr. Ashok Chaudhary, Addl. A.G.

For the Respondents: Mr. N.K. Thakur, Sr. Advocate with Mr. Rahul Verma, Advocate.

The following judgment of the Court was delivered:

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

This appeal is instituted against the judgment dated 24.1.2003 rendered by the Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr in NDPS Case No. 4 of 2002 whereby the respondents-accused (hereinafter referred to as the "accused" for convenience sake), who were charged with and tried for offence punishable under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, have been acquitted.

2. Case of the prosecution, in a nutshell, is that on 8.3.2002 at about 5.00 A.M. ASI Hans Raj alongwith HC Bodh Raj, HHC Jia Lal and Constable Puran Chand was present in Nakka operation at place Bahu, Tehsil Ani. They went to place Bahu in a gipsy. At 5.00 A.M., indica car bearing registration No. HP-20-A-4328 came there. It was intercepted. Four persons were traveling in the car alongwith driver. Driver disclosed his name as Kuldeep. The person, who was sitting adjoining the driver seat, disclosed his name as Shyam Sunder. The person, who was sitting in the back seat of the car, disclosed his name as Pratap Singh and the other person sitting in the back seat disclosed his name Sampuran Singh. The driver and other co-accused were ordered to get down from the car. ASI gave his personal search to the driver of the car and memo Ex.PW-2/A to this effect was prepared. PW-7 ASI Hans Raj searched the car in the presence of Bodh Raj and Jia Lal. Charas was found from the dickey of the vehicle. The scale and weights were arranged. On weighing it was found to be 4 kg 250 grams. Two samples of 25 grams each were taken out for sample. These were packed in parcels. The remaining bulk of charas and sample of charas were sealed with seal impression 'X'. Each parcel was sealed with five seal impressions. NCB form was filled in. Sample of seal was separately taken on a piece of cloth Ex.PW-2/A. Seal after use was handed over to HHC Jia Lal. Recovery memo Ex.PW-2/B was prepared. Personal search of the accused was also undertaken. Rukka Ex.PW-7/A was sent to the Police Station. Special report was given to the Superintendent of Police, Ani vide Ex.PW-3/A. 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 seven witnesses in all to prove its case against the accused. Statements of accused under Section 313 Cr.P.C. were recorded. They denied the case of the prosecution in entirety. Learned trial Court acquitted the accused.

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

5. Mr. N.K. Thakur, learned Senior Advocate 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 carefully.

7. PW-1 Constable Bhupal Singh has deposed that he was posted as a Driver to Deputy Superintendent of Police, Ani. On 8.3.2002 at about 5.00 A.M., he went in the gipsy to place Bahu alongwith ASI Hans Raj, Head Constable Bodh Raj, HHC Jia Lal and Constable Puran Chand. Nakka was laid. Tata Indica car came from the opposite side, i.e. Gugra side. It was stopped. The occupants of the car were ordered to come out. ASI searched the driver of the vehicle. Other co-accused were also searched. The car was checked. The dickey of the car was also checked. Charas was kept in the dickey. It weighed 4 kg 250 grams. Two samples of charas 25 grams each were taken out and were sealed with seal impression 'X' and the remaining charas was also sealed with seal impression 'X'. Seal after use was handed over to Jia Lal. Rukka was also sent to the Police Station. In his cross-examination, he has deposed that Gurga was situated at a distance of 2½ to 3 KMs from Ani. Shamshar was at a distance of 2 KM from Ani. According to him, no house was situated at the place of incident. The houses of Mohar Singh, Duni Chand and Blaso Devi were situated at a distance of 500 meters from the place of incident. He has also admitted in his cross-examination that he went to bring the scale and of weights at about 7-7.15 A.M. alongwith Puran Chand. The shopkeeper was called from his house. He came back at the place of incident alongwith scale and weights at about 7.30 P.M. Charas was weighed in his presence.

8. PW-2 HHC Jia Lal has also deposed the manner in which the vehicle was intercepted and the charas 4 kg 250 grams was recovered and the sealing and seizure process was completed. In his cross-examination, he has deposed that the place where the charas was recovered was lonely. The houses were situated at a distance of about half kilometer. He has admitted that two houses have been shown in the photographs. He volunteered that no person resides in the houses shown in the photographs. Bahu was situated at a distance of 7 KMs from Ani. He has admitted that 4-5 houses were situated adjoining the road side at a distance of about 500 meters. No person was associated in the proceedings of the case. Puran Chand was sent to Police Station alongwith Rukka at about 7.30 A.M. He could not narrate the time when he reached the Police Station.

9. PW-3 Head Constable Jhabe Ram has deposed that the special report was received in the office on 8.3.2002 at 4.10 P.M.

10. PW-4 LHC Mast Ram has deposed that on 10.3.2002 one charas parcel duly sealed was handed over to him by MHC Rattan Chand. The parcel was sealed with seal impression 'X'. NCB form in triplicate was also given to him vide RC No. 29/2002 on 10.3.2002. He deposited the parcel alongwith documents in the office of chemical analysis, Kandaghat on 11.3.2002.

11. PW-5 SI Kaur Singh Guleria has prepared the challan.

12. PW-6 HC Rattan Chand has deposed that on 8.3.2002, Rukka was sent through Constable Puran Chand. He recorded the FIR Ex.PW-6/A. Case property was deposited in the Police Malkhana by ASI Hans Raj. Two parcels were also deposited in which sample of charas was kept 25

grams each which were sealed with seal impression 'X'. NCB form in triplicate was also deposited in the Malkahna alongwith seal impression. He entered the parcel and other articles in the Malkhana register. On 10.3.2002, he sent the sample of charas to C.T.L. Kandaghat through Constable Mast Ram vide RC No. 29/2002 alongwith NCB triplicate form and sample of seal.

13. PW-7 ASI Hans Raj has also deposed the manner in which the car was intercepted on 8.3.2002 at about 5.00 A.M. He gave his personal search to the accused. Charas was recovered. On weighing it was found to be 4 kg 250 grams. The sealing and seizure process was completed on the spot. The rukka was sent to the Police Station. In his cross-examination, he has deposed that no house was available at Bahu. However, 5-7 houses were available at place Gugra. Gugra was situated at a distance of 500 meters from place Bahu. However, shops were available at Gugra. No house was visible from Bahu. Photographs placed on record were taken in the rest house. At about 5.15 A.M. PW-1 Constable Bhupal Singh was sent to bring the scale and weights.

14. Learned Sessions Judge has acquitted the accused for non-compliance of section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985. According to PW-7 ASI Hans Raj, there was no prior information about the contraband with the police. We are of the considered view that it was a chance recovery and section 42 of the Act was not attracted in the present case. It was not necessary for the police to make entry in the record that it was a chance recovery. However, fact of the matter is that prosecution has not examined any independent witness at the time of recovery and seizure of the contraband. According to PW-1 Bhupal Singh, the houses of Mohar Singh, Duni chand, Blaso Devi were situated at a distance of 500 meters from the place of incident. He went to bring scale and weights at about 7 – 7.15 A.M. alongwith Constable Puran Chand. The shopkeeper was called from his house. If the shopkeeper was called from his house to bring the scale and weights, he should have been associated as an independent witness at the time of recovery and seizure of contraband. PW-2 HHC Jia Lal has also admitted in his cross-examination that two houses were shown in the photographs placed on record. He has volunteered that no person used to live in the houses. It is not believable that no persons were occupying those houses. If there were houses, they were bound to be occupied. He has also admitted in his cross-examination that no person was associated in the proceedings of the case. PW-7 ASI Hans Raj has also deposed that no house was available at place Bahu. However, 5-7 houses were available at place Gugra. The distance between Bahu and Gugra was only 500 meters. PW-7 ASI Hans Raj has also admitted that shops were available at Gugra. According to PW-7, PW-1 Bhupal Singh was sent to bring the scale and weight. According to PW-1 Bhupal Singh, he and Constable Puran Chand were sent to bring the scale and weights. Constable Puran Chand has not been examined by the prosecution. According to PW-1 Bhupal Singh and PW-7 ASI Hans Raj, rukka was sent to Police Station through Puran Chand. Puran Chand was material witness to prove that he had taken the rukka to Police Station from the spot and had brought the file back to the spot.

15. The prosecution has failed to prove that contraband was recovered from the exclusive and conscious possession of the accused. We need not interfere with the well reasoned judgment rendered by the trial court.

16. Accordingly, in view of the analysis and discussion made hereinabove, the prosecution has failed to prove its case against the accused beyond reasonable doubt for offence under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

17. Consequently, the appeal is dismissed.

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

D.D. Gautam .....Appellant.
Versus
Vimal Kishore .....Respondent

RFA No. 464 of 2004.
Reserved on: 15th October, 2014.
Date of Decision :20th October, 2014.

Malicious Prosecution- plaintiff was working as Ex. En.- defendant was a class-D contractor- FIR was registered by the defendant against the plaintiff with the allegation that plaintiff had demanded bribe of Rs. 1,000/- from the defendant- however, plaintiff was acquitted by the Trial Court- plaintiff filed a suit for claiming damages for malicious prosecution- held, that plaintiff has to prove independently that the defendant had launched the prosecution maliciously- no finding was recorded by the Trial Court that plaintiff had not accepted the money- on the other hand, it was stated in the notice served by the defendant upon the plaintiff that he had confessed to the recovery of Rs. 1,000/- in the presence of the witnesses- no reply was filed to the notice which shows that the plaintiff had accepted the averments of the notice, therefore, the plea of the defendant that plaintiff had accepted a sum of Rs. 1,000/- from the defendant is to be accepted as probable and the prosecution could not be said to be launched without reasonable and probable cause. (Para-12 and 15)

Cases referred:
Upinder Singh Lamba versus Raminder Singh, AIR 2012 Punjab & Haryana, 92

For the Appellant: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For the respondent: Mr. Karan Singh Kanwar, Advocate.

The following judgment of the court was delivered:

Sureshwar Thakur, Judge (Oral)

This appeal is directed against the impugned judgment and decree, rendered on 10.09.2004, by the learned Addl. District Judge (Presiding Officer Fast Track Court), Solan, in case No.4 FT/1 of 2004/98, whereby, the learned Additional District Judge, Solan dismissed the suit instituted by the appellant/plaintiff for recovery of damages on account of malicious prosecution.

2. The brief facts, of the case, are that the plaintiff instituted a suit for recovery of damages on account of defamation and malicious prosecution. The plaintiff was working as Exn. Kasauli Division from Agusut, 1994 to 7th July, 1995, while the defendant was a class-D contractor listed with H.P. Government. The defendant had been allotted some works. He had failed to start some works, due to which general public was suffering. Notices were issued by the plaintiff to the defendant in respect of 9 such works, to start the work within 7 days, failing which the earnest money deposited by him with the State of Himachal Pradesh would have been forfeited and contracts terminated. Despite such notices, the defendant/respondent did not start the work. Notices dated 19.5.95 and 22.5.95 were then issued to defendant/respondent intimating him that for his failure to start the work earnest money stood forfeited and the contract stood closed. It is further averred that the defendant visited the plaintiff's office on 23.5.95 and 24.5.95 in connection with some tenders which were likely to be opened on 25.5.1995. Due to non performance of works previously allotted to the defendant, the tender forms were not supplied to the defendant. At this, the defendant/respondent averred to have raised hue and cry and openly threatened that he would not spare the plaintiff. The defendant again visited the plaintiff's office at Kasauli on 25.5.1995 accompanied by his father and some relatives and fiends and asked for tender forms. All of them advance threats and tried to get tender forms, but forms were not supplied to them. They then left the office stating that they would not spare the plaintiff. An FIR against the plaintiff was lodged by the defendant with Police Station Anti Corruption Zone Soolan on 26.5.1995. The allegation was that the plaintiff demanded bribe of Rs.1000/- from the defendant. It is averred that the allegation was false. No bribe was ever demanded. The allegation was made with malice to lower the reputation of the plaintiff. Pursuant to the registration of FIR the plaintiff was arrested and after investigation police submitted the challan. However, the plaintiff was acquitted by the learned Special Judge, Solan on 6.12.97 finding the allegations to be false. It is further averred that no appeal or revision against the judgment was filed by the State of H.P., however, the defendant preferred a revision. It is further averred by the plaintiff that due to false propaganda made by defendant about the alleged demand of the bribe and be getting him prosecuted, he suffered socially mentally and physically. A sum of Rs.80,000/- has been claimed by the plaintiff as litigation expenses, a sum of Rs.2,50,000/- has been claimed for

loss of reputation and a sum of Rs.1,50,000/- has been claimed on account of mental and physical pain and agony. Hence this suit.

3. The defendant resisted and contested the suit of the plaintiff and filed the written statement wherein he had taken preliminary objections inter alia non joinder of necessary parties, the suit being pre-matured. On merits, the factum of lodging of FIR was admitted. It was pleaded that there was no manipulation on the part of the defendant to involve the plaintiff in a false case. The demand of bribe was actually made and thus the report made to the police was genuine. It was further averred that there was no malice on the part of the defendant. As regard the findings of the learned Special Judge, it was stated that they called for no comment as the matter was pending before the Hon'ble High Court in a revision petition.

4. The plaintiff filed replication to the written statement of the defendants, wherein, he denied the contents of the written statement and re-affirmed and reasserted the averments made in the plaint.

5. On the pleadings of the parties, the learned trial Court struck following issues interse the parties in contest:

1. Whether the defendant committed defamation as alleged? OPP
2. If issue No.1 is proved in affirmative, to what amount of damage the plaintiff is entitled? OPP
3. Whether the suit is premature as alleged in the preliminary objection No.1, if so its effect? OPD
4. Whether the State of H.P. is necessary party and present suit is bad for non joinder of necessary parties as alleged? OPD
5. Relief.

6. On Appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff for damages on account of defamation and false and malicious prosecution.

7. Now, the plaintiff/appellant has instituted the instant appeal before this Court, assailing the findings recorded by the learned trial Court, in its impugned judgment and decree.

8. The learned counsel appearing for the plaintiff/appellant, has, concertedly and vigorously contended, that the findings recorded by the learned trial Court below are not based on a proper appreciation of the evidence on record, rather, they are sequeled by gross mis-appreciation of the material evidence on record. Hence, he contends that the findings of learned trial Court dismissing the suit of the plaintiff/appellant be reversed by this Court in exercise of its appellate jurisdiction and, hence, the suit of the plaintiff be decreed.

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

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

11. The appellant/plaintiff was prosecuted for demanding and accepting bribe of Rs.1,000/- on 25.5.1995 from the defendant/respondent for clearing the payments of work order No.31-9-94, awarded to the defendant/respondent. However, the prosecution had failed to prove the charge against the plaintiff/appellant under Section 13(1)(d) of the Prevention of Corruption Act, 1988. The learned trial Judge as disclosed by Ex. PW1/A, recorded findings of acquittal in favour of the plaintiff/appellant. The matter was carried in Revision by the defendant/respondent before this Court. This Court on a consideration and appraisal of the evidence on record declined to interfere in the findings of acquittal comprised in Ex.PW1/A, recorded by the learned Special Judge, Solan. The findings of acquittal recorded in favour of the plaintiff/appellant by the learned Special Judge, Solan, comprised in Ex.PW1/A on affirmation thereof by this Court having, hence attained finality, the plaintiff/appellant instituted a suit for damages arising from his being, hence, maliciously prosecuted by the defendant/respondent. The suit sequelled dismissal, hence, the instant appeal.

12. Bereft of verbosity the factum probandum which necessitated proof at the instance of the plaintiff/appellant for achieving success in his suit against the defendant/respondent was of the prosecution launched against him at the instance of the latter being actuated by malice, besides not generated by any reasonable and probable cause. The findings of acquittal recorded by the learned Special Judge, Solan, comprised in EX.PW1/A and affirmed by this Court in Criminal Revision No.78 of 1999, comprised in Ex.P-I, per se *ipso facto* do not, as laid down in a judgment reported in ***Upinder Singh Lamba versus Raminder Singh, AIR 2012 Punjab & Haryana, 92***, the relevant portion whereof is extracted hereinafter, sprout in favour of the aggrieved plaintiff/appellant an inference of a fructified consummated proof of the averments in his plaint having hence emanated, rather a heavy obligation/burden was cast upon the plaintiff/appellant to independently of the judgment of acquittal recorded in his favour, adduce cogent evidence before the learned trial Court, that the complaint instituted against him at the instance of the defendant/respondent which sequeled his prosecution was actuated by malice or was a mere concoction, besides was a well engineered ingenious move on the part of the defendant/respondent to for an unfounded imaginative cause prosecute him. The relevant portion/paragraph of the judgment referred to hereinabove reads as under:-

> "17. From the enunciation of law and the perusal of the issues framed by the learned court below, it can safely be concluded

> that the burden to prove as to whether the respondent-plaintiff is entitled to recovery Rs.5,00,000/- from the petitioner-defendant on account of his malicious prosecution, is on the plaintiff. He had to discharge it. Mere acquittal of an accused in a criminal case does not give rise to a presumption of his malicious prosecution in a suit for damages on that account. The issue has to be proved before the civil court independently. Whatever evidence the respondent-plaintiff wanted to lead to discharge the burden to prove issue No.1 was to be produced at the very first instance. The case of the plaintiff-respondent from the very beginning is that it was a case of malicious prosecution……." (p.94)

13. The judgment referred to hereinabove holds the field as the view adopted in it by the Punjab and Haryana High Court is anvilled upon a catena of decisions on the apposite subject. In pursuance to the complaint lodged by the defendant/respondent against the plaintiff/appellant for the latter's deprecatory conduct of demanding an illegal gratification from him, led to the formation of a raiding party by the police agency which associated the defendant/respondent as a decoy witness. In the said capacity he proceeded to handover a sum of Rs.1000/-, to the plaintiff/appellant demanded by him as illegal gratification for clearing the payments of the bills of the defendant/respondent pending before him. The illegal gratification in the sum of Rs.1000/- un-controvertedly came to be received by the plaintiff/appellant. Despite the factum of receipt of a sum of Rs.1,000/- by the plaintiff/appellant from, the defendant/respondent, the learned Special Judge, Solan, however, did not record findings of conviction against the plaintiff/appellant, rather the learned Special Judge, Solan while trying the plaintiff/appellant for his having committed an offence punishable under Section 13(1)(d) of the prevention of Corruption Act, had afforded him the benefit of doubt on the score that the work pending for clearance before the plaintiff/appellant, inasmuch as the relevant bills were subsequently prepared on 31st March, 1995, as such there arose no occasion for the appellant/plaintiff for a making demand for illegal gratification from the defendant/respondent for clearing them in December, 1994. Consequently, there being no nexus inter se the demand of bribe/illegal gratification and the public work inasmuch as the bills of the defendant/respondent not then awaiting clearance before the plaintiff/appellant, hence, the purported demand of Rs.1,000/- as illegal gratification by the plaintiff/appellant was construed to be tenuous as well as unebelievable. The findings of acquittal recorded in favour of the plaintiff/appellant would not ipso facto generate an inference of the prosecution launched against the plaintiff/appellant for his having allegedly committed an offence punishable under Section 13(I)(d) of the Prevention of Corruption Act at the instance of the defendant/respondent, being both spiteful and inventive. Nor also naturally no conclusion can be formed that the prosecution of the plaintiff/appellant in its entirety was founded on any ill will nursed by the defendant/respondent against the plaintiff/appellant. The courts which recorded findings of acquittal in favour of the plaintiff/appellant proceeded to do so on the evidence/material available before them dispelling the fact of

no work of the defendant/respondent pending before the plaintiff/appellant, hence, the demand by the plaintiff/appellant from the defendant/respondent for a sum of Rs.1,000/- as an illegal gratification for clearing his bills was concluded to be wholly unbelievable. However, the factum probandum or the core pre-eminent issue of the plaintiff/appellant having received from the defendant/respondent with his being a decoy witness of the police agency to nab red handed the plaintiff/appellant while receiving it for the reasons hereinafter remained un-dispelled. (a) it having remained unpronounced in the judgments of acquittal recorded in favour of the plaintiff/appellant that there was no acceptance of a sum of Rs.1000/- by the plaintiff/appellant from the respondent/defendant unveils an inference, dehors the fact that the said fact may not have earlier constituted a formidable ground for this Court to record findings of conviction against the plaintiff/appellant rather this Court proceeded to record findings of acquittal on the score of material available before it demonstrating the fact of no work of the defendant/respondent pending or awaiting clearance before the plaintiff/appellant, hence, the demand for illegal gratification by the plaintiff/appellant from the defendant/respondent stood dispelled/repelled, yet the fact of the plaintiff/appellant having accepted the sum of Rs.1,000/- from the defendant/respondent while the latter acting as a decoy witness has uncontroveredly remained un-repelled; (b) the fact of an elucidation occurring in Ex. PW1/E, a notice served by the defendant/respondent through his counsel upon the plaintiff/appellant of the latter, before witnesses in the presence of the Magistrate having confessed the fact of recovery of Rs.1,000/- from his person and his hands when washed by the police in the presence of the witnesses having turned pink, palpably and imminently display the fact of the plaintiff/appellant having received a sum of Rs.1,000/- as an illegal gratification from the defendant/respondent. Now when the said elucidations earmarking the fact aforesaid remain un-falsified at the instance of the plaintiff/appellant by his taken to rebut the elucidations aforesaid comprised in Ex. PW1/E by his furnishing a reply thereto. Consequently, for lack of falsification of elucidations aforesaid in Ex.PW1/E, at the instance of the plaintiff/appellant by his taking to file an appropriate reply to it, conveys his acquiescence to the said fact. With the acquiescence of the plaintiff/appellant to the said elucidations, the ready, apt and concomitant inference which ensues is that dehors the fact that the plaintiff/appellant may contend that the receipt of the said amount by him comprised repayment of loan to him by the defendant/respondent, yet the further fact of their existing an averment in the plaint of the defendant/respondent when refused to be allotted work by him had threatened him with dire consequences, dispels the explanation afforded by the plaintiff/appellant for his receiving a sum of Rs.1,000/- from the defendant/respondent as repayment of loan to him by the latter.

14. The summon bonum of the above discussion is that the factum probandum of the plaintiff/appellant having received, as a matter of fact, a sum of Rs.1,000/- from the defendant/respondent is not illusory nor sequelly it is sprouted by any ill will or malice nursed by the defendant/respondent against the plaintiff/appellant, nor also it can be

concluded that his complaint against the plaintiff/appellant which led to the formation of the raiding party by the police agency with the defendant/respondent acting as decoy witness was both a sham and a charade nor it can also be concluded that the complaint preceding the nabbing of the plaintiff/appellant was an ingeniously concocted and well planned engineered move on the part of the defendant/respondent. Besides obviously in the plaintiff/appellant having come to be consequently prosecuted cannot be a prosecution having been launched without any reasonable and probable cause. Moreover, the natural corollary is that the prosecution of the plaintiff/appellant for his having committed an offence under Section 13(I)(d) of the Prevention of Corruption Act at the instance of the defendant/respondent was neither a concoction nor an invention.

15. For reiteration, the factum probandum of the complaint lodged by the defendant/respondent being generated by a reasonable and probable cause is per se loudly communicated by the factum of the plaintiff/appellant having received a sum of Rs.1,000/- from the defendant respondent with his acting as a decoy witness under the aegis of the police agency, which amount as received by him from the defendant/respondent was recovered from his possession by the police and of as a sequel to its recovery, the hands of the plaintiff/appellant being washed by the police in presence of the witnesses, having turned pink. Even though the said fact appears to have carried no weight either with the Special Judge, Solan, who tried the plaintiff/appellant for his having committed an offence punishable under Section 13(I)(d) of the Prevention of Corruption Act nor with this Court while adjudicating upon the Criminal Revision preferred before it by the defendant/respondent, yet when both the Courts, when acquitted the appellant/plaintiff on the ground of the demand by the plaintiff/appellant from the defendant/respondent being improbablized for dearth of evidence or scanty evidence portraying non existence of pending work of the defendant/respondent before the plaintiff/appellant. Nonetheless with the factum probandum of the plaintiff/appellant having received a sum of Rs.1,000/- from the defendant/respondent when remains established, it does not constitute the complaint lodged by the defendant/respondent against the plaintiff/appellant which sequelled his prosecution to be ingrained with any element of either malice or ill will or it being actuated by sheer invention or concoction. Consequently, this Court cannot but form a conclusion for the reasons aforesaid, of the findings of the learned trial Court dismissing the suit of the plaintiff/appellant are anchored upon proper appreciation of evidence on record.

16. For the foregoing reasons, there is no merit in this appeal which is dismissed accordingly. The judgment of the learned trial Court is affirmed and maintained. No costs. All the pending applications, if any, also stand disposed of.

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

Mohinder Kumar Goel and others Petitioners.
Versus
Kusum Kapoor, and others Respondents.

CMPMO No. 135 of 2014.
Date of decision: 20.10.2014.

Indian Evidence Act, 1872- Section 65- An application filed for leading secondary evidence by filing typed copy of the judgment stated to be delivered by Learned Sub Judge 2nd Class, Mandi- report of the Copying Agency stating that the file was not treacable and the certified copy could not be supplied was also filed in support of the application- held, that the secondary evidence can be led when the original is lost or destroyed- there was no evidence to establish that the original existed and that the original was lost or destroyed- no copy of the register was filed to prove this fact, therefore, the typed copy could not have been produced in evidence.
(Para-3)

Case referred:
Marwari Kumar and others vs. Bhagwanpuri Guru Ganeshpuri and another *AIR 2000 SC 2629*

For the petitioners: Mr. Neeraj Gupta, Advocate.

For the respondents: Mr. K.D.Sood, Sr. Advocate with
Mr. Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The petitioners are aggrieved by the orders rendered on 19.12.2013 by the learned Civil Judge (Sr. Division),Mandi, on an application preferred by the plaintiffs under Section 65 of the Indian Evidence Act, read with Section 151 of the CPC for leading secondary evidence i.e. the typed copy of the Judgement purportedly rendered by the learned Sub Judge IInd Class, Mandi in Civil Suit No. 5 decided on 32.4.1998 BK.

2. The learned trial Court while being seized of the application concluded that its adduction was just and essential to decide the controversy inter-se the parties at contest. The contest inter-se the parties at lis is qua the ownership of Khasra No. 421. The plaintiffs concerted to establish their ownership qua the aforesaid khasra numbers by moving the instant application for adduction into evidence the typed copy of the judgement purportedly rendered in Civil Suit No.5. The learned trial Court while allowing the application had relied upon report Ext.PW-3/A of the copying agency divulging the fact that it was not traceable hence its certified

copy being not suppliable. On strength thereof, it appears that the learned trial Court concluded that since as such it was lost or destroyed, hence, a mere uncertified copy was sufficient to be adduced into evidence.

3. For deciding the controversy, the relevant provisions of Section 65 of the Indian Evidence Act requires extraction, which are extracted hereinafter:-

> "**65. Cases in which secondary evidence relating to documents may be given:-** Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-
>
> (a) .....
>
> (b). .....
>
> (c). When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect produce it in reasonable time."

4. True it is that any document is to be proved by adduction into evidence of its original. True it is also that when the original has been lost or destroyed it is permissible as well as open for any party to prove its case by relying upon a certified copy thereof. However, adduction into evidence a certified copy of the original is permissible only in the event of loss or destruction of the original being sufficiently established. However, the typed copy which has been proposed to be adduced into evidence by the plaintiffs to prove its case qua the disputed Khasra number is an uncertified typed copy of the judgement rendered by the learned Sub Judge, Mandi in Civil Suit No. 5. Merely on the strength of the report of the copying agency divulged in Ext.PW-3/A though disclosing the factum of the case file being not traceable, hence no concomitant conclusion of its being lost or destroyed was formable as untenably done. Nonetheless, at the stage of adjudication of the application it was also incumbent upon the learned trial Court to look into any other evidence portraying the fact that as a matter of fact the record of adjudication in the civil suit of which adjudication an uncertified copy/typed copy has been proposed to be adduced ever existed, connoted by an entry in the apposite register. Proof of existence of the original record was a pre-requisite to determine, hence, its loss or destruction. However, no such apposite register depicting therein the factum of an entry of the civil suit in which the judgement had been purportedly pronounced and is being relied upon by the learned counsel for the plaintiffs was ever placed before the learned trial Court. In the absence of adduction of the apposite register and its adduction displaying the factum of the Civil Suit in which the purported judgement was pronounced being recorded/entered therein, the pre requisite condition of its existence stood not proved, as such, no conclusion of either the civil suit having been ever instituted nor also concomitantly the conclusion that its record was either lost or destroyed could be marshaled. Consequently, for reiteration even if the record of the

original civil suit was lost or destroyed, proof of institution thereof and concomitantly of adjudication therein was required to be adduced comprised in its having been entered in or recorded in the apposite register, besides when accompanied by an admission of the parties that such a judgement was previously rendered, would have surged forth a facilitation for the learned trial Court to proceed to allow the application preferred before it by the plaintiffs inasmuch, as, proof having been then lent not only qua its loss or destruction but also qua its being both admissible in evidence as also relevant. When the typed copy of the judgement has neither emanated from the copying agency nor when an entry of institution of the civil suit in the apposite register exists. As a sequel, when it did not come to be instituted, hence, when it obviously did not exist no conclusion of its being lost or destroyed can come to be formed nor hence it is adducible in evidence. In aftermath, the learned trial Court has committed a grave illegality or impropriety in allowing the application. Though the learned counsel for the defendants contends on the score of the judgement rendered in **Marwari Kumar and others vs. Bhagwanpuri Guru Ganeshpuri and another *AIR 2000 SC 2629,*** wherein it has been mandated that in the event of the contesting parties having admitted the factum of a previous adjudication having culminated in the rendition of a judgement, a mere typed copy thereof was sufficiently admissible for adduction into evidence, is inapplicable to the facts of the case at hand. The reason is that in the cited case the parties at lis had admitted the factum of theirs being a previous litigation inter-se the parties at lis. However, when in the instant case when the parties at contest are disputing the rendition of the purported judgement therein besides when they contest the factum of their being any previous litigation inter-se them, renders it inapplicable. Consequently, the said submission made by the Shri K.D.Sood, learned senior counsel for the respondents is rejected. The petition is allowed. Impugned order is set-aside. Records be sent back. No costs.

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

Ram Dei and others — Appellants.

Versus

Kalan and others — Respondents.

RSA No. 419 of 2003.
Reserved on: 16.10.2014.
Date of decision : 20.10.2014.

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit for declaration with the allegations that the parties are joint owners in possession to the extent of ½ share in the suit land, the defendants had manipulated the reduction of the share of the plaintiff from ½ share to ¼ share and the defendants had got land partitioned on the basis of wrong entries- defendants contended that plaintiffs were in possession of ¼ share- They relied upon the copy of the jamabandi and the order passed by Learned A.C. 1st Grade, Ghumarwin- Statement was made by predecessor-in-interest of the plaintiffs, and predecessor-in-interest of defendants No. 3 and 4 admitting that predecessor-in-interest of plaintiffs had ½ share in the suit property- However, there was no evidence to show that defendant No. 2 had authorized them to make statement- statement would not be binding upon the defendant No. 2- defendant No. 2 was also not summoned by a Compensation Officer- therefore, order passed by him was in violation of the principles of natural justice, which could not be relied upon- Appeal dismissed. (Para-7)

For the appellants: Mr. G.D.Verma, Sr. Advocate with
Mr. B.C.Verma, Advocate.
For the respondents: Mr. J.R.Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

The instant appeal is directed against the judgment and decree, rendered on 1.7.2003, in Civil Appeal No. 92 of 1995, by the learned District Judge, Bilaspur, Himachal Pradesh, H.P., whereby, the learned First Appellate Court dismissed the appeal, preferred by the plaintiffs/appellants.

2. The brief facts of the case are that the plaintiffs had instituted a suit for declaration with consequential relief of permanent injunction against the defendants on the allegations that both the parties had been joint owners in possession of land described in Khata/Khatoni No. 263/383, Khasra No. 87, measuring 3-18 bighas situated in revenue estate, Chhat, Pargana Sunhani, Tehsil Ghumarwin, District Bilaspur. The plaintiffs were stated to be owners of ½ share of the suit land. The defendants were stated to be owners of the remaining ½ share of the suit land. The defendants stated to be in connivance with the officials of the revenue department had manipulated reduction of the share of the plaintiffs from ½ to 1/4th. The share of the defendants had been increased from ½ to 3/4th. It is stated that the change of entries of the books of the Collector relating to the share of the parties was wrong, illegal and void. On the strength of the wrong and illegal entries of the suit land, the defendants had applied for partition of the suit land. The A.C. 1st Grade, Ghumarwin vide order dated 2.5.1987 had proceeded to partition the suit land. The plaintiffs were being allotted 1/4th share of the suit land. The order dated 2.5.1987 passed by A.C 1st Grade was stated to be wrong, illegal and void. The plaintiffs had instituted the appeal against the order dated 2.5.1987

passed by A.C. 1st Grade before the Collector. The appeal of the plaintiffs had been dismissed by the Collector vide order dated 13.6.1988. It is stated that the orders dated 2.5.1987 and 13.6.1988 passed by the Assistant Collector, 1st Grade and Collector respectively were wrong, illegal and void. The defendants were sought to be restrained from interfering with the ownership and possession of the plaintiffs of ½ share of the suit land by issuance of a decree of perpetual injunction. With these allegations, the plaintiffs had instituted the suit in the Court below on 15.1.1990.

3. The defendants had resisted the suit on the grounds of maintainability and limitation in the preliminary objection. In reply to paras on merits, the defendants had admitted joint and undivided character of the suit land. The plaintiffs had been owners in possession of ¼ share of the suit land. The defendants had been owners in possession of ¾ share of the suit land. The defendants had denied having manipulated reduction of the share of the plaintiffs. The A.C. 1st Grade vide order dated 2.5.1987 had proceeded to partition the suit land as per the shares of the parties. The appeal of the plaintiffs had been dismissed by the Collector vide order dated 13.6.1988. The plaintiffs were not entitled to any relief much less to the discretionary relief of permanent injunction.

4. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiffs are entitled for the declaration that plaintiffs are joint owners in possession of the suit land alongwith defendantrs No. 1 to 3 and the share of the plaintiffs comes to 1.9 bighas? OPP.

2. Whether the revenue entries showing the plaintiffs owners to the extent of 9 biswas only is wrong and contrary to the real facts? OPP.

3. Whether the partition order of A.C. 1st Grade, Ghumarwin dated 2.5.1987 is based on wrong and illegal facts and is not binding on the right, title and interest of the plaintiffs? OPP.

4. Whether the plaintiffs are entitled for the relief of permanent injunction, as alleged? OPP.

5. Whether the suit is not maintainable? OPD.

6. Whether the suit is not within limitation? OPD.

7. Relief.

5. On appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs. In appeal,

preferred before the learned first Appellate Court, against the judgment and decree of the learned trial Court, the learned first Appellate Court also dismissed the appeal.

6. Now the plaintiffs/appellants have instituted the instant Regular Second Appeal before this Court, assailing the findings recorded by the learned first Appellate Court, in, its impugned judgment and decree. When the appeal came up for admission on 8.4.2004, this Court, admitted the appeal instituted by the plaintiffs/appellants against the judgment and decree rendered by the learned first Appellate Court, on, the hereinafter extracted substantial question of law:-

1. Whether the learned first appellate Court erred in relying upon the latest entries in the revenue record for which foundation has not been laid which resulted into the miscarriage of justice?

Substantial Question of Law No.1

7. The plaintiffs-appellants are the successors- in-interest of Pohlo. Pohlo alongwith his three brothers, namely, Tihru, Mahant and Pessu, had been prior to the conferment of the proprietary rights upon them, cultivating the suit land as tenants under the land owners. The extant entries in the apposite jamabandi, qua the suit land depict therein the share of the plaintiffs, who are successors-in-interst of Pohlo to be to the extent of 1/4th share and of the defendants, one amongst whom is Mahant the brother of Pohlo, and the others who are the successor-in-interest of the other bothers of Pohlo, namely, of Pessu and of Tihru to be also having a share compatible to the plaintiffs-appellants, inasmuch, as, they too having a share to the extent of 1/4th share in the suit land. The entries in the latest Jamabandi qua the suit land are subjected to a frontal attack at the instance of the plaintiffs-appellants. Besides the order rendered by the Assistant Collector Ist Grade, Ghumarwin which has been affirmed in appeal by the Collector under order rendered on 2.5.1987, whereby the suit land was partitioned in equal shares amongst the plaintiffs-appellants, successor-in-interest of Pohlo, Mahant and the successor-in-interest of Tihru and Pessu, has also come be assailed. The counsel for the plaintiffs-appellants has anchored his impeachment to the aforesaid, on the ground that, with the revelation in Ext.D-2 of Pohlo the predecessor-in-interest of the plaintiffs-appellants, having ½ share in the suit land, whereas Kalan, the successor-in-interest of Tihru, besides defendant No.2 and the predecessors-in-interest of defendants No. 3 and 4 namely Pesu, having been divulged therein to be having an equal proportionate share in the residue, any entry marking a reflection contrary to the reflection of Ex. D-2 is wholly unwarranted or erroneous. Moreso, when a presumption of truth is to be imputed to the entries in the jamabandi Ex. D-2 and theirs having remained unrebutted. The counsel for the plaintiffs-appellants has also further proceeded to foist untenability to the entries in the latest jamabandi on the score of theirs being not in consonance with the reflection in the order of mutation bearing No.578 attested on 23.11.1969 whereby Pohlo, the predecessor-in-interest of the plaintiffs/appellants was ordered to be recorded in the apposite jamabandi to be having a ½ share in the suit property. The submissions as addressed before this Court by the learned

counsel for the appellants-plaintiffs though, attractive on their facade, nonetheless they loose much of their sheen, when this Court proceeds to peer beneath the legality of the entries recorded in Ext.D-2. When this Court proceeds to delve into the order preceding the making of the entries comprised in Ext.D-2 for discerning whether it carries an aura of legality, it is unearthed that the said jamabandi is anchored upon the order rendered on 17.10.1966 comprised in Ext.PX. The aforesaid order has been rendered by the Compensation Officer. It is anvilled upon Ext.PY, which is a statement recorded by the predecessor-in-interest of the plaintiffs-appellants, namely, Pohlo, Kalan, the successor-in-interest of Tihru and Pesu, the predecessor-in-interest of defendants No. 3 and 4. A perusal of their statement discloses the factum of theirs conceding to the factum of Pohlo, the predecessor-in-interest of the plaintiffs having a ½ share in the suit property. Consequently, it led the Compensation Officer to render a direction of Pohlo, the predecessor-in-interest of the plaintiffs-appellants having ½ share in the suit property. It appears that, hence it sequelled the rendition of an order attesting mutation in consonance thereto. Besides obviously it sequelled the reflection in the jamabandi Ext.D-2 of Pohlo, the predecessor-in-interest of the plaintiffs-appellants having a ½ share in the suit property. However, the 3rd brother of Pohlo namely Mahant, though has been admitted by PW-1 to be alongwith his predecessor-in-interest, besides, with Tihru, Mahant and Pesu having an equal share as tenants under the landowners, do not or omitted to make a statement preceding the rendition of an order rendered by the Compensation Officer, comprised in Ext.PX, revealing therein that he too alongwith Kalam and Pesu had conceded to the factum of Pohlo, the predecessor-in-interest of appellant/plaintiffs having a ½ share in the suit land. As a sequel, when it has not been established that Kalan, Pessu and Pohlo while holding an authorization conferred upon them by defendant No.2, who, too had a compatible right in the suit property as a tenant alongwith them had proceeded to make a statement hence on his behalf too qua the factum of Pohlo having ½ share in the suit property and the other half share being proportionately available to Kalan the successor-in-interest of Tihru and defendants No. 3 and 4 the successors-in-interest of Pessu. As a natural corollary, in the absence of authorization having been conferred upon or accorded to the aforesaid by Mahant admittedly also having a compatible share in the suit property, the statements of Kalan, Pohlo and Pesu cannot be construed to be hence comprising an authorization to the latter to abridge his compatible or an interest in equivalent measure along with them in the suit property. As a natural corollary, the statement comprised in Ex. PY which sequelled rendition of Ex. PX being not a statement rendered by its makers authorization conferred upon them by Mahant did not hence constitute it to be a statement by or on behalf of Mahant, the other brother of Pohlo, who too had an equal share or a compatible right with the aforesaid, it cannot be construed to be binding upon him nor it can be concluded that it has the effect of eroding his right in the suit property. In other words, the interest of defendant No.2 in the suit property remained uneroded or intact. Moreover, even the Compensation Officer while rendering his order comprised in Ext.PX appears to have misconstrued the impact of the statement comprised in Ext.PY, especially when for want of authorization having been afforded by

defendant No.2 to the makers of the statement, the statement recorded/comprised therein abridging or restricting besides abrogating the right of defendant No.2 in the suit land, could not be carried forward adversely as untenably done in Ex. D-2. What further vitiates Ext.PX is the factum of Mahant having remained unpleaded in the proceedings which sequelled rendition of Ext.PX, consequently, when hence he remained unpleaded. He remained un-served and as a natural corollary, did not participate in the proceedings which sequelled rendition of Ext.PX. Consequently, when it was rendered behind the back of defendant No.2, hence, in infraction of the principles of natural justice necessitating his being heard prior to its rendition, rather his neither having participated in the proceedings launched by the Compensation Officer culminating in the rendition of Ext.PX nor with obviously he was neither served nor heard by the authority who rendered Ext.PX, renders it to acquire no force or vitality, in so far as defendant No.2 is concerned. Now since the latter has come to be condemned unheard, as a sequel, the order comprises is void abnitio, with its being gripped with the vice of infraction of the principle of audi altrum partum. As a sequel, it even has no binding effect so as to render tenable the order attesting mutation qua the suit land in favour of the predecessor-in-interest of the plaintiffs, namely, Pohlo to the extent of ½ share nor hence the subsequent jamabandi comprised in Ext.D-2 acquires any vigour or strength. As a natural corollary, when neither Ex. PX nor Ex. PY have marshaled any strength, then the order rendered by the Assistance Collector, Ist Grade, Ghumarwin on 2.5.1987 acquires vigour and strength, obviously then, the entries in the jamabandi reflecting the parties at lis tobe each having ¼ share in the suit property do not acquire any taint or vice.

8. The effect of the above discussion is that when the anvil or the anchor of the entries in Jamabandi Ext.D-2 gathers no force or momentum. The reflections therein are inconsequential and are rendered rudderless. The arguments built on strength thereof by the learned counsel for the appellant carry no weight, hence discountenanced.

9. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the both the Courts below are maintained and affirmed. Substantial question of law is answered accordingly. No costs.

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

Chain Singh S/o Sh Sant Ram. .....Petitioner.

Versus

State of HP and others. .....Respondents.

CWP No. 1489 of 2010.
Order reserved on: 16.10.2014.
Date of Order: October 21, 2014

Constitution of India, 1950- Article 226- Petitioner was engaged as Gardner after completing the training- he was not regularized- according to the petitioner, respondents were taking the work of the clerk from the petitioner- respondent contended that petitioner was initially engaged for seasonal work subject to the availability of work- petitioner had not completed 180 days- it was further denied that respondent had taken work of the clerk from the petitioner- held, that the service of the petitioner can be regularized as per Recruitment and Promotion Rules after the appointment was made by the selection committee - further, regularization is dependent upon the existence of the vacant post- petitioner had not placed any record to show that there was regular vacancy in the department or that his appointment was made by a duly constituted Selection Committee- further, petitioner was engaged for a particular work which work came into end on the completion of the season, therefore, petitioner was not entitled to be regularized or granted status of work charge employee. (Para- 5 to 7)

For the petitioner: Mr. Sanjeev Bhushan, Advocate.
For Respondents. Mr. M.L.Chauhan, Addl. Advocate General with Mr.Pushpinder Singh Jaswal, Dy Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present Civil Writ Petition is filed under Article 226 of the Constitution of India. It is pleaded that respondent department invited applications from the desirous candidates having a particular qualification for providing them one year training of gardener. It is further pleaded that petitioner applied for the training of gardener and after conducting the interview he was selected for the same post vide selection letter dated 1.8.1997. It is further pleaded that in the year 1998 petitioner successfully completed the training of gardener. It is further pleaded that petitioner was engaged by the respondent department as gardener in the year 1999 but work for the post of Clerk was obtained from the petitioner. It is further pleaded that eleven years have past but respondents have not regularized the service of the petitioner despite many representations for regularization. It is further pleaded that direction be issued to the respondents for regularization/work charge the services of the petitioner in the capacity of gardener. It is further pleaded that respondents be directed to pay wages of Clerk/gardener to the petitioner from 1999. It is further pleaded that respondents be directed to pay the arrears of salary with interest at the rate of 9% per annum. Prayer for acceptance of writ petition sought.

2. Per contra reply filed on behalf of the respondents pleaded therein that one year vocational gardener training was conducted under the Dr. Y.S Parmer University and the resident commissioner being the single line administrator selected the petitioner along with others for the said training. It is further pleaded that main purpose to conduct the training was to make the unemployed youth self reliant. It is further pleaded that training

was imparted for self employment purpose. It is further pleaded that petitioner has no legitimate right to claim the government service on the basis of training imparted and the respondent department is not bound to provide government job. It is further pleaded that petitioner was initially engaged during the month of June 1999 for seasonal work at Progeny-cum-Demonstration Orchard at Killar as well as some time in the office of Subject Matter Specialist Pangi at Killar subject to availability of work and petitioner remained on work till 2004. It is further pleaded that petitioner has not completed required 160 days in the year 1999, 2003 and 2004. It is further pleaded that petitioner is not eligible for work charge status as the petitioner has not worked continuously with respondent department. It is further pleaded that petitioner was engaged as daily paid labourer at Progeny-cum-Demonstration Orchard Killar and when the work was not available at Progeny-cum-Demonstration Orchard the petitioner thereafter worked in the office of Subject Matter Specialist Pangi as beldar for cleaning the office and to distribute the official letters etc. It is further pleaded that petitioner was engaged at Progeny-cum-Demonstration Orchard Killar as beldar for seasonal work and is not entitled for any relief. It is further pleaded that wages already stood paid to the petitioner. It is further pleaded that petitioner was not engaged as Clerk and petitioner is not eligible for the wages of Clerk. Prayer for dismissal of writ petition sought. Petitioner filed rejoinder and re-asserted the allegation pleaded in the civil writ petition.

3. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General on behalf of the respondents and also perused entire records carefully.

4. Following points arise for determination in the present writ petition:

(1) Whether petitioner is entitled for regularization of service as alleged?

(2) Whether petitioner is entitled for work charge status as alleged?

(3) Whether petitioner is entitled for the wages of Clerk from the year 1999 with interest at the rate of 9% per annum as alleged?

Finding upon Point No.1.

5. Submission of learned Advocate appearing on behalf of the petitioner that the service of the petitioner should be regularized is rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that services in public post are regularized as per Recruitment and Promotion Rules after the appointment of selection committee by the employer. It is well settled law that regularization in the service is not automatic. It is well settled law that regularization in the services is subject to the vacancy available qua particular post. Petitioner did not place on record any document in order to prove that he was recommended by the selection committee for regularization of his service. Petitioner also did not

prove on record that there is regular vacancy as claimed by the petitioner. It is also proved on record that as per Annexure R1 there is break in service of petitioner in the year 1999, 2000, 2001, 2002, 2003 and 2004 and it is also proved on record that petitioner did not continuously worked for 160 days without any interruption. In view of the above stated facts the prayer of the petitioner that his service be regularized is declined in the ends of justice. Hence point No.1 is answered against the petitioner.

Finding upon Point No.2.

6. Submission of learned Advocate appearing on behalf of the petitioner that work charge status should be given to the petitioner is accepted for the reason hereinafter mentioned. It is well settled law that work charged employees are engaged on a temporary basis and their appointments are made for execution of specified work. It is well settled law that service of work charged employee automatically come to an end on the completion of work for the sole purpose for which the employee was engaged. See 1979 4 SCC 440 titled Jaswant Singh and others Vs. Union of India and others. It is admitted by the respondents that service of the petitioner obtained for a particular season. Administrative Officer Directorate of Horticulture HP has submitted document Annexure R1 which is quoted in toto:-

Detail of the working days in respect of Sh Chain Singh S/o Sh Sant Ram of the office of Subject Matter Specialist, Pangi at Killar w.e.f.1.6.1999 to 30.4.2004.

	1999	2000	2001	2002	2003	2004
January	---	---	31	30	---	20
February	---	---	28	27	---	29
March	---	---	23	27	---	---
April	---	---	---	---	---	29
May	---	31	---	---	31	---
June	15	15	29	---	30	---
July	31	31	30	7	31	---
August	---	31	20	30	---	---
September	---	22	28	30	30	---
October	---	31	27	31	---	---
November	---	---	29	30	---	---
December	---	---	30	31	---	---

Total Days.	46	161	275	243	122	78

It is also proved on record as per Annexure R1 that service of petitioner was engaged for particular season. It is also proved on record vide Annexure P2 that training was imparted to petitioner Chain Singh for self employment. In view of the fact that petitioner has worked in particular season in the year 1999, 2000, 2001, 2002, 2003 and 2004 for specified period with break as shown in Annexure R1 it is held that petitioner will be entitled for seasonal work which the petitioner had performed in the aforesaid years. Hence point No.2 is decided accordingly.

Finding upon Point No.3

7. Submission of learned Advocate appearing on behalf of the petitioner that he has worked as Clerk and salary of Clerk be granted to the petitioner along with interest at the rate of 9% per annum is rejected being devoid of any force for the reason hereinafter mentioned. There is no evidence on record in order to prove that petitioner has worked as a Clerk. On the contrary it is proved on record that petitioner has worked in a particular season. Petitioner did not place on record any office order in order to prove that the competent authority has directed him to perform the work of Clerk. It is well settled law that no person can work upon a post unless directed by the employer in a written manner in accordance with law. In the absence of any order of employer to engage the petitioner as Clerk it is not expedient in the ends of justice to grant the salary of Clerk to the petitioner. Point No.3 is decided against the petitioner.

8. In view of the above stated facts it is held (1) That petitioner will be legally entitled for seasonal work with remuneration as performed by the petitioner in the year 1999, 2000, 2001, 2002, 2003 and 2004. (2) Respondents are directed to provide seasonal work to petitioner as gardener. (3) Other relief(s) claimed by petitioner declined. Writ petition is accordingly disposed of with no order as to costs. All miscellaneous application(s) are also disposed of.

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HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

M/s. Delux Enterprises ...Appellant.
Versus
H.P. State Electricity Board Ltd. & others ...Respondents.

LPA No. 125 of 2014
Reserved on: 13.10.2014
Decided on: 21.10.2014

Constitution of India, 1950- Article 226- Petitioner filed a Writ for quashing the order passed by Himachal Pradesh State Electricity Board demanding levy/charges-held, that the petitioner had not questioned the order passed by the Zonal Level Dispute Settlement Committee or the order passed by, Forum for Redressal of Grievances of Consumers of HPSEB or the order passed by Himachal Pradesh Electricity Ombudsman- authorities had exercised the powers and jurisdiction vested in terms of applicable law- Further, the dispute regarding tariff to be levied and demand to be made, are the disputed question of fact which cannot be decided in a Writ Petition. (Para- 8 to 13)

Cases referred:

Himachal Futuristic Communications Ltd. versus State of H.P. and another, CWP No. 4622 of 2013 decided on 4th August, 2014

Arpana Kumari versus State of H.P. and others, LPA No. 485 of 2012 decided on 11th August, 2014

Ajmer Singh versus State of H.P. and others, LPA No. 23 of 2006 decided on 21st August, 2014

Bhuvnesh Kumar Dwivedi versus M/s Hindalco Industries Ltd., 2014 AIR SCW 3157

For the appellant: Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Satyen Vaidya, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This Letters Patent Appeal is directed against the judgment and order, dated 6th June, 2014, passed by the learned Single Judge in a writ petition, being CWP No. 4465 of 2009, titled as M/S Deluxe Enterprises versus H.P.S.E.B. & others, whereby the writ petition filed by the appellant-writ petitioner came to be dismissed (hereinafter referred to as "the impugned judgment").

2. Heard.

3. The appellant-writ petitioner invoked the jurisdiction of this Court by the medium of CWP No. 4465 of 2009 for issuance of writ of certiorari quashing orders made by the respondents-authorities, dated 18th April, 2007 (Annexure P-1); Annexure P-2, dated 29th January, 2008; Annexure P-3, dated 5th August, 2008 and Annexure P-8, dated 19th November, 2009; also sought writ of mandamus commanding the respondents to levy/charge the demand from it with effect from 1st November, 2001 to 20th August, 2004 on the basis of maximum recorded demand during the said period, on the grounds taken in the memo of writ petition.

4. Precisely, the case of the writ petitioner is that the orders impugned in the writ petition have been made by the respondents-authorities, i.e. The Zonal Level Dispute Settlement Committee, Forum for

Redressal of Grievances of Consumers of HPSEB, Himachal Pradesh Electricity Ombudsman, on forged documents-bills, thus, are illegal and is not liable to be charged/levied on the basis of contract demand; the action of the respondents-authorities is violative of Articles 14 and 16 of the Constitution of India for the reason that all other units and firms have been levied/charged on the basis of maximum recorded demand for the month.

5. The respondents have resisted the petition by the medium of reply and have raised the objection that the writ petition was not maintainable.

6. The learned Single Judge held that the writ petitioner is bound to make the payment as per the prevailing rates of electricity tariff and is bound by the contract, as contained at page 109 of the paper book.

7. The learned Single Judge has not discussed as to whether the writ petition was maintainable. It appears that the disputed questions of facts are involved in the writ petition and it is a moot question as to whether the writ was maintainable or not?

8. The writ petition, on the face of it, is not maintainable for the reason that the writ petitioner has not questioned the order dated 18th April, 2007, passed by the Zonal Level Dispute Settlement Committee (Annexure P-1); order dated 29th January, 2008, passed by the Forum for Redressal of Grievances of Consumers of HPSEB (Annexure P-2) and orders, dated 5th August, 2008, passed by the Himachal Pradesh Electricity Ombudsman (Annexure P-3) and order, dated 19th November, 2009, (Annexure P-8) passed by the Himachal Pradesh Electricity Ombudsman, on the petition for review/recalling the order, dated 5th August, 2008, on the ground that the respondents-authorities have no jurisdiction to make these orders.

9. The authorities have exercised the powers and jurisdiction as vested with them in terms of the law applicable.

10. The dispute raised, at the cost of repetition, is that as to at what rate, the tariff was to be levied and demand was to be made, which is a disputed question of fact, cannot be gone into in a writ petition. It is also not the case of the writ petitioner that the orders have been passed on any inadmissible evidence or on the documents which are not legal. Thus, the writ petition, on the face of it, was not maintainable.

11. The Apex Court in a series of cases held that the orders made by the Tribunals and other quasi-judicial authorities/ functionaries cannot be questioned by the medium of writ petition unless the orders have been passed without jurisdiction or in breach of the provisions of the mandate of law.

12. This Court in a series of cases, being **CWP No. 4622 of 2013,** titled as **M/s Himachal Futuristic Communications Ltd. versus State of H.P. and another,** decided on 4th August, 2014; **LPA No. 485 of 2012,** titled as **Arpana Kumari versus State of H.P. and others,** decided on 11th August, 2014; and **LPA No. 23 of 2006,** titled as **Ajmer Singh versus State of H.P. and others,** decided on 21st August, 2014, while relying upon the

latest decision of the Apex Court in **Bhuvnesh Kumar Dwivedi versus M/s Hindalco Industries Ltd.,** reported in **2014 AIR SCW 3157,** has held that question of fact cannot be interfered with by the Writ Court. However, such findings can be questioned if it is shown that the Tribunal/Court has erroneously refused to admit admissible and material evidence or has erroneously admitted inadmissible evidence which has influenced the impugned findings. It is apt to reproduce paras 16, 17 and 18 of the judgment rendered by the Apex Court in **Bhuvnesh Kumar Dwivedi's case (supra)** herein:

> *"16. ..... The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of*

evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.....

17. The judgments mentioned above can be read with the judgment of this court in Harjinder Singh's case (AIR 2010 SC 1116) (supra), the relevant paragraph of which reads as under:

> *"21. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and/or 227 of the Constitution in matters like the present one, the High Courts are duty-bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that:*
>
> > *"10. … The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State."(State of Mysore v. Workers of Gold Mines, AIR 1958 SC 923 p.928, para 10.)*

18. A careful reading of the judgments reveals that the High Court can interfere with an Order of the Tribunal only on the procedural level and in cases, where the decision of the lower courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution

amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant." [Emphasis added]

13. On this count only, the writ petition merits to be dismissed.

14. We have gone through the orders impugned in the writ petition, have been passed by the respondents-authorities as per the authority vested with them, cannot be said to be orders without jurisdiction.

15. All the authorities have made the orders legally, are not suffering from any patent error or mistake and it is not the case of the appellant that the findings are based on inadmissible evidence, thus, the findings returned cannot be said to be erroneous.

16. The impugned judgment is well reasoned and speaking one. It is apt to reproduce relevant portion of the impugned judgment herein:

"5. .....The respondents by applying the two way mode, of levying electricity tariff, in as much, as, by raising demand, both, qua the energy charges, as well, as qua demand charges, its, hence, constituting and comprising the prevalent rates of levy of tariff which mode of rates of tariff has been accepted by the petitioner in a concluded contract inter-se the parties at contest. Therefore, the petitioner-unit is estopped from contending that the levy of tariff on the prevalent rates comprised, in Annexure RS-F are either arbitrary or capricious, rather the raising of electricity tariff by the respondents for the electricity consumed by the petitioner-unit is anvilled upon firm and formidable material existing on record. ....."

17. Having glance of the above discussions, the appeal as well as the writ petition merit to be dismissed and the impugned judgment merits to be upheld.

18. Having said so, the appeal is dismissed alongwith all pending applications.

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

Madan Lal — Petitioner.
Versus
State of H.P. — Respondent.

Cr.MP(M) No. 1173 of 2014.
Date of decision: 21.10.2014.

Code of Criminal Procedure, 1973- Section 439- FIR registered against the petitioner for the commission of offences punishable under Sections 420 and 120-B IPC- petitioner in judicial custody since 22.5.2014- it was contended by the prosecution that the accused had indulged in criminal activities and he is not entitled for the concession of bail- held, that the repeated and successive indulgence of the applicant in criminal activities and the fact that criminal cases were pending against him is necessary factor to be kept in mind while granting or refusing the bail- however, the Court can impose strict conditions to ensure that the applicant will not flee from justice and will not indulge in criminal activities- Bail granted with the appropriate condition. (Para-3)

Case referred:

Maulana Mohammed Amir Rashadi vs. State of Uttar Pradesh and another *(2012) 2 SCC 382*

For the petitioner: Mr. Hament Kumar Sharma, Advocate with Mr. Anil Negi, Advocate.

For the respondent: Mr. Vivek Singh Attri, Dy. Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

1. The instant bail application has been filed under Section 439 of the Cr. P.C. by the bail-applicant in case F.I.R. No. 68/2014 dated 11.4.2014, under Section 420, 120B of the Indian Penal Code, registered at Police Station Ghumarwin, District Bilaspur. H.P.

2. The bail applicant is suffering judicial incarceration for his having committed offences under Section 420 and 120-B IPC. He is in judicial custody since 22.5.2014. The learned Deputy Advocate General submits that at this stage four criminal cases are pending against the bail applicant in various courts. Consequently, he submits that in face of repeated and successive indulgence of the bail applicant in criminal activities, the according of facility of bail in his favour, may not be appropriate as there is every likelihood of his influencing the prosecution witnesses in the four cases pending against him.

3. Even though the factum of repeated and successive indulgence of the bail applicant in criminal activities and besides the factum of criminal cases pending against him is a necessary factor to be borne in mind when according or refusing the facility of bail to him. However, in view of the mandate enshrined in **Maulana Mohammed Amir Rashadi vs. State of Uttar Pradesh and another *(2012) 2 SCC 382*** wherein it has been enshrined that strict/stringent conditions can be imposed by this Court to obviate the factum of the bail applicant fleeing from justice or influencing witnesses. The imposition of such conditions would also mitigate as well as allay the apprehension of the State that given his previous repeated indulgence in criminal activities he in case is granted bail would abuse his bail and re-indulge in criminal activities. Consequently, this Court to allay the apprehension of the respondent that there is likelihood of his influencing the witnesses as well as his again indulging in criminal activities, proceeds

to afford the facility of the bail to the bail applicant subject to the following conditions:

(i) That he shall furnish one personal and two surety bonds in the sum of Rs.1,00,000/- each to the satisfaction of the learned Chief Judicial Magistrate, Bilaspur;

(ii) That the bail applicant shall join the investigation, as and when required by the investigating agency;

(iii) That he shall not directly or indirectly advance any threat, inducement or promise to any person acquainted with the facts of the case and shall not tamper with the prosecution evidence;

(iv) That he shall not leave India without the permission of the Court.

(v) That in case of reindulgence of the bail applicant in criminal activities, it shall be open to the State to move for cancellation of the bail.

(vi) That in case an intimation is received by the State that the bail applicant is influencing the witnesses in criminal cases pending against him then it shall be open for the state for apply for cancellation of the bail.

With the aforesaid observations, the present petition stands disposed of. It is, however, made clear that the findings recorded hereinabove will have no bearing on the merits of the case.

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

Shri Ram son of Shri Bhagat Ram and another ....Petitioners

Versus

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

CWP No. 8414 of 2012
Order Reserved on 15th October,2014
Date of Order 21st October, 2014

Constitution of India, 1950- Article 226- Petitioners were appointed on daily wages in the Department in the year 1988- work charge status was granted to them after completion of 10 years- their services were regularized in the year 2007 and they worked till 2010- however, pension was not granted to them - held, that the services rendered by petitioners as work charge employees has to be counted towards qualifying service for pension. (Para-5)

For the Petitioners: Ms. Archana Dutt, Advocate.

For the Respondents: Mr. M.L. Chauhan, Additional Advocate General, Mr. Pushpinder Singh Jaswal, Deputy Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Section 226 of the Constitution of India pleaded therein that petitioners were engaged on daily wage basis in the respondents department in Forest Division situated in Bilaspur District in the year 1988. It is pleaded that work charge status was granted to the petitioners after completion of ten years of daily wage service. It is further pleaded that services of petitioners were regularized by the respondents department in the year 2007 and petitioners worked as such till the year 2010. It is further pleaded that after completion of ten years regular service petitioners were entitled for pension as prescribed in CCS (Pension) Rules. It is pleaded that pension was not granted to petitioners by the respondents department. It is pleaded that petitioners retired from service after attaining the age of superannuation and despite eligibility of pension the pension was denied to petitioners by the respondents department. It is pleaded that respondents department be directed to grant pension to petitioners as per Clause 49 of CCS (Pension) Rules and further pleaded that respondents be also directed to grant benefit of gratuity.

2. Per contra reply filed on behalf of the respondent Nos. 1 to 3 pleaded therein that petitioners were engaged on daily wage basis in the respondents department and they worked till their regularization. It is pleaded that on receipt of posts from State Government for regularization of daily waged workers their services were regularized on dated 19.9.2007 and petitioners retired from service after attaining the age of superannuation during the year 2010 after completing only about two and a half years regular service. It is pleaded that petitioners filed civil writ petition before this Court and as per order of the Hon'ble High Court of H.P. work charge status was granted to the petitioners w.e.f. 1.4.1998 and 1.1.1998 respectively. It is pleaded that petitioners have not completed required qualifying service for pension as prescribed under CCS (Pension) Rules 1972 and they are not entitled for pension benefits. It is pleaded that H.P. State Government vide letter No, FFE-A(B)19-2/2011 dated 30.11.2011 annexed as Annexure R-1 advised that daily wager who is conferred work charge status retrospectively is not entitled for grant of benefits under Assured Carrier Progression Scheme, Earned leave and medical leave etc. It is pleaded that keeping in view above stated facts service rendered by petitioners on work charge basis could not be considered as regular service for grant of pensionary benefits as per CCS (Pension) Rules 1972. It is pleaded that present writ petition is not maintainable. It is pleaded that Hon'ble Apex Court of India in case titled as Jaswant Singh and others vs. Union of India and others (1979)4 SCC 440 held that employees of work charge are not entitled to service benefits as available to regular employees.

It is pleaded that as per directions of Hon'ble High Court of H.P. the work charge was granted to petitioners w.e.f. 1.4.1998 and 1.1.1998 respectively and they have retired from government service in the year 2010 after putting two and a half years regular service. It is pleaded that as petitioners have not completed qualifying service for pension they are not entitled for any pensionary benefits as sought in relief clause of petition. Prayer for dismissal of civil writ petition sought.

3. Court heard learned Advocate appearing on behalf of the petitioners and learned Additional Advocate General appearing on behalf of the respondents-State and Court also perused the entire record carefully.

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

1. Whether work charge service of petitioners will be counted for pensionary benefits and gratuity benefits, as alleged.

Findings on point No.1

5. Submission of learned Advocate appearing on behalf of the petitioners that services of petitioners as work charge employees w.e.f. 1.4.1998 and 1.1.1998 will be counted for pensionary benefits is accepted for the reasons hereinafter mentioned. Hon'ble High Court of Himachal Pradesh in CWP No. 6167 of 2012 titled Sukru Ram vs. State of H.P. and others decided on dated 6.3.2013 held that service rendered by petitioner as work charge employee should be counted towards qualifying service for pension. Hon'ble High Court of Himachal Pradesh relied upon the ruling of Apex Court of India reported in (2010)4 SCC 317 titled Punjab State Electricity Board and another vs. Narata Singh and another. There is no document on record in order to prove that order passed by Hon'ble High Court of Himachal Pradesh in CWP No. 6167 of 2012 titled Sukru Ram vs. State of H.P. and others decided on dated 6.3.2013 was set aside in LPA by Hon'ble High Court of Himachal Pradesh or set aside in SLP by Apex Court of India. Order passed by Hon'ble High Court of Himachal Pradesh in CWP No. 6167 of 2012 titled Sukru Ram vs. State of H.P. and others decided on 6.3.2013 has attained the stage of finality.

6. Submission of learned Additional Advocate General appearing on behalf of the respondents that in view of letter No. FFE-A(B)19-2/2011 dated 30.11.2011 issued from Additional Chief Secretary (Forests) to the Government of Himachal Pradesh petitioners are not entitled for pensionary benefits is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that administrative order cannot override the judicial order. On the contrary it is well settled law that judicial order always overrides administrative order. In view of above stated facts point No.1 is answered in affirmative.

7. In view of above findings, it is held that (1) work charged service of petitioners will be counted towards qualifying service for grant of pension and thereafter pension of petitioners will be calculated in accordance with law payable to the petitioners. It is further held that order will be complied within a period of eight weeks from today. (2) It is held that

petitioners will also be entitled for gratuity if not paid in accordance with law from the date of their regularization of service i.e. from dated 19.9.2007. Writ petition stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

The Executive Engineer HPPWD and anr. .....Appellants

Versus

Attar Singh ...Respondent.

LPA No. 165 of 2014

Date of decision: 21st October, 2014.

Industrial Disputes Act, 1947- Section 25-G & H- dispute between the workman-employee and employer was raised before the Industrial Tribunal-cum-Labour Court- award was passed by the Labour Court- Writ Petition was preferred against the award which was dismissed- held, that the petitioner had failed to prove that workman had abandoned his job at any point of time- no notice was served upon workman- workman is entitled to protection in terms of Sections 25-G & 25-H- Appeal dismissed.

(Para-2 to 5)

For the appellants: Mr. Shrawan Dogra, Advocate General with Mr. V.S. Chauhan, & Mr. Romesh Verma, Additional Advocate Generals, Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals.

For the respondent: Mr. S.C. Awasthi, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This Letters Patent Appeal is directed against the judgment dated 8.5.2014, passed by the learned Single Judge in CWP No.1750 of 2013, titled Executive Engineer, HP, PWD and another vs. Shri Attar Singh whereby and whereunder the writ petition came to be dismissed, for short "the impugned judgment", on the grounds taken in the memo of appeal.

2. It appears that there was a dispute between the workman-employee and employer and the said dispute was raised before the Industrial Tribunal-cum-Labour Court, Shimla, which culminated into the award dated 7.8.2012. Feeling aggrieved, the petitioners/ appellants questioned the same by the medium of the Civil Writ petition, on the grounds taken in the writ petition.

3. The Writ Court has specifically observed in para 6 of the impugned judgment that the petitioners/appellants herein have failed to prove that the workman has abandoned his job at any point of time. Even Ajay Kumar Soni who appeared as RW-1 before the Tribunal has specifically admitted that no notice was ever served to the workman, which is not in dispute before this Court.

4. The writ Court has rightly recorded the findings in para 6 of the impugned judgment.

5. Apparently, the workman/respondent herein is entitled to protection in terms of Sections 25-G & 25-H.

6. Having said so, the Writ court has passed a well reasoned judgment, needs no interference. The appeal is accordingly, dismissed and the impugned judgment is upheld.

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

Bansi Ram son of Shri Narayan Singh ....Petitioner
Versus
State of H.P. and others ....Respondents

CWP No. 5306 of 2013
Order Reserved on 17th October,2014
Date of Order 22nd October, 2014

Constitution of India, 1950- Article 226- Petitioner was appointed as a daily wage driver- his services were terminated on 22.12.2012 on the charges of misconduct- he approached Industrial Tribunal, which allowed the complaint- however, his joining report was not accepted by the respondent- explanation of the Officer was called by Labour Commissioner, after which joining report was accepted- however, services of the petitioner were not regularized- Department contended that the petitioner had not worked for 240 days in each calendar year and he is not entitled for regularization- held, that a person can be regularized only, if he is appointed by the Competent Authority on the recommendation of Selection Committee- petitioner had not placed any material on record to show that his appointment was made after the recommendation of the Selection Committee- further, no material was placed on record to show that any vacancy was lying vacant upon which petitioner could be regularized-hence the petitioner cannot be regularized. (Para-5)

Cases referred:

Trilok Raj vs. State of H.P. and others, CWP No. 7035 of 2012-D decided on dated 19.11.2012

Bhagwati Prasad vs. Delhi State Mineral Development Corporation, (1990)1 SCC 361

For the Petitioner:	Mr. Dhruv Shaunak, Advocate.
For the Respondents:	Mr. M.L. Chauhan, Additional Advocate General, Mr. Pushpinder Singh Jaswal, Deputy Advocate General.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Article 226 of the Constitution of India pleaded therein that in May 1999 petitioner was appointed as a daily waged driver by the respondents. It is further pleaded that service of petitioner was terminated by the respondents on dated 22.12.2012 on the charges of misconduct. It is further pleaded that thereafter on dated 29.9.2004 petitioner approached the H.P. Industrial Tribunal-cum-Labour Court Dharamshala District Kangra H.P. and on dated 25.7.2006 H.P. Industrial Tribunal-cum-Labour Court allowed the claim of petitioner and awarded the seniority benefits to the petitioner. It is further pleaded that in the month of September 2006 petitioner gave his joining report to the respondents but the same was not accepted by them. It is pleaded that in the year 2006-07 learned Labour Commissioner called the explanation of concerned officer for not implementing the orders passed by H.P. Industrial Tribunal-cum-Labour Court and in the month of March 2007 petitioner gave his joining which was duly accepted by the respondents and since then petitioner is working under the respondents. It is further pleaded that on dated 6.10.2007 one Shri Bhagwan Dass was regularized as a driver in the department though he was illiterate. It is further pleaded that respondents be directed to regularize the services of petitioner w.e.f. May 2007 with all consequential benefits and seniority.

2. Per contra reply filed on behalf of respondent Nos. 1 to 3 pleaded therein that present civil writ petition is not maintainable. It is admitted that petitioner had worked as daily wage driver since 1999 to 2002. It is pleaded that petitioner was re-engaged as daily wage driver during the year 2007 as per award announced by Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala. It is pleaded that petitioner did not work for 240 days in each calendar year. It is further pleaded that petitioner is not entitled for regular post of driver. Prayer for dismissal of petition sought.

3. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the respondents and Court also perused the entire record carefully.

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

1. Whether petitioner is legally entitled for regularization of his service subject to availability of vacancy with all consequential benefits, as alleged?

2. Final Order.

Findings on point No.1

5. Submission of learned Advocate appearing on behalf of the petitioner that petitioner is legally entitled for regularization of his service w.e.f. 6.10.2007 subject to availability of regular post of driver is partly answered in yes and partly answered in no. It is well settled law that regularization of public post is always conducted by appointment authority after the recommendation of Selection Committee constituted for regularization of the services of an employee. Petitioner did not place on record any material in order to prove that he was recommended by Selection Committee for regularization on the post of driver. Petitioner also did not place on record any document in order to prove that regular vacancy of driver is available as of today. It is well settled law that regularization in public post is not automatic in nature same is subject to recommendation of Selection Committee constituted by appointing authority.

6. Submission of learned Advocate appearing on behalf of the petitioner that one Shri Bhagwan Dass was regularized as driver in the department on dated 6.10.2007 though he was an illiterate person and on this ground petitioner should also be regularized is rejected being devoid of any force for the reasons hereinafter mentioned. Petitioner did not implead Shri Bhagwan Dass as co-respondent in present petition. It is well settled law that no adverse order can be passed against any person who is not impleaded as co-party in the civil writ petition on the concept of audi-alterm-partem (No one should be condemned unheard). Hence it is held that it is not expedient in the ends of justice to pass any adverse order against Bhagwan Dass because Bhagwan Dass is not co-respondent in present civil writ petition. Point No.1 is decided accordingly.

Final Order

7. In view of decision rendered by Hon'ble High Court of H.P. in CWP No. 7035 of 2012-D titled Trilok Raj vs. State of H.P. and others decided on dated 19.11.2012 and in view of ruling of Hon'ble Apex Court of India reported in (1990)1 SCC 361 titled Bhagwati Prasad vs. Delhi State Mineral Development Corporation it is directed that petitioner will file a representation for regularization of his service before the respondents within one month. It is further held that respondents will consider the representation of petitioner subject to availability of regular vacancy of driver in the department and keeping in view the recommendation of Selection Committee constituted by appointment authority within further two months in accordance with law. Any other reliefs sought by petitioner decline in the interest of justice. Civil writ petition stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Manga Singh. ...Appellant.

Versus

State of H.P. and others. ...Respondent.

Cr.A.No. 523 of 2010
Reserved on : 20.10.2104
Decided on: 22.10. 2014

Indian Penal Code, 1860- Section 376- As per prosecution case, accused cousin of the prosecutrix, had raped her, however, no injuries were found on her person- hymen was found intact- Medical Officer was not sure, whether sexual intercourse had taken place or not- held, that in these circumstances accused is entitled to benefit of doubt. (Para-17 to 23)

Cases referred:
Raju and others vs. State of Madhya Pradesh, (2008) 15 SCC 133
Tameezuddin alias Tammu vs. State (NCT of Delhi), (2009) 15 SCC 566
Narender Kumar vs. State (NCT of Delhi), (2012) 7 SCC 171

For the Appellant: Mr. Vijay Chaudhary, Advocate.
For the Respondent: Mr. M.A. Khan, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 28.9.2010 rendered by the Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala in RBT SC No. 36-N/VII/10 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 of the Indian Penal Code has been convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs. 25,000/- and in default of payment of fine, he was ordered to undergo rigorous imprisonment for a period of one year.

2. Case of the prosecution, in a nutshell, is that prosecutrix was studying in Government Primary School, Kandwal. On 4.3.2010, when the school timing was over at about 2.30 P.M. she did not go to home. The brother of prosecutrix was called. She was sent with her brother. However, she came back. She was reluctant to go home. The prosecutrix was asked by the teacher Pooja Mahajan in presence of two other lady teachers Ritubala and Chandarkanta. The prosecutrix told them that accused was her cousin. Accused and his mother had been torturing and beating her. Accused used to put off her clothes and used to commit sexual intercourse with her. Accused had been doing this act for the last three years. School teacher called the President of Gram Panchayat Narinder Kumar. He came to the school and asked the prosecutrix. The prosecutrix told the President all the facts which were narrated to the school teachers. The police was informed. I.O. came to the spot. He recorded the statement of Pooja Mahajan under section 154 of the Code of Criminal Procedure. FIR was registered. The prosecutrix was taken for her medical examination. She

was got medically examined. Clothes, vaginal, vulval slides and swabs were taken into possession. These were sent for chemical examination. Accused was also medically examined. 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 ten witnesses in all to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He has denied the case of the prosecution in entirety. Learned trial Court convicted and sentenced the accused as noticed hereinabove.

4. Mr. Vijay Chaudhary, has vehemently argued that the prosecution has miserably failed to prove its case against the accused. He has primarily relied upon the statements of PW-6 Dr. Neerja Gupta and PW-7 Dr. Pooja Gupta.

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

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

7. PW-1 Pooja Mahajan has deposed that she was JBT teacher in Government Primary School, Kandwal for the last five years. In the month of March, 2010, prosecutrix was studying in third class. On 4.3.2010, the school time was over at 2.30 P.M. Prosecutrix came back after two minutes and told that she would not go home. She called her brother. He was studying in 6th class. She sent her with him. However, she again came back. She called two teachers Ritu Bala and Chanderkanta. Prosecutrix told that her aunt Rita and her son Manga Ram used to torture and beat her in the house. She told that during night Manga Ram forcibly committed sexual intercourse with her. Accused had been doing this act for the last three years. Accused had been doing this daily during night. Accused also used to tell her not to disclose this to any body. Pradhan Narinder was called. He asked the prosecutrix. She narrated the incident to him. Police recorded her statement Ex.PW-1/A. She has admitted in her cross-examination that the Pradhan was standing outside when her statement was recorded.

8. PW-2 Ritu Bala has deposed that on 4.3.2010 at 2.30 P.M. when the school timing was over Madam Pooja Mahajan called her alongwith teacher Chanderkanta. She told them that prosecutrix was not going to her house. Prosecutrix told that her aunt and her son had been beating her. Accused had been committing sexual intercourse with her during night. Accused had been doing this for the last three years. Pradhan Narinder was called. Pradhan also inquired from the prosecutrix. She narrated all the facts to him. She has admitted in her cross-examination that when Madam Pooja called her, prosecutrix was not present. Volunteered that they had taken prosecutrix to the office. She has also admitted that Pradhan had come on the date of recording of her statement. She has also admitted that she has come with the Pradhan.

9. PW-3 Narinder Kumar has deposed that he was called by a teacher Pooja Mahajan telephonically to the Primary School on 4.3.2010. He went to the school. The teacher told him that prosecutrix was saying that her aunt and her son were torturing her. She told that during night accused slept with her and he used to put off his clothes and used to rub his private part on her body. He used to commit sexual intercourse with her. She told that accused had been doing this for the last two years. He informed the police. The police got the prosecutrix medically examined and also prepared the spot map. He has admitted in his cross-examination that he had come with the school teachers.

10. Statement of PW-4 prosecutrix was recorded on oath. She has deposed that she was studying in 3rd class in Kandwal Primary School. She used to stay in the house of her aunt and accused also used to stay with them. Her brother was also staying with them. Accused used to put off her clothes in the night and used to make her sleep with him. He also used to put off his clothes. He used to touch his private part with her private part. He used to insert his private part inside her private part. Accused used to tell her not to disclose it to anybody. Accused had been doing it with her since the time when she was in first class. He also threatened her to do away with her life. On 4.3.2010, when the school was over, she told this fact to Pooja Madam. Two other teachers came there. She disclosed this fact to them. Later on, Pradhan had also reached on the spot. In her cross-examination, she has admitted that she used to sleep with her aunt and brother Aryan. Volunteered that despite refusal on the part of her aunt, accused used to make her sleep with him. She had come to the Court with her father.

11. PW-5 Dr. Kapil Sharma has examined the accused. He has issued MLC Ex.PW-5/B. According to him, accused was capable of performing sexual intercourse.

12. PW-6 Dr. Neerja Gupta has medically examined the prosecutrix on 4.3.2010. She issued MLC Ex.PW-6/B. There were no injury marks on her body. According to MLC, there was no injury over chest, arms, face, back, abdomen, eyes, legs and perineal region or buttocks. There was no injury or congestion over the labia and hymen. Vaginal swabs and vaginal slides could not be taken. On 26.4.2010, police has produced the report of Gynecologist. In view of the report of Gynecologist, there was no evidence to suggest that sexual act has not taken place. She gave her opinion Ex.PW-6/C. As per report, the age of the prosecutrix was 14 years. She has given her opinion regarding age Ex.PW-6/E. According to her, in case of slightest penetration, hymen would not tear. In her cross-examination, she has admitted that if adult commit sexual intercourse with the child, who was examined by her, the hymen would tear. Volunteered that it would only be possible if there was complete penetration. She has admitted that in view of observation, there was no penetration.

13. PW-7 Dr. Pooja Gupta has deposed that the patient was already examined at Nurpur Civil Hospital. Since there was no Gynecologist in Zonal Hospital, Dharamshala, the patient was referred to Tanda Hospital. There was no history of any pain, bleeding per vagina. There was no history

of any difficulty during micturation and efecation. There was no menarche. There were no injury marks or inflammation. There was no discharge, stain or bleeding or vulva. Urepheral opening was normal. Fortuettee and hymen were intact and circular. Vaginal and vulval slides and swabs were taken and handed over to Constable Satish. The F.S.L. report is Ex.PX. As per her final opinion, there was no evidence to suggest that sexual act has not taken place. She has given her observation/opinion on the reverse of MLC Ex.PW-6/B vide Ex.PW-7/A. In her cross-examination, she has admitted that she was not sure whether the sexual intercourse had taken place or not.

14. Statement of PW-8 Suram Singh is formal in nature.

15. PW-9 ASI Rakesh Kumar has deposed that on 4.3.2010 at 3.00 P.M. after receiving the information, Rapat Ex.PW-9/A was recorded. He reached Kandwal, Primary School. He recorded the statement of Pooja Mahajan Ex.PW-1/A. He appended endorsement Ex.PW-9/A. FIR Ex.PW-9/C was registered. It was signed by Inspector Kamaljit. He also recorded the statements of two other lady teachers and residents of Panchayat. He inspected the spot and prepared spot map Ex.PW-9/D. He moved application Ex.PW-6/A for the medical examination of the prosecutrix and obtained MLC Ex.PW-6/B. The Medical officer handed over the clothes of prosecutrix to him in a sealed parcel. She was got medically examined on 5.3.2010 at Tanda. He arrested the accused on 4.3.2010. He recorded the statement of prosecutrix on 6.3.2010. The Medical Officer handed over the trousers of the accused in a sealed parcel. He deposited the same with the MHC. He has also obtained the opinion of the Doctor regarding the age of the prosecutrix. He has also obtained the certificate of the prosecutrix from the school.

16. PW-10 Sudarashan has deposed that MHC Sawrup Singh handed over to him three sealed parcels and one sealed vial sealed with seal 'M', two envelops sealed with seal 'CH' and one letter. These articles were handed over to him vide RC 62/10. He deposited all these articles with F.S.L. Junga on 11.3.2010.

17. According to the prosecutrix, she used to stay in the house of her aunt. Her brother was also staying with them. Accused used to make her sleep with him. He also used to put off his clothes. He used to touch his private part with her private part. He used to tell her not to disclose it to anybody. In her cross-examination, she has categorically deposed that she used to sleep with her aunt and brother Aryan. Volunteered that despite refusal on the part of her aunt, accused used to make her sleep with him. In Indian society, no aunt would permit her son to sleep with a young girl. In one breath she has stated that she used to sleep with her aunt and in the next breath she has stated that accused used to make her sleep with him. In the present case PW-6 Dr. Neerja Gupta has issued MLC Ex.PW-6/B. She has not noticed any injury on her body. There were no injury on her chest, arms, face, back, abdomen, eyes, legs and perineal region or buttocks. She has given the opinion after the report of the Chemical Examiner and Radiologist. Radiologist has given the age of prosecutrix as 14 years. In her cross-examination, she has categorically admitted that if

an adult commits sexual intercourse with the child, who was examined by her, the hymen would tear. According to her examination-in-chief, there was no congestion over the labia and hymen. She has also admitted that in view of her observation there was no penetration. She has waited for the opinion of the Gynecologist's report.

18. PW-7 Dr. Pooja Gupta has examined the prosecutrix on 5.3.2010. According to her also, there was no history of any pain and bleeding. There was no history of any difficulty during micturation and efecation. There was no menarche. There was no injury marks or inflammation. There was no discharge, stain or bleeding. There were no injury marks over chest, thigh, face, abdomen, back or lips. Fortuettee and hymen were intact and circular. She has given her opinion vide Ex.PW-7/A. We have already noticed hereinabove that in her cross-examination, PW-7 Dr. Pooja Gupta has admitted that she was not sure whether the sexual intercourse had taken place or not.

19. Statement of PW-1 Pooja Mahajan was recorded under section 154 of the Code of Criminal Procedure vide Ex.PW-1/A. PW-1 Pooja Mahajan and PW-2 Ritu Bala have deposed that they have come to the Court with Pradhan PW-3 Narinder Kumar. PW-3 Narinder Kumar has also deposed that he has come to the Court alongwith teachers. PW-4 prosecutrix has deposed that she has come to the court with her father. Accused is her cousin. Prosecutrix was staying with her aunt, i.e. brother's sister. The opinions of PW-6 Neerja Gupta and PW-7 Pooja Gupta are not conclusive that the accused has forcibly committed sexual intercourse with the prosecutrix. We have already noticed that the hymen was not ruptured and as per statement of PW-6 Neerja Gupta there was no penetration. The version of the prosecutrix that her modesty was repeatedly outraged by the accused is neither borne out from the statement of PW-6 Neerja Gupta nor from the statement of PW-7 Pooja Gupta. The prosecutrix would have definitely told the incident to her mother and father. The father though accompanied her to the court at the time of recording her statement, but he was not cited as a witness.

20. Their Lordships of the Hon'ble Supreme Court in ***Raju and others vs. State of Madhya Pradesh, (2008) 15 SCC 133*** have held that stains on the underwear of accused itself cannot support case of rape against the accused and that the accused must be protected against the possibility of false implication. Their Lordships have further held that in so far as the allegations of rape are concerned, the evidence of prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should without exception be taken as the gospel truth. Their Lordships have held as under:

> **"10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they**

cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court.

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

12. Reference has been made in Gurmit Singh's case to the amendments in 1983 to Sections 375 and 376 of the India Penal Code making the penal provisions relating to rape more stringent, and also to Section 114A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113A and 113B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.

21. Their Lordships of the Hon'ble Supreme Court in ***Tameezuddin alias Tammu vs. State (NCT of Delhi), (2009) 15 SCC 566*** have held that though evidence of prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. Their Lordships have held as under:

"9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is

improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that story is indeed improbable.

10. We note from the evidence that PW.l had narrated the sordid story to PW.2 on his return from the market and he had very gracefully told the appellant that everything was forgiven and forgotten but had nevertheless lured him to the police station. If such statement had indeed been made by the PW. 2 there would have been no occasion to even go to the police station. Assuming, however, that the appellant was naive and unaware that he was being lead deceitfully to the police station, once having reached there he could not have failed to realize his predicament as the trappings of a police station are familiar and distinctive. Even otherwise, the evidence shows that the appellant had been running a kirana shop in this area, and would, thus, have been aware of the location of the Police Station. In this view of the matter, some supporting evidence was essential for the prosecution's case."

22. Their Lordships of the Hon'ble Supreme Court in ***Narender Kumar vs. State (NCT of Delhi), (2012) 7 SCC 171*** have held that minor or insignificant inconsistencies, discrepancies or contradictions in the statement of prosecutrix are inconsequential. However, if the statement of prosecutrix suffers from serious infirmities, inconsistencies and deliberate improvements on material points, no reliance can be placed thereon. Their Lordships have further held that onus of proof is on the prosecution to establish each ingredient of offence beyond reasonable doubt on basis of cogent evidence and material on record. Their Lordships have further held that the sole testimony of prosecutrix can be relied for the purpose of conviction without any corroboration if inspires confidence, but if court finds it difficult to accept version of prosecutrix on its face value, it may look for corroboration by other evidence, direct or circumstantial. The Court must appreciate evidence in its totality with utmost sensitivity. Their Lordships have held as under:

"20. It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide: Vimal Suresh Kamble v. Chaluverapinake Apal S.P. & Anr., AIR 2003 SC 818; and Vishnu v. State of Maharashtra, AIR 2006 SC 508).

29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide: Tukaram & Anr. v. The State of Maharashtra,, AIR 1979 SC 185; and Uday v. State of Karnataka, AIR 2003 SC 1639).

30. Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.

31. The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtue/unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of.

32. The instant case is required to be decided in the light of the aforesaid settled legal propositions. We have appreciated the evidence on record and reached the conclusions mentioned hereinabove. Even by any stretch of imagination it cannot be held that the prosecutrix was not knowing the appellant prior to the incident. The given facts and circumstances, make it crystal clear that if the evidence of the prosecutrix is read and considered in totality of the circumstances alongwith the other evidence on record, in which the offence is alleged to have been committed, we are of the view that her deposition does not inspire confidence. The prosecution has not disclosed the true genesis of the crime. In such a fact-situation, the appellant becomes entitled to the benefit of doubt."

23. Consequently, in view of analysis and discussion made hereinabove, the prosecution has failed to prove the case for offence under section 376 of the Indian Penal Code beyond reasonable doubt against the accused.

24. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 28.9.2010 rendered in RBT SC No. 36-N/VII/10 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.

25. 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 P.S.RANA, J.

Ruchy Sharma wife of Sh Vikas Sharma. ....Petitioner.

Versus

State of HP and another. ....Respondents.

CWP No. 7229 of 2010.
Order reserved on:20.10.2014.
Date of Order: October 22, 2014

Constitution of India, 1950- Article 226- Petitioner was appointed as lecturer college cadre on contract basis- petitioner contended that she was entitled to be appointed on regular basis- respondent contended that the Government had sent a requisition for filling up 742 posts of lecturers in which 92 posts were reserved for persons with disability- however, Government withdrew the requisition except for the post reserved for disabled person- Government again sent a requisition for filling up 633 posts of lecturers on contract basis- Public Service Commission had recommended the names of 6 persons with disability, if recruitment

appointment was given to handicapped persons they would become senior to the regular employee- held, that Commission had invited applications for the posts reserved for the persons with disability- the name of the petitioner was recommended by the Commission on regular basis- Department was not competent to appoint the petitioner on contract basis contrary to the recommendation of Public Service Commission- respondent directed to give appointment to the petitioner on regular basis. (Para-6 & 7)

For the petitioner: Mr.Ramakant Sharma &
Mr.Bhuvnesh Sharma, Advocates.

For Respondent-1. Mr. M.L.Chauhan, Addl. Advocate General with Mr.Pushpinder Singh Jaswal, Dy Advocate General.

For Respondent-2 Mr.D.K.Khanna, Advocate

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present Civil Writ Petition is filed under Article 226 of the Constitution of India. It is pleaded that petitioner has passed M.Com in the year 2001. It is further pleaded that in the year 2006 petitioner has qualified NET and in the year 2008 petitioner passed M.Phill in commerce. It is further pleaded that thereafter petitioner served as lecturer college cadre in erstwhile DAV College Daulatpur chowk. It is further pleaded that petitioner is 50% physically handicapped in her right lower limb. It is further pleaded that in the year 2008 HP Public Service Commission notified one post of lecturer in commerce college cadre reserved for Ortho handicapped and the petitioner applied for the same post. It is further pleaded that in the year 2009 petitioner was called for personal interview against Roll No. 3 and she was declared successful and was recommended for appointment as lecturer in commerce college cadre on regular basis against the post reserved for physically handicapped. It is further pleaded that on dated 5.6.2010 instead of giving regular appointment to the petitioner, she was appointed as lecturer in college cadre in commerce subject on contract basis on consolidated salary of Rs.12,000/- per month. It is further pleaded that on dated 11.6.2010 petitioner joined duties under protest. It is further pleaded that notification dated 5.6.2010 Annexure P8 to the extent that petitioner was appointed on contract basis instead of regular appointment be quashed and set aside. It is further pleaded that respondent No.1 be directed to give appointment to the petitioner on regular basis as recommended by HP Public Service Commission Shimla through its Secretary. Prayer for acceptance of writ petition sought.

2. Per contra reply filed on behalf of respondent No.1 pleaded therein that requisition was sent to HP Public Service Commission for filling up 742 posts of lecturers in college cadre in which 92 posts were reserved for persons having disability. It is further pleaded that same were advertised

by HP Public Service Commission. It is further pleaded that during the year 2008 government withdrew said requisition from HP Public Service Commission except 92 posts reserved for the disabled persons. It is further pleaded that thereafter government again submitted requisition for filling up 633 posts of lecturers in colleges on contract basis and said posts were advertised by HP Public Service Commission. It is further pleaded that 92 posts reserved for person with disability. It is further pleaded that six names were recommended by HP Public Service Commission for the appointment of lecturer college cadre out of handicapped person. It is further pleaded that before offering appointment to handicapped candidates government had already offered appointments to number of candidates as lecturer in various subjects on contract basis in college. It is further pleaded that if regular appointment was given to the handicapped persons then regular candidate would become senior. It is further pleaded that thereafter administratively it was decided to offer the appointment to the handicapped candidates on contract basis. It is further pleaded that claim of the petitioner is not justified. Prayer for dismissal of writ petition sought.

3. Per contra separate reply filed on behalf of respondent No.2 pleaded therein that HP State Public Service Commission through its Secretary Nigam Vihar Shimla advertised 73 backlog posts of lecturer college cadre reserved for persons with disabilities. It is further pleaded that nine applications were received by HP Public Service Commission. It is further pleaded that on scrutiny six candidates were provisionally admitted including petitioner and were called for interview on dated 30.7.2009 and 31.7.2009. It is further pleaded that HP State Public Service Commission through its Secretary Nigam Vihar Shimla recommended appointment for the post of lecturer college cadre vide Annexure R2/A. It is further pleaded that petitioner was recommended by HP State Public Service Commission through its Secretary in the pay scale of Rs.8000-13500/- Prayer for dismissal of writ petition sought. Petitioner also filed rejoinder and re-asserted the allegation pleaded in the civil writ petition.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the State and learned Advocate appearing on behalf of HP State Public Service Commission and also perused entire records carefully.

5. Following points arise for determination in the present writ petition:

(1) Whether respondent No. 1 i.e. State of HP through F.C-cum-Secretary Education to the Government of HP could not appoint the petitioner contrary to advertisement and contrary to recommendation of HP Public Service Commission Shimla in public post as alleged?

(2) Relief.

Finding upon Point No.1.

6. Submission of learned Advocate appearing on behalf of the petitioner that petitioner was recommended for the post of lecturer college cadre in commerce class-I gazetted in the pay scale of Rs 8000-13500 by HP Public Service Commission vide letter No. 3-33/2007-PSC(R-I) 22429 issued in the month of September 2009 in the reserved vacancy of disabled person in the category of Ortho handicapped and respondent No.1 State of HP through F.C.-Cum-Secretary to the Government of HP is not legally competent to appoint the petitioner on contract basis as per notification No. EDN-A-B(1)18/2009 dated 5.6.2010 is accepted for the reason hereinafter mentioned. It is proved on record that Public Service Commission vide advertisement No. 10 of 2008 dated 4.12.2008 invited application from disabled person. It is proved on record that Public Service Commission on dated 4.12.2008 advertised 73 posts for disabled persons out of which 32 posts were reserved for blind persons, 30 posts were reserved for deaf and dump persons and 11 posts were reserved for Ortho handicapped persons for different subjects. It is proved on record that one post was reserved for Ortho handicapped in commerce subject. It is proved on record that petitioner in compliance to the advertisement of HP Public Service Commission applied for the post of lecturer college cadre in commerce. It is proved on record that HP Public Service Commission vide letter No. 3-33/2007-PSC(R-1) 22429 issued in the month of September 2009 recommended the name of petitioner Ms Ruchy Sharma for the post of lecturer college cadre in commerce subject in the pay scale of Rs. 8000-13500/-. It is proved on record that HP Public Service Commission did not recommend the appointment of petitioner on contract basis. It is proved on record that HP Public Service Commission recommended the appointment of the petitioner on regular basis. It is proved on record that thereafter Government of HP Department of Higher Education vide Notification No. EDN-A-B(1)18/2009 dated 5.6.2010 posted petitioner Ms Ruchy Sharma as lecturer in commerce college cadre on contract basis and consolidated salary was fixed at the rate of Rs.12,000/- per month. It is proved on record that petitioner joined the service under protest. It is held that Government of Himachal Pradesh Department of Higher Education was not legally competent to appoint the petitioner contrary to the recommendation of the HP Public Service Commission and contrary to the advertisement. There is no evidence on record to prove that advertisement was given by HP Public Service Commission for the said post on contract basis. There is no evidence on record that recommendation was sent by HP Public Service Commission for appointment of petitioner on contract basis.

7. Submission of learned Advocate appearing on behalf of the respondents that administratively it was decided to offer the appointment to the petitioner on contract basis in order to avoid the seniority of lecturers in various subjects who were already appointed by the respondents is rejected for the reason hereinafter mentioned. It is well settled law that person appointed to a post on ad hoc basis cannot have any lien on the post. See AIR 1989 SC 696 titled Harbans Misra and others Vs. Railway Board and others. It was held in case reported in AIR 1994 SC 1808 titled J&K Public Service Commission etc. Vs. Dr. Narinder Mohan and others that ad hoc employee should be replaced as expeditiously as possible by direct recruits.

It was held in case reported in 1995 Supp (3) SCC 363 titled Dr. Kashinath Nagayya Ibatte Vs. State of Mharashtra and others that candidates working on ad hoc basis have to give place to regular appointee. It is well settled law that ad hoc appointment is temporary appointment pending regular recruitment. It was held in case reported in AIR 1992 SC 2070 titled Director Institute of Management Development UP Vs. Smt Pushpa Srivastava that appointment on contractual basis is only for a limited period and after expiry of period of contract post comes to an end. It was held in case reported in AIR 1996 SC 3194 titled Y.H Pawar Vs. State of Karnataka and another that seniority is to be determined with effect from the date on which the employee is regularized. It is proved on record that appointment of the petitioner was regular appointment. It is proved on record that HP Public Service Commission has recommended regular appointment of the petitioner from handicapped category. It is held that respondent No.1 was not legally competent to give appointment to the petitioner contrary to the recommendation of HP Public Service Commission by way of administrative direction. It is also held that administrative direction cannot be given qua the appointment in a public post contrary to the notice of advertisement and contrary to the recommendation of HP Public Service Commission as per Constitution of India. It is held that administrative direction given by respondent No.1 is contrary to the advertisement notice and contrary to the recommendation of HP Public Service Commission. It is also proved on record that advertisement of regular appointment of lecture in commerce was not withdrawn qua handicapped persons by HP Public Service Commission by way of subsequent advertisement till date. Point No.1 is decided in favour of petitioner.

Relief:

8. In view of the above stated facts it is held (1) That words appointment on contract basis as per contractual amount of Rs.12,000/- per month mentioned in Notification No. EDN-A-B(1)18/2009 dated 5.6.2010 is illegal and same is ordered to be deleted and quashed with immediate effect and words regular appointment in the pay scale of Rs.8000-13500/- is ordered to be incorporated qua petitioner only with immediate effect in Notification No. EDN-A-B(1)18/2009 dated 5.6.2010. (2) It is further held that petitioner will also be entitled for all consequential monetary benefits in accordance with law. Writ petition is accordingly disposed of with no order as to costs. All miscellaneous application(s) are also disposed of.

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

Cr.Appeal Nos. 148 of 2008 & 404 of 2008.
Judgment reserved on:14.5.2014.
Date of Decision: May 22, 2014,

1.*Cr.Appeal No. 148 of 2008*.
State of H.P. ….*Appellant.*
Vs.
Ganesh Kumar. …*Respondent.*

2. *Cr.Appeal No. 404 of 2008*.
Ganesh Kumar. …..*Appellant.*
Vs.
State of Himachal Pradesh. ….*Respondent.*

N.D.P.S. Act, 1985- Section 20- Trial Court had awarded sentence of rigorous imprisonment of four years and fine of Rs. 40,000/- - an appeal was preferred by the State contending that the sentence was inadequate- another appeal was preferred by the convict on the ground that accused was wrongly convicted- held, that percentage of resin contents in stuff would not be a determinative factor of quantity- Moreover, as per notification issued by Government dated 18.11.2009- entire quantity would be a determining factor- accused was found in possession of 1 kg 200 grams charas which is a commercial quantity- minimum punishment of 10 years and minimum fine of Rs. 10 lacs has been provided for the same- accused sentenced to undergo imprisonment for a period of 10 years and to pay a fine of Rs. 1 lac.
(Para- 16 and 36)

Cr.Appeal No. 148 of 2008.

For the appellant: Mr. B.S.Parmar Additional Advocate General with Mr. Vikram Thakur, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.

For the respondent: Mr.Vivek Singh Thakur, Advocate.

Cr.Appeal No. 404 of 2008.

For the appellant: Mr.Vivek Singh Thakur, Advocate
For the respondent: Mr. B.S.Parmar Additional Advocate General with Mr. Vikram Thakur, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

P.S.Rana Judge

Both these appeals are being disposed of together by this common judgment as both appeals have been filed against the same judgment and sentence passed by the learned Special Judge Fast Track Kullu HP in Sessions Trial No. 40/2007 titled *State of HP Vs. Ganesh Kumar* decided on 9th January 2008.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by the prosecution are that on 9th May 2007 at about 9.30 AM at a place Baldhar District Kullu accused was found in conscious and exclusive possession of charas measuring 1Kg 200 grams. Learned trial Court framed the charge against the accused under Section 20 of the Narcotic Drugs & Psychotropic Substances Act 1985 (hereinafter referred to as the 'Act') on 13th September, 2007. Accused did not plead guilty and claimed trial.

3. Prosecution examined six oral witnesses in support of its case:-

Sr.No.	Name of Witness
PW1	Sobha Ram
PW2	Rajender Singh.
PW3	Vipon Kumar
PW4	Prem Lal
PW5	Kashmi Ram
PW6	Ram Karan.

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

Sr.No.	*Description:*
Ext.PA	*Copy of Rapat Rojnamcha.*
Ext.PB	*Specimen of seal impression 'T'*
Ext.PC	*Seizure memo of Charas.*
Ext.PD	*Copy of FIR*
Ext.PE	*Copy of extract of entry in Malkhana Register.*
Ext.PF.	*Copy of R.C.*
Ext.PG	*Copy of Column No.12 of NCB Form.*
Ext.PL	*Copy of Column No.1 to 8 of NCB Form.*
Ext.PK	*Copy of Special Report.*
Ext.PH	*Endorsement on S.R.*
Ext. PJ	*Extract of Special Report Register.*
Ext.PM	*Rukka.*

Ext.PN	*Spot Map.*
Ext.PO	*Arrest Memo.*
Ext.PP.	*Report of Chemical Examiner.*

4. Statement of the accused was also recorded under Section 313 Cr.P.C. The accused did not examine any defence witness. The accused took the plea of complete innocence and false implication. The learned Special Judge Fast Track, Kullu HP convicted the appellant under Section 20 of the 'Act' to rigorous imprisonment for four years and to pay fine of Rs. 40,000/- (Rs. Forty thousands). The learned trial Court further directed that in default of payment of fine the appellant shall further undergo simple imprisonment for a period of one year.

GROUNDS OF CRIMINAL APPEAL NO. 148 OF 2008:

5. Feeling aggrieved against the judgment and sentence passed by the learned Trial Court the State of Himachal Pradesh filed the present appeal. It is pleaded that learned trial Court has awarded lesser punishment to convict Ganesh Kumar which has resulted in mis-carriage of justice and it is further pleaded that the sentence imposed by the learned trial Court deserves for enhancement and prayer for enhancement of sentence sought.

GROUNDS OF CRIMINAL APPEAL NO.404 OF 2008:

6. It is pleaded that the findings of the learned trial Court are based upon conjectures and surmises. It is pleaded that there is no link evidence in prosecution case and it is pleaded that there is no direct evidence in present case and appellant Ganesh Kumar is entitled for the benefit of doubt. It is pleaded that contraband was not recovered from appellant-Ganesh Kumar. It is further pleaded that prosecution did not associate any independent eye witnesses except police officials. It is pleaded that learned trial Court did not properly appreciate oral as well as documentary evidence placed on the record.

7. We have considered the submissions of the learned Additional Advocate General appearing on behalf of the State and Mr. Vivek Singh Thakur, learned counsel appearing on behalf of the appellant-Ganesh Kumar.

8. Question that arises for determination before us in *Cr. Appeal No. 148 of 2008 titled State of HP Vs. Ganesh Kumar* is whether learned trial Court has not awarded adequate sentence and another question arises for determination before us in *Cr. Appeal No. 404 of 2008 titled Ganesh Kumar Vs. State of HP* is whether the learned trial Court on the basis of material on record was not justified in convicting appellant-Ganesh Kumar.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9. PW1 Sobha Ram has stated that he was posted as HHC at Police Station Banjar since 24th August, 2005 and he brought roznamcha

Ext.PA of Police Station Banjar. He has stated that the same is correct as per original record.

10. PW2 HC Rajinder Singh has stated that he was posted as Head Constable at Police Station Banjar w.e.f. 2003 to September 2007. He has stated that on 9.5.2007 he along with SHO Ram Karan, Constable Dalip Kumar, Constable Laxman Kumar and HHC Ajay Kumar were proceeding towards Baldhar in order to collect information about the illicit cultivation of poppy plants. He has stated that at about 9.30 AM they reached near Baldhar. He has stated that accused present in the Court came from forest side. He has stated that the accused was carrying polythene envelope in his right hand and when he saw the police officials accused threw polythene envelope at the spot and fled towards the forest. He has stated that SHO Ram Karan directed Constable Laxman Dass and HHC Ajay Kumar to chase and apprehend the accused. He has stated that the accused was apprehended by Constable Laxman Dass and HHC Ajay Kumar and he has further stated that accused was brought to the spot. He has further stated that SHO Ram Karan asked the name of the accused and accused disclosed his name as Ganesh Kumar son of Bhim Bahadur resident of Gushaini. He has stated that it was secluded place and no independent witness was available at the spot. He has stated that SHO Ram Karan and Constable Laxman Dass associated him as witness in the present case. He has stated that polythene envelope thrown by the accused at the spot was checked by SHO Ram Karan. He has stated that one sky blue coloured bag was found inside the polythene envelope and he has further stated that on checking the bag it was found containing charas. He has further stated recovered charas was weighed at the spot and it was found 1 Kg 200 grams. He has further stated that two samples of charas 25 grams each were separated and sealed in separate parcels. He has stated that remaining charas was kept back in the same bag and said bag was placed back in the same polythene envelope which was sealed in separate parcel. He has stated that six seal impression of 'T' were affixed on each parcel. He has stated that the samples of seal impressions 'T' were obtained separately and sample Ext PB bears his signature. He has stated that the seal after use was handed over to him. He has further stated that NCB Form in triplicate was filled at the spot by SHO Ram Karan. He has further stated that the sealed parcels were taken into possession vide seizure memo Ext PC. He has further stated that memo Ext PC was signed by him and Constable Laxman Dass. He has further stated that seizure memo Ext. PC was handed over to the accused free of cost. He has further stated that thereafter rukka was prepared at the spot by SHO Ram Karan which was handed over to him. He has stated that he took rukka to Police Station Banjar and handed over the same to MHC Vipon Kumar. He has further stated that charas Ext P5, Polythene envelope Ext P3 and blue sky coloured bag Ext P4 were the same which were recovered from the accused. He has further stated that charas Ext. P5 was recovered from the possession of the accused. In cross examination he has denied suggestion that he was not present at the spot. He has also denied suggestion that charas was not recovered from the accused. He has also denied suggestion that NCB Form were not filled in at the spot. He has also denied suggestion that unclaimed bag was also found by the police at bus

stand Banjar. He has denied suggestion that on the basis of suspicion accused was took to Police Station Banjar. He has also denied suggestion that accused was falsely implicated in present case as the accused is Nepali National.

11. PW3 HC Vipon Kumar has stated that he was posted as Head Constable at Police Station Banjar since 2005. He has stated that on 9th May 2007 he was holding temporary charge of the post of MHC at Police Station Banjar because MHC Chaman Lal had proceeded on leave. He has stated that HC Rajender Kumar had handed over rukka to him on the basis of which FIR Ext PD was registered at Police Station Banjar. He has stated that on the same day at 1.30 PM SHO Ram Karan had handed over three sealed parcels, NCB Form in triplicate, samples of seal impressions 'T' and other connected documents to him. He has stated that he deposited aforesaid articles at police Malkhana Banjar. He has further stated that each parcel contained six seal impressions of 'T'. He has further stated that on 10th May, 2007 he handed over one sealed sample parcel, NCB Form in triplicate, sample of seal impressions 'T', copy of seizure memo and copy of FIR to HHC Prem Lal No. 240 vide RC No.35/07 with a direction to deposit the same at FSL Junga. He has further stated that extract of Malkhana register Ext PE is correct as per the original record. He has further stated that the case property was not tampered at any stage. In cross examination he has denied suggestion that he did not receive any rukka. He has also denied the suggestion that FIR was not written by him and he has also denied suggestion that case property was not deposited with him. He has also denied suggestion that sample was not sent to FSL Junga. He has also denied suggestion that the case property had been tampered by him.

12. PW4 HHC Prem Lal has stated that he was posted as General Duty Constable at Police Station Banjar in the month of May 2007. He has stated that on 10.5.2007 MHC Vipon Kumar had handed over one sealed sample parcel of charas and other connected documents to him with a direction to deposit the same at FSL Junga and deposited the same in the laboratory on 11th May, 2007. He has stated that he obtained receipt from the laboratory and handed over the same to MHC Police Station Banjar. In cross examination he has denied suggestion that he did not take the sample to FSL Junga.

13. PW5 HHC Kashmi Ram has stated that he was posted as Deputy Superintendent of Police Kullu in the month of May, 2007. He has stated that on 10th May, 2007 special report of this case was received by Sh. Ahmad Sayeed Deputy Superintendent of Police Kullu and he has stated that he appended his endorsement on the report Ext PH. He has stated that necessary entry was made by him in the extract register Ext PJ. He has stated that the special report Ext PK is correct as per the original record. In cross examination he has denied suggestion that special report was not received by Deputy Superintendent Kullu. He has denied suggestion that he had fabricated entry in the register.

14. PW6 SI Ram Karan has stated that he was posted as SHO at Police Station Banjar w.e.f. August 5 to September 2007. He has stated that on 9th May, 2007 he along with HC Rajender HHC Ajay Kumar Constable

Laxman and Constable Dalip Kumar had proceeded from Police Station Banjar in order to collect information regarding illicit cultivation of poppy plants. He has stated that at about 9.30 AM near Baldhar one person Nepali came from forest side. He has stated that he was carrying polythene envelope in his hand. He has stated that he identified the Nepali in the Court. He has further stated that when the police officials saw the accused he threw the polythene envelope at the spot and fled towards the nearby forest. He has stated that he directed Constable Laxman Dass and HHC Ajay Kumar to chase and apprehend the accused. He has further stated that both of them apprehended the accused and brought him to the spot. He has stated that he asked the name of the accused on which he disclosed his name as Ganesh Kumar son of Bhim Bhadur resident of Gushaini. He has stated that the place was secluded and barren forest. He has stated that no independent person was found present at the spot. He has stated that he associated HC Rajender Singh and Constable Laxman Dass as witness in this case. He has stated that the polythene envelope which was thrown on the spot by the accused was checked by him and it was found containing one blue sky coloured bag. He has stated that on checking of the bag it was found containing charas. He has further stated the recovered charas was weighed on the spot and it was found 1 Kg 200 grams. He has stated that two samples of charas 25 grams each were separated from the recovered charas and were sealed in separate parcels. He has stated that remaining charas was placed back in the same bag and the same was again placed in the polythene envelope and was sealed in separate parcel. He has stated that thereafter each parcel was sealed by affixing six seal impressions of 'T'. He has further stated that NCB Form Ext PL in triplicate filled in by him at the spot. He has stated that FIR number was added subsequently in column No.1. He has stated that the seal after use was handed over to HC Rajender Singh. He has further stated that a copy of seizure memo Ext PC was supplied to the accused free of cost. He has stated that rukka Ext PM was prepared at the spot by him which was handed over to HC Rajender Singh. He has further stated that the site plan Ext PN was prepared at the spot. He has stated that the accused was arrested by him and he was apprised about the commission of offence and punishment prescribed under Section 20 of the 'Act'. He has further stated that thereafter he proceeded to Police Station Banjar from the spot along with accused and case property. He has stated that he has filled column of NCB Form. He has stated that he reached at Police Station Banjar at 1.30 PM and handed over the case property, NCB Form in triplicate, samples of seal impressions 'T' and other connected documents to MHC Vipon Kumar who deposited the articles in police Malkhana. He has stated that on the next day he handed over special report Ext PK to Sh Ahmad Sayeed Deputy Superintendent of Police Kullu. He has stated that statements of witnesses were also recorded by him and the report of FSL Junga was received which is Ext PP. He has stated that on bulk parcel Ext.P1, sample parcel Ext.P2, and sample of seal impressions 'T' Ext P6 bears his signatures. He has stated that polythene envelope Ext P3, bag Ext P4 and charas Ext P5 were recovered from the accused and after completion of investigation he prepared the challan and presented the same in Court. In cross examination he has denied suggestion that he was not present at the spot. He has also denied suggestion that charas was

recovered from the accused. He has denied suggestion that parcels were sealed at the spot. He has also denied the suggestion that NCB Form in triplicate were not filled in at the spot. He has also denied suggestion that site plan was not prepared at the spot. He has denied suggestion that rukka was not prepared at the spot. He has also denied suggestion that entire proceedings were conducted at Police Station Banjar falsely in order to implicate the accused in this case. He has also denied suggestion that unclaimed bag was found by the police at bus stand Banjar. He has also denied suggestion that on the basis of suspicion accused was took to police station Banjar. He has denied suggestion that accused has been falsely implicated in the present case.

15. Statement of the accused under Section 313 Cr.P.C. was recorded. Accused has stated that a false case has been foisted against him. Accused has stated that charas was not recovered from him. Accused did not lead any defence evidence.

Findings qua grounds of Criminal Appeal No. 148 of 2008, titled State vs. Ganesh Kumar

16. Submission of learned Additional Advocate General appearing on behalf of the State that learned trial Court has not awarded adequate sentence upon the convict in view of the ruling of Full Bench of this Court announced in ***Criminal Appeal No. 763 of 2002, titled State of H.P. vs. Mehboon Khan along with Criminal Appeal No. 195 of 2003 titled State of H.P. Vs. Kuldeep Singh and others and Criminal Appeal No. 541 of 2004, titled State of H.P. Vs. Chaman Lal decided on 24th September 2013*** is accepted for reasons hereinafter mentioned. It was held by Full Bench of Hon'ble H.P. High Court in case cited supra that percentage of resin contents in stuff would not be a determinative factor of small quantity, above smaller quantity and commercial quantity. It was held that whole of the stuff is to be taken to determine the quantity i.e. smaller, above smaller and commercial quantity. Even as per notification No. SO2941 dated 18th November 2009 issued by the Ministry of Finance Department of Revenue entire mixture of any solution in narcotic drugs and psychotropic substances' cases would be a determining factor of small quantity above smaller quantity and commercial quantity. It is well settled law that ruling given by the Full Bench of Hon'ble High Court of H.P. is binding throughout the Himachal Pradesh till the ruling given by Full Bench of Hon'ble High Court of H.P. is not set aside by Hon'ble Apex Court of India. As of today ruling given by the Full Bench of Hon'ble High Court of H.P. Criminal Appeal No. 763 of 2002 titled State of H.P. vs. Mehboon Khan cited supra has not been set aside by the Apex Court of India and even as of today, operation of judgment announced by the Full Bench of Hon'ble High Court of H.P. in Criminal Appeal No. 763 of 2008, titled State of H.P. vs. Mehboon Khan has not been stayed by the Hon'ble Apex Court of India. Hence it is held that whole of stuff was to be taken to determine the quantity i.e. smaller, above smaller and commercial in the present case. The Full Bench of Hon'ble High Court of H.P. has overruled the ruling given by the Division Bench of Hon'ble High Court of H.P. in case reported in ***Latest HLJ 2010 HP 207 titled Sunil vs. State of Himachal Pradesh.***

17. Learned trial Court has convicted the appellant to rigorous imprisonment of four years and also directed to pay fine of ` 40,000/- (Rs. Forty thousands only) for commission of offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act'). 1 Kg and 200 grams charas was found from the conscious and exclusive possession of accused which falls in the category of commercial quantity. Sr. No. 23 of the Notification specifies the small and commercial quantity as per the Act. As per Section 20 (c) of the Act minimum punishment for recovery of commercial quantity is for a term which shall not be less than ten years but it may extend to twenty years and minimum fine is rupees one lac which may extend to rupees two lac. We are of the view that learned trial Court has committed illegality by way of imposing lesser punishment prescribed under Section 20 (c) of the Act.

18. Submission of learned Advocate appearing on behalf of the convict that learned trial Court had granted adequate punishment in accordance with law is rejected being devoid of any force for the reasons hereinafter mentioned. We hold that learned trial Court has not granted the minimum punishment prescribed under Section 20 (c) of the Act qua recovery of commercial quantity from the accused/convict in view of ruling given by the Full Bench of Hon'ble High Court of H.P. cited supra, titled State of H.P. vs. Mehboon Khan. Hence we hold that sentence imposed by learned trial Court warrants enhancement in the ends of justice.

Findings qua grounds of Criminal Appeal No. 404 of 2008 titled Ganesh Kumar vs. State of H.P.

19. Submissions of learned Advocate appearing on behalf of appellant Ganesh that judgment and sentence passed by learned trial Court is based upon conjectures and surmises is rejected being devoid of any force for the reasons hereinafter mentioned.

Oral eye witness examined by the prosecution

20. There are two direct eye witnesses of the case namely PW2 HHC Rajender Singh and PW6 Ram Karan and both have stated in positive manner that contraband 1 Kg 200 grams was recovered from the conscious and exclusive possession of the accused. The evidence of both these witnesses is trustworthy, reliable and inspire confidence of the Court. There is no reason to disbelieve the testimony of PW2 Rajender Singh and PW6 Ram Karan.

Oral corroborative evidence examined by the prosecution.

21. In the present case PW1 HHC Sobha Ram has proved the roznamcha in his testimony, PW3 HC Vipan Kumar has stated in positive manner that three sealed parcels and NCB form in triplicate, samples of seal impression 'T', copy of seizure memo and copy of FIR have been deposited by him in the malkhana. PW4 HHC Prem Lal the another link witness has stated that he deposited the articles in the office of FSL Junga and PW5 HHC Kashmi Ram the another link witness has stated in positive manner that special report was received to Dy.S.P.. Hence, we hold that prosecution

has proved its case by way of oral corroborative evidence adduced by the prosecution.

Documentary evidence produced by the prosecution

22. Another submission of learned Advocate appearing on behalf of appellant that prosecution did not prove its case by way of documentary evidence is also rejected being devoid of any force for the reasons hereinafter mentioned. Even documentary evidence adduced by the prosecution is Ext.PA copy of Rapat Roznamcha, Ext.PB specimen of seal impression 'T', Ext.PC seizure memo of charas, Ext.PF copy of RC, Ext.PG and Ext.PL copies of NCB Forms, Ext.PK copy of Special Report, Ext.PJ extract of Special Report, Ext.PM Rukka, Ext.PN Spot map, Ext.PO Arrest Memo and Ext.PP report of Chemical Examiner also proved the case of the prosecution without any reasonable doubt that contraband was recovered from the possession of the accused. Even as per chemical analyst report placed on record shows various scientific tests such identification, chemical and chromatographic were carried out in the Laboratory with Ext.P-1 under reference. The tests performed indicated cannabinols including the presence of tetrahydrocannabinol in the sample. The microscopic examination indicated the presence of cystolithic hair in the sample. The resin were found to be 33.57% in W/W in Ext.P-1. As per opinion of the Chemical Examiner the exhibit marked as P/1 is a sample of Charas.

23. Submission of learned Advocate appearing on behalf of appellant Ganesh that there is no direct independent witness in the present case and on this ground, appellant/accused Ganesh is entitled for the benefit of doubt is rejected being devoid of any force for the reasons hereinafter mentioned. PW2 H.C. Rajinder Singh eye witness of the incident and PW6 Ram Karan another eye witness of the incident have stated in positive manner that place where the contraband was recovered from the possession of appellant Ganesh was secluded place and independent witness could not be procured. Testimonies of PWs 2 and 6 that place was secluded and independent witness could not be procured are trustworthy, reliable and inspire confidence of this Court. There is no reason to disbelieve the testimonies of PW2 and PW6 to the effect that no independent witness could be procured at the time of recovery of contraband due to secluded place. Hence we hold that non-procurement of independent witness at the time of recovery is satisfactorily explained by PW2 H.C. Rajinder Singh and PW6 Ram Karan in their oral testimonies. We also hold that non-procurement of independent witness at the time of recovery is not fatal to the prosecution case.

24. Another submission of learned Advocate appearing on behalf of appellant Ganesh that contraband was recovered from other person and was not recovered from the possession of appellant Ganesh is also rejected being devoid of any force for the reasons mentioned hereinafter. PW2 H.C. Rajinder Singh eye witness of the incident and PW6 Ram Karan another eye witness of the incident have stated in positive manner that contraband was recovered from the possession of the accused in their presence. There is no reason to disbelieve the testimonies of PW2 and PW6 who are direct eye witnesses of the incident.

25. Another submission of learned Advocate appearing on behalf of the appellant that testimonies of PWs 2 and 6 are not sufficient to convict the appellant in the present case is also rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that conviction can be sustained in a criminal case upon the sole testimony of a single witness if testimony is trustworthy, reliable and inspire confidence of the Court. See: ***AIR 1973, S.C. 944 Jose Vs. State of Kerla, See: AIR 1957 S.C. 614 Vadivelu Thevar Vs. The State of Madras and See: AIR 1965 S.C. 202 Masalti and others Vs. The State of Uttar Pradesh.*** It was held in case reported in ***AIR 1987 S.C. 1328 Dalbir Singh Vs. State of Punjab*** that there is no hard and fast rule which could be laid down for appreciation of evidence and it is a question of fact and each case has to be decided on the fact as they proved in a particular case.

26. Another submission of learned Advocate appearing on behalf of appellant Ganesh that link evidence is missing in the present case and on this ground appeal filed by Ganesh appellant be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. Link evidence PW4 Prem Lal and PW5 Kashmi Ram and documentary evidence Ext.PA to Ext.PP clearly corroborate the version of prosecution case, which inspires confidence of the Court and same are trustworthy and reliable.

27. Another submission of learned Advocate appearing on behalf of appellant Ganesh that PW2 HC Rajinder Singh and PW6 SI Ram Karan are police officials and on the testimony of police witness, conviction could not be sustained is also rejected being devoid of any force for the reasons mentioned hereinafter. It was held in case reported in ***AIR 1973 S.C. 2783 Nathu Singh Vs. State of Madhya Pradesh*** that mere fact that the witnesses examined in support of the prosecution case were the police officials was not strong enough to discard their evidence. It was held in case reported in ***AIR 1985 S.C.1092 State of Gujrat Vs. Raghunath Vamanrao Baxi*** that in appreciating oral evidence in criminal cases the question in each case is whether the witness is a truthful witness and whether there is anything to doubt his veracity in any particular matter about which he deposes. Where the witness is found to be truthful on material facts that is end of the matter. It was further held by Hon'ble the Apex Court that where the witness found to be partly truthful Court may take the precaution of seeking some corroboration and Court is not entitled to reject the evidence of a witness merely because they are government servants who in the course of their duties or even otherwise might have come into contact with investigating officers and who might have been requested to assist the investigating agencies. It was further held by Hon'ble Apex Court of India that it would be wrong to reject the evidence of police officers either on the mere ground that they are interested in the success of the prosecution and it was held that it is extremely unfair to a witness to reject his evidence by merely giving him a label.

28. We have carefully perused the judgment and sentence passed by learned trial Court and found that learned trial Court has considered the oral as well as documentary evidence in detail while convicting appellant Ganesh. However, learned trial Court has not awarded minimum adequate

sentence to appellant Ganesh Kumar as prescribed under Section 20 of the Act as the contraband recovered from exclusive and conscious possession of appellant Ganesh Kumar falls in the category of commercial quantity. We are of the opinion that business of charas is spoiling the youth of the Nation and youth of the Nation is wealth of the Nation. No individual person can be allowed to acquire monetary gain at the cost of wealth of the Nation i.e. youths.

29. In view of our above findings, we allow ***Criminal Appeal No. 148 of 2008 titled State of H.P. vs. Ganesh Kumar*** on ground of inadequacy of sentence and hold that enhancement of sentence is expedient in the ends of justice.

30. We dismiss the ***Criminal Appeal No. 404 of 2008, titled Ganesh Kumar vs. State of H.P***. Certified copy of this judgment be placed in Criminal Appeal No. 404 of 2008, titled Ganesh Kumar vs. State of H.P. All pending miscellaneous application(s), if any, also stands disposed of accordingly.

31. Let convict Ganesh Kumar be produced before us on 19-6-2014 for hearing upon enhancement of sentence.

QUANTUM OF SENTENCE

20.10.2014

Present:- Mr. B.S. Parmar, Additional Advocate General with Mr.Vikram Thakur, Deputy Advocate General, and Mr.J.S. Guleria, Assistant Advocate General, for the appellant/State.

Mr.Vivek Thakur, Advocate, for convicted person.

Convicted person namely Ganesh Kumar is in custody of C. Prem Chand No. 755 and C. Virender Mohan No. 415 of P.L. Kaithu. Mr. Surinder Verma, S.P. Kullu is also present in person.

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

33. Learned Additional Advocate General appearing on behalf of the State submitted before us that heinous punishment be awarded to the convicted person in order to maintain majesty of law. On the contrary learned defence counsel appearing on behalf of convicted person submitted before us that lenient view be adopted by the Court keeping in view the age of convicted person and keeping in view the responsibilities of convicted person.

34. Learned Special Judge Kullu in Sessions trial No. 40 of 2007 titled State of H.P. vs. Ganesh Kumar convicted the accused under Section 20 of Narcotic Drugs and Psychotropic Substances Act 1985. Learned trial Court imposed the sentence to rigorous imprisonment for four years and to

pay fine to the tune of Rs.40,000/- (Rupees Forty thousand only) for commission of offence punishable under Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985 and learned Special Judge further directed that in default of payment of fine the convicted shall further undergo simple imprisonment for one year. Learned Special Judge further directed that period of detention undergone by convicted shall be set off as per Section 428 of Code of Criminal Procedure.

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

36. It is proved on record beyond reasonable doubt that on dated 9.5.2007 at 9.30 AM at Baldhar the convicted was found in conscious and exclusive possession of 1 Kg. 200 Grams of charas which falls within commercial quantity. It is well settled law that business of drugs for commercial purpose is stigma upon the society. It is also well settled law that no one can be allowed to get personal commercial gain at the cost of Nation and youth of Nation. As per Section 20 of Narcotic Drugs and Psychotropic Substances Act 1985 the minimum sentence prescribed for offence punishable under Section 20 of Narcotic Drugs and Psychotropic Substances Act 1985 qua commercial quantity is ten years and fine to the tune of Rs.1 lac (Rupees one lac only). We are of the opinion that word "shall" mentioned in Section 20 of Narcotic Drugs and Psychotropic Substances Act is mandatory in nature and not directory in nature. Hence in order to maintain majesty of law and in order to deter the commercial business of drugs in the society we enhance the sentence of imprisonment imposed by learned trial Court as follow:-

Sr. No.	Nature of Offence	Enhanced sentence imposed
1.	Offence under Section 20 of Narcotic Drugs and Psychotropic Substances Act 1985	The convicted shall undergo rigorous imprisonment for ten years and will also be liable to pay fine of Rs. 1 lac (Rupees one lac only). In default of payment of fine the convicted shall further undergo rigorous imprisonment for one year.

37. Period of custody during investigation, inquiry and trial will be set off and period of sentence already undergone by the convicted will also be set off. Case property will be confiscated to State of H.P. after the expiry of period of limitation for challenging the judgment imposed by Hon'ble High Court of Himachal Pradesh. Certified copy of this judgment and sentence be also supplied to convicted person forthwith free of costs by learned Additional Registrar (Judicial). Warrant of execution of sentence be issued to

the Superintendent Jail forthwith for compliance by learned Additional Registrar (Judicial) in accordance with law. Appeal stands disposed of accordingly. All pending miscellaneous application(s) if any also stands disposed of.

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